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# Religious Freedom and Recycled Tires: The Meaning and Implications of *Trinity Lutheran*

*Richard W. Garnett\* and Jackson C. Blais\*\**

The story of constitutionalism and ordered liberty in the West features many dramatic clashes and confrontations between religious and political authority, between conscience and coercion.<sup>1</sup> At the same time, many of the American chapters of this story are Supreme Court decisions whose facts might seem pedestrian, even picayune: How many “talking wishing wells” and reindeer are necessary to purge a city’s Christmas display of unconstitutional “endorsement” of religion? Or, what is the First Amendment significance of the differences among books, maps, and atlases—the last being, as Sen. Daniel Patrick Moynihan famously pointed out, “books of maps”?<sup>2</sup>

This year’s marquee church-state case, *Trinity Lutheran Church of Columbia, Inc. v. Comer*, was about replacing the pea-gravel on a church-run preschool’s playground with shredded scrap tires.<sup>3</sup> More specifically, it presented the question whether the Constitution allows the state of Missouri to refuse an otherwise-available reimbursement grant for this project simply because the applicant

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<sup>1</sup> See, e.g., Brian Tierney, Religion, Law, and the Growth of Constitutional Thought 1150–1650 1 (1982) (“It is impossible really to understand the growth of Western constitutional thought unless we consider constantly, side by side, . . . ideas about the church and ideas about the state.”). See generally Richard W. Garnett, The Freedom of the Church, 4 J. Cath. Soc. Thought 59 (2007).

<sup>2</sup> 124 Cong. Rec. 25661 (1978). See also Daniel P. Moynihan, Government and the Ruin of Private Education, *Harpers*, Apr. 1978, at 36 (“Backward reels the mind. Books are constitutional. Maps are unconstitutional. Atlases, which are books of maps, are unconstitutional. Or are they? We must await the next case.”).

<sup>3</sup> 137 S. Ct. 2012 (2017).

is a church. It is fair to say that, at least at first blush, the dispute is pretty far removed from, say, *Murder in the Cathedral*. As Chief Justice John Roberts admitted in the concluding section of his opinion for the Court, the government “ha[d] not subjected anyone to chains or torture on account of religion” and the consequence of the challenged state policy “is, in all likelihood, a few extra scraped knees.”<sup>4</sup> However, the Court’s decision is no less important for its prosaic particulars. It echoes and continues one of our longest running law-and-religion arguments and it has implications for similarly deep-rooted—and divisive—public-policy debates.

In *Trinity Lutheran*, the justices achieved substantial consensus regarding both a fundamental “basic principle”—that is, the First Amendment “protect[s] religious observers against unequal treatment”—and that principle’s bottom-line application to the question before them.<sup>5</sup> At the same time, the justices’ several opinions contain wrinkles and ambiguities and so provide reasons to ask whether the ruling is a “this day only” pronouncement about playgrounds;<sup>6</sup> an earthquake-like, “shambles”-leaving subversion of the “wall separating church and state”;<sup>7</sup> or something else. Stay tuned.

## I. Background and Context

Before turning to *Trinity Lutheran*’s details, it is worth identifying and explaining briefly three features of the case’s legal, historical, and doctrinal contexts. First, the Court’s doctrine having to do with government support for and funding of religious institutions and activities has evolved gradually, but significantly, since the early 1970s. The details of this development—one of the most noteworthy aspects

<sup>4</sup> *Id.* at 2024–25.

<sup>5</sup> *Id.* at 2019 (quoting *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 542 (1993)).

<sup>6</sup> See Marc O. DeGirolami, “Blaine Amendment” Case Decided, Seemingly without Reference to Blaine Amendments or Animus Inquiry, *Law and Religion Forum*, June 26, 2017, <https://lawandreligionforum.org/2017/06/26/blaine-amendment-case-decided-without-reference-to-blaine-amendments-or-animus-inquiry>.

<sup>7</sup> Erwin Chemerinsky, *The Crumbling Wall Separating Church and State*, *SCOTUSblog*, June 27, 2017, <http://www.scotusblog.com/2017/06/symposium-crumbling-wall-separating-church-state>.

of the late Chief Justice William H. Rehnquist's legacy<sup>8</sup>—have been presented and evaluated many times and in great detail.<sup>9</sup>

From the nation's beginning (and before), governments and religious institutions in this country have cooperated, regularly and frequently, in all kinds of ways, to promote the common good. The appropriate nature and permissible extent of this cooperation have always been and still are debated, but the "wall of separation" that Thomas Jefferson told the Danbury Baptists our Constitution "buil[t] . . . between Church & State" has only rarely—and never by the Court—been understood to rule out cooperation entirely.<sup>10</sup> The justices in the *Lemon* and *Nyquist* cases, and in many that followed through the mid-1980s, embraced and attempted to apply a rule of fairly strict "no aid" separationism, according to which policies that had the "principal or primary effect" of "advanc[ing] . . . religion" were unconstitutional establishments of religion.<sup>11</sup> Over time, however, the Court's focus shifted from the possibility of "advancement" to a requirement of government evenhandedness or neutrality. And, in a series of cases—most notably, the *Zelman* case, decided in 2002<sup>12</sup>—a slim but consistent majority of the Court developed and applied the rule that governs today, namely, "equal treatment is not establishment" when it comes to religion-neutral funding programs with valid public purposes.<sup>13</sup>

The second contextual feature is similar to the first. In both its Free Speech Clause and Free Exercise Clause doctrines, the Court made "neutrality" its constitutional touchstone. Time and again, the justices held that the government may not discriminate on the basis

<sup>8</sup> See generally, Richard W. Garnett, Chief Justice Rehnquist, Religious Freedom, and the Constitution, *The Constitutional Legacy of William H. Rehnquist* (Bradford Wilson, ed., 2015).

<sup>9</sup> See generally, e.g., Michael McConnell, et al., *Religion and the Constitution* 303–449 (4th ed. 2016); Nicole S. Garnett & Richard W. Garnett, *School Choice, the First Amendment, and Social Justice*, 4 *Tex. Rev. L. & Pol.* 301 (1999).

<sup>10</sup> Compare, e.g., James Madison, *Memorial and Remonstrance against Religious Assessments* (1785) with, e.g., *Barnes v. First Parish in Falmouth*, 6 *Mass.* 400 (1810). See also Thomas Jefferson, *Letter to the Danbury Baptists* (1802).

<sup>11</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). See also *Comm'n for Pub. Ed. and Rel. Liberty v. Nyquist*, 413 U.S. 756 (1973).

<sup>12</sup> *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

<sup>13</sup> Eugene Volokh, *Equal Treatment Is Not Establishment*, 13 *Notre Dame J. L. Ethics & Pub. Pol'y* 341 (1999).

of religion in the provision of benefits or the imposition of burdens<sup>14</sup> and may not exclude, censor, or disadvantage speech or speakers because of their religious “viewpoint.”<sup>15</sup> In addition, the government is not required to exempt religious or religiously motivated activities from reach of “neutral,” generally applicable, yet meaningfully burdensome regulations.<sup>16</sup>

The third aspect of *Trinity Lutheran’s* background to note at the outset is that almost 40 states—including Missouri—have provisions in their own constitutions that purport to prohibit or limit public funding of religious institutions and activities. The terms of these provisions differ in some ways; they were enacted and re-enacted at various times and in varying circumstances; and they have not been uniformly interpreted and applied by the relevant state courts. In both the popular and scholarly literature—as well as in many of the amicus curiae briefs filed with the Court in *Trinity Lutheran*—these provisions are known as “Blaine Amendments” or “Baby Blaines,” after Senator James G. Blaine, who in 1875 proposed an amendment to the Constitution of the United States. The proposal, which failed, would have prohibited states from directing public funds or lands to the use or control of “religious sects or denominations.”

In recent years, increased scholarly attention and criticism have been directed at Sen. Blaine’s proposal and at state provisions that resemble it both textually and in terms of their inspiration and aims. It is clear that the proposal and these provisions reflect—significantly, even if to varying degrees—the anti-Catholicism, nativism, and nationalism of the 19th and early 20th centuries.<sup>17</sup> This should not be particularly surprising given that, “in a certain sense . . . anti-Catholicism is integral to the formation of the United States.”<sup>18</sup> Indeed,

anti-Catholicism in America was nothing new, and went well beyond the legal penalties imposed upon, and disabilities endured by, Catholics in the American colonies and states.

<sup>14</sup> See generally, e.g., Lukumi, *supra* note 5 and related text.

<sup>15</sup> See generally, e.g., *Rosenberger v. University of Virginia*, 515 U.S. 819 (1995).

<sup>16</sup> See generally, e.g., *Employment Div. v. Smith*, 494 U.S. 872 (1990).

<sup>17</sup> See generally, e.g., Richard W. Garnett, *The Theology of the Blaine Amendments*, 2 *First Amd. L. Rev.* 45 (2003).

<sup>18</sup> John T. McGreevy, “A History of the Culture’s Bias,” Remarks at the Anti-Catholicism: The Last Acceptable Prejudice Conference (May 24, 2002).

From the Puritans to the Framers and beyond, anti-“popery” was thick in the cultural air breathed by the early Americans, who were raised on tales of Armadas and Inquisitions, Puritan heroism and Bloody Mary, Jesuit schemes and Gunpowder Plots, lecherous confessors and baby-killing nuns.<sup>19</sup>

To be sure, some scholars dispute the duration, extent, and virulence—or, in any event, the contemporary relevance—of anti-Catholic opinions and their influence on the various no-aid constitutional provisions.<sup>20</sup> These matters are discussed in more detail below. For present purposes, it is enough to note the existence of these provisions and the well-grounded claims about their purpose and motive, and to recall that the Supreme Court has held in several cases that laws “motivated by an improper animus or purpose”—including, of course, animus toward a particular religious community or tradition—are, for that reason, presumptively unconstitutional.<sup>21</sup>

With *Trinity Lutheran’s* scene-setting backdrop in place, we can move to the unfolding and resolution of the case.

## **II. The Facts and History of *Trinity Lutheran***

Trinity Lutheran Church Child Learning Center is a preschool and daycare center in Boone County, Missouri. It is operated by Trinity Lutheran Church, on church property. Also on church property is a colorful, inviting, well-equipped playground. Several years ago, however, the school’s staff decided that rubber surfaces made from recycled scrap tires were better for children’s knees and elbows than coarse pea gravel and grass. As Chief Justice Roberts put it, “[y]oungsters, of course, often fall on the playground or

<sup>19</sup> Richard W. Garnett, *American Conversations with(in) Catholicism*, 102 Mich. L. Rev. 1191, 1199 (2004) (reviewing John T. McGreevy, *Catholicism and American Freedom: A History* (2003)).

<sup>20</sup> See, e.g., Steven K. Green, *Locke v. Davey and the Limits of Neutrality Theory*, 77 Temple L. Rev. 913 (2004). All things considered, however, the weight of the evidence supports the conclusion that “the Blaine Amendments were designed to (and still do) impose special legal disadvantages on Catholics because their beliefs were feared or hated by a sufficient majority.” Brief of Amici Curiae The Becket Fund et al. in Support of Respondent, *Locke v. Davey* 540 U.S. 712 (2004).

<sup>21</sup> See, e.g., *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Lukumi*, *supra* note 5, at 547.

tumble from the equipment. And when they do, the gravel can be unforgiving.”<sup>22</sup>

Because of these safety concerns, the church applied for a grant from the Scrap Tire Program, run by Missouri’s Department of Natural Resources (DNR). This program awards reimbursement grants to qualifying nonprofits that upgrade playgrounds, and thereby ease burdens on landfills, using materials made from used tires. Funding is scarce, the program is competitive, and grants go to those who score the highest on the basis of a range of criteria. The church scored very well—5th out of 44—but was nevertheless denied, “simply because of what it is,” the chief justice reported, “a church.”<sup>23</sup> At the time the church’s application was considered, he explained, the DNR had a “strict and express policy of denying grants to any applicant owned or controlled by a church, sect, or other religious entity.”<sup>24</sup> The denial letter sent to Trinity Lutheran explained that this policy was based on, and required by, Article I, Section 7 of Missouri’s constitution, which provides among other things that “no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion.”

The church took the matter to federal court and claimed that the rejection of its application pursuant to what the Supreme Court characterized as Missouri’s “[n]o churches need apply” policy violated the First Amendment’s Free Exercise Clause<sup>25</sup> and other state and federal constitutional provisions. According to the church, Missouri’s policy forced the church to make a choice between abandoning its religious beliefs, mission, and character and foregoing an otherwise-available public benefit. The district court dismissed the case, relying on the Supreme Court’s 2004 decision in *Locke v. Davey*, which upheld the constitutionality of a Washington state scholarship program that excluded students pursuing a “degree in devotional theology.”<sup>26</sup> The district judge insisted that Missouri had

<sup>22</sup> Trinity Lutheran, 137 S. Ct. at 2017.

<sup>23</sup> *Id.* at 2023.

<sup>24</sup> In April 2017, the governor of Missouri directed the DNR to change the policy and allow religious nonprofits to compete for grants. The Court determined that the governor’s announcement “does not moot this case.” Trinity Lutheran, *id.* at 2019 n.1.

<sup>25</sup> See U.S. Const. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .”) (emphasis added).

<sup>26</sup> 540 U.S. 712 (2004).

done nothing to prevent church members from holding religious beliefs or to penalize them for exercising religious practices and that the DNR's decision did not reveal "hostility toward religion." The Free Exercise Clause, the court reasoned, speaks to restraints and compulsion in religious matters; it does not require governments to provide "affirmative benefit[s]" and it permits them to fastidiously avoid directly funding religious institutions.<sup>27</sup>

The court of appeals affirmed and for substantially the same reasons invoked by the district court: Given the Supreme Court's decision in *Locke v. Davey*, the First Amendment permits, but does not require, Missouri to fund reimbursement-grant applications from churches.<sup>28</sup> Judge Raymond Gruender, however, insisted in dissent that *Locke* can and should be read more narrowly, as a case involving the specific and historically fraught issue of funding for the religious training of clergy, and that the ruling "did not leave states with unfettered discretion to exclude the religious from generally available public benefits." Safe playgrounds, he observed, unlike theological formation, have "nothing to do with religion" and so Missouri's differential treatment of churches' grant applications cannot be defended as a safeguard against establishments of religion.<sup>29</sup>

### III. The Court's Decision and the Justices' Opinions

On January 15, 2016, the Supreme Court granted Trinity Lutheran's petition for certiorari. A few weeks later, Justice Antonin Scalia died. Nearly a year after that—after the March nomination by President Barack Obama of Judge Merrick Garland to fill Justice Scalia's seat, the Senate Republicans' sustained refusal to act on that nomination, the November 2016 election of President Donald Trump, and the nomination to the Court in January 2017 by President Trump of Judge Neil Gorsuch—the church's case was set for oral argument. Despite a filibuster by Senate Democrats, Justice Gorsuch was confirmed on

<sup>27</sup> *Trinity Lutheran Church v. Pauley*, 976 F. Supp. 2d 1137, 1147 (W.D. Mo. 2013).

<sup>28</sup> *Trinity Lutheran Church v. Pauley*, 788 F.3d 779, 785 (8th Cir. 2015). Although the court referred to Trinity Lutheran's challenge as a "facial attack" on the relevant provision of Article I, Section 7, *id.* at 783, 785, Judge Gruender pointed out in dissent that the church repeatedly characterized its claim as an "as-applied challenge," *id.* at 790–91.

<sup>29</sup> *Id.* at 791, 793 (Gruender, J., dissenting).



April 7, and—with a full, nine-justice complement for the first time since Scalia’s death—the Court heard the case 12 days later.

During the months of the eight-member Court, some wondered whether *Trinity Lutheran* would wind up on the list of 4-4, lower-court-affirming splits along partisan lines.<sup>30</sup> However, most observers concluded that the justices’ questions and lawyers’ answers during oral arguments pointed clearly to a win for Trinity Lutheran.<sup>31</sup> More than a few times, various justices—including Justices Elena Kagan and Stephen Breyer—pressed counsel for the DNR to explain why its policy—its understanding and application of Article I, Section 7—would not deny basic public services, like police and fire protection, to churches.<sup>32</sup> Justice Samuel Alito pursued a similar line, asking counsel for the DNR about a “security grant program . . . through the Department of Homeland Security . . . to harden . . . non-profit organizations” that are deemed high-risk targets for terrorist attacks or a program that “provide[s] . . . security enhancements at schools where there’s fear of [a] shooting.”<sup>33</sup> That the state’s policy could prohibit financial support in such cases was clearly troubling to most members of the Court.<sup>34</sup>

<sup>30</sup> See, e.g., Ron Elving, “On the Docket, In Limbo: Scalia’s Death Casts Uncertainty on Key Cases,” NPR (Feb. 14, 2016), <http://www.npr.org/2016/02/14/466752491/on-the-docket-in-limbo-scalias-death-casts-uncertainty-on-key-cases>.

<sup>31</sup> The parties agreed, both in written filings and at oral argument, that the Missouri governor’s announcement directing a change in policy did not moot the case. See *Trinity Lutheran*, 137 S. Ct. at 2019 n.1; Transcript of Oral Arg., at 23, 24 (Counsel for petitioner states that if “political winds change[d] . . . [the policy could] easily be changed back” and that “absent a ruling [at the Supreme Court] . . . , the old policy will be back in place.”); *id.* at 52 (Counsel for respondent agrees that “there is no assurance that four years from now, with a change of administration, or at some point in the interim through a taxpayer standing suit, that there wouldn’t be a . . . change back to the prior practice.”).

<sup>32</sup> See, e.g., the account of the oral argument in *Playground Scrap: The Supreme Court Appears to Side with a Church in a Funding Battle*, *The Economist* (Apr. 19, 2017), <https://www.economist.com/blogs/democracyinamerica/2017/04/playground-scrap>.

<sup>33</sup> Transcript of Oral Arg. at 32, 33, *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012 (2017).

<sup>34</sup> Even Justices Sonia Sotomayor and Ruth Bader Ginsburg, who dissented, agreed that it “would violate the Free Exercise Clause” to “fence out religious persons or entities from a truly generally available public benefit” such as “police or fire protections.” 137 S. Ct. at 2040 (Sotomayor, J., dissenting).

On June 26, 2017, the Court's 7-2 decision in favor of the church was announced, although it was somewhat overshadowed by fever-pitch speculation regarding Justice Anthony Kennedy's possible retirement and the justices' *per curiam* disposition of the challenge to President Trump's executive order restricting entry into the country for certain classes of foreign nationals.<sup>35</sup> The clarity of the church's win and the strong bottom-line consensus among the justices notwithstanding, the chief justice's opinion for the court, which five other justices joined either in full or almost entirely, both raised and left open questions. There were three complicating, concurring opinions filed as well as a lengthy and indignant dissent. It is worth addressing each opinion on its own before turning to the task of identifying the decision's meaning, implications, and limits.

*A. Chief Justice Roberts's Opinion for the Court: "Exclusion . . . is odious to our Constitution . . . and cannot stand"*

Part II of the chief justice's opinion sets out what the majority identified as the governing rules and controlling precedents. He observed laconically that "[t]he parties agree that the Establishment Clause . . . does not prevent Missouri from including Trinity Lutheran in the Scrap Tire Program."<sup>36</sup> That none of the justices in the majority saw any need to push back against this agreement is striking. It suggests that the evolution, described above, in the Court's approach to cases involving public support for, and cooperation with, religious institutions is fairly settled. The opinion moves quickly to the commands of the Free Exercise Clause, which "'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.'"<sup>37</sup> Given this command, "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.'"<sup>38</sup> Laws that "single out the religious for

<sup>35</sup> *Trump v. Int'l Refugee Assistance Program*, Nos. 16-1436 & 16-1540 (June 26, 2017) (*per curiam*).

<sup>36</sup> *Trinity Lutheran*, 137 S. Ct. at 2019.

<sup>37</sup> *Id.* (quoting *Lukumi*, 508 U.S. at 533).

<sup>38</sup> *Id.* (quoting *McDaniel v. Paty*, 435 U.S. 618, 628 (1978) (plurality opinion) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972))).

disfavored treatment,” in other words, are crucially different from and much more suspect than those that are “neutral and generally applicable without regard to religion.”<sup>39</sup> The majority concluded that Missouri’s policy—that is, its interpretation and application of Article I, Section 7—is of the former kind. It “expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character” and “imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny.”<sup>40</sup>

The chief justice then addresses, and rejects, the state’s argument that “merely declining to extend funds”—or, “declin[ing] to allocate a subsidy”—to Trinity Lutheran does not prohibit the church from engaging in any religious conduct or otherwise exercising its religious rights.<sup>41</sup> According to Missouri, a decision not to grant money that the state had no obligation to provide leaves the church entirely free to believe and profess religious truths and imposes no burden on religious exercise. The Court, however, frames the matter differently: “[T]he Department’s policy puts Trinity Lutheran to a choice: It may participate in an otherwise available benefit program or remain a religious institution.”<sup>42</sup> And, the chief justice insists, this is an imposition the Court’s precedents almost never permit. It is not that the church is “claiming any entitlement to a subsidy” or that the state has “criminalized the way Trinity Lutheran worships”; instead, the “express discrimination against religious exercise here is . . . the refusal to allow the Church—solely because it is a church—to compete with secular organizations for a grant.”<sup>43</sup>

Next, there is the matter of the Court’s *Locke v. Davey* decision, which has already been mentioned and on which the lower courts relied. Again, in *Locke*, a (different) seven-justice majority, invoking the “play in the joints” between what the Establishment Clause allows and the Free Exercise Clause compels,<sup>44</sup> had permitted the state of Washington to deny an otherwise available college scholarship to

<sup>39</sup> *Id.* at 2020.

<sup>40</sup> *Id.* at 2021.

<sup>41</sup> *Id.* at 2022.

<sup>42</sup> *Id.* at 2021–22.

<sup>43</sup> *Id.* at 2022.

<sup>44</sup> *Locke*, 540 U.S. at 718.

a student who intended to train for the ministry and to pursue a degree that was “devotional in nature or designed to induce religious faith.”<sup>45</sup> This case, the Court explained, is different. The student in *Locke* “was denied a scholarship because of what he proposed to do[,]” not “because of who he *was*”; here, on the other hand, “Trinity Lutheran was denied a grant simply because of what it is—a church.”<sup>46</sup> Indeed, the chief justice emphasized, Washington allowed religious students to receive scholarships, attend religious schools, and study religious subjects—just not to get a devotional-theology degree. Trinity Lutheran, on the other hand, is “put to the choice between being a church and receiving a government benefit. The rule is simple: No churches need apply.”<sup>47</sup>

Having reached the conclusion that the choice demanded by Missouri’s policy penalizes the free exercise of religion, the chief justice dropped a footnote that, *Carolene Products*-style, has drawn the close attention of scholars, commentators, and activists:<sup>48</sup>

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.<sup>49</sup>

This note, which both unremarkably states the obvious and potentially unsettles the consensus, and which Justices Neil Gorsuch and Clarence Thomas declined to join, is discussed in more detail below.

The majority opinion concludes with the determination that the state’s “policy preference for skating as far as possible from religious establishment concerns”—unlike the state of Washington’s historically pedigreed aim of avoiding funding clergy-training—“cannot qualify as compelling” and so cannot justify the burden its discriminatory policy imposes.<sup>50</sup> “[T]he exclusion of Trinity Lutheran from a

<sup>45</sup> *Id.* at 716.

<sup>46</sup> Trinity Lutheran, 137 S. Ct. at 2023.

<sup>47</sup> *Id.* at 2024.

<sup>48</sup> See United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

<sup>49</sup> Trinity Lutheran, 137 S. Ct. at 2024 n.3.

<sup>50</sup> *Id.* at 2024.

public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution . . . and cannot stand.”<sup>51</sup>

*B. Justice Thomas’s Concurrence: Locke “Remains Troubling”*

Justice Thomas joined all of the Court’s opinion except “Footnote 3,” which was just quoted. In a short, three-paragraph concurring opinion, which Justice Gorsuch also signed, he re-affirmed his view that *Locke v. Davey* was wrongly decided: “This Court’s endorsement in *Locke* of even a ‘mil[d] kind’ . . . of discrimination against religion remains troubling.”<sup>52</sup> He welcomed the majority’s “appropriately . . . narrow[]” reading of *Locke*, however, and underscored that the decision “did not suggest that discrimination against religion outside the limited context of support for ministerial training” would or should be “exempt from exacting review.”<sup>53</sup>

*C. Justice Gorsuch’s Concurrence: “General Principles, Rather Than Ad Hoc Improvisations”*

The Court’s newest member, Justice Gorsuch, also joined all of the chief justice’s opinion but Footnote 3. He set out the reasons—as he put it, “two modest qualifications”—for his reservations in a concurring opinion, which Justice Thomas also joined.<sup>54</sup> First, Justice Gorsuch expressed “doubts about the stability of . . . a line” between “laws that discriminate on the basis of religious *status* and religious *use*.”<sup>55</sup> What is more, he suggested, it is not clear that the line should matter, given that the Constitution “guarantees the free *exercise* of religion, not just the right to inward belief (or status).”<sup>56</sup> He elaborated, “I don’t see why it should matter whether we describe [a] benefit, say, as closed to Lutherans (status) or closed to people who do Lutheran things (use). It is free exercise either way.”<sup>57</sup>

Next, Justice Gorsuch objected to the Court’s anodyne, yet mysterious, observations in Footnote 3. On the one hand, it is generally and

<sup>51</sup> *Id.* at 2025.

<sup>52</sup> *Id.* at 2025 (Thomas, J., concurring in part).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 2025 (Gorsuch, J., concurring in part).

<sup>55</sup> *Id.* (emphasis in original).

<sup>56</sup> *Id.* at 2026.

<sup>57</sup> *Id.*

not controversially the case that the Court addresses and resolves particular controversies involving particular players, facts, and circumstances. On the other hand, he cautioned “that some might mistakenly read [the footnote] 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 relevant rules and precedents. “[O]ur cases,” he insisted, “are ‘governed by general principles, rather than ad hoc improvisations[.]’ . . . [a]nd the general principles here do not permit discrimination against religious exercise—whether on the playground or anywhere else.”<sup>58</sup>

*D. Justice Breyer’s Concurrence: “Public Benefits Come in Many Shapes and Sizes”*

Justice Breyer “agree[d] with much of what the Court sa[id] and with its result” but concurred only in the judgment.<sup>59</sup> As he had during the oral arguments, he emphasized the “particular nature of the ‘public benefit’ here at issue.”<sup>60</sup> Seventy years earlier, in the landmark *Everson* ruling, the Court had observed 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.’”<sup>61</sup> And yet, by “cut[ting] Trinity Lutheran off from participation in a general program designed to secure or to improve the health and safety of children,” Missouri is effectively doing the same thing. However, clearly aware of the possible implications and applications of the “general principles” cited by Justice Gorsuch, he wrote, “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.”<sup>62</sup>

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 2026 (Breyer, J., concurring in the judgment).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 2027 (quoting *Everson v. Board of Educ.*, 330 U.S. 1, 16 (1947)).

<sup>62</sup> *Id.*

*E. Justice Sotomayor's Dissent: A "Constitutional Slogan" or a "Constitutional Commitment"?*

Justice Sonia Sotomayor's dissenting opinion, which only Justice Ruth Bader Ginsburg joined, is bracing, unyielding, and nearly twice as long as the Court's. She read a version live from the bench and omitted the customary "respectfully" from the last line of her opinion.<sup>63</sup> An opinion by the late Justice Scalia that was similar in tone and urgency would probably have been widely characterized as "fiery," "blistering," or even "bitter." She warned that *Trinity Lutheran* is not "a simple case about recycling tires to resurface a playground" but is instead "about nothing less than the relationship between religious institutions and the civil government—that is, between church and state."<sup>64</sup> She charged the majority with "profoundly chang[ing]" that relationship, "slight[ing] both our precedents and our history," and "weaken[ing] this country's longstanding commitment to a separation of church and state beneficial to both."<sup>65</sup>

In a sense, Justice Sotomayor dissented twice. Recall, for starters, that the parties, the court of appeals, and the majority agreed, or at least assumed, that the Establishment Clause would allow Missouri to award a reimbursement grant to Trinity Lutheran for the purpose of resurfacing the Learning Center's playground.<sup>66</sup> The same is true

<sup>63</sup> *Id.* at 2041 (Sotomayor, J., dissenting).

<sup>64</sup> *Id.* at 2027.

<sup>65</sup> *Id.* Interestingly, Chief Justice Roberts's opinion for the Court nowhere specifically addressed these denunciations or the historical and precedential accounts that are offered in support of them. Had he or another justice done so, he could have demonstrated that Justice Sotomayor's effort to analogize late-18th century arguments about public funding for clergy training to the exclusion of a church-run preschool from a playground-resurfacing-grants program is, among other things, anachronistic.

<sup>66</sup> The district court's opinion commented that "using taxpayer-raised funds to refurbish Trinity's playground, no matter how innocuous, raises Establishment Clause concerns even if such use of funds would not violate the Establishment Clause." *Trinity Lutheran*, 976 F. Supp. 2d at 1150. However, that court continued, "the question of whether awarding a scrap tire grant directly to Trinity would violate the Establishment Clause is not at issue in this case, and so it is neither necessary nor appropriate to resolve this question here." *Id.* at 1151. Nonetheless, the court of appeals noted that "it now seems rather clear that Missouri could include the Learning Center's playground in a non-discriminatory Scrap Tire grant program without violating the Establishment Clause." *Trinity Lutheran*, 788 F.3d at 784. Judge Gruender, who dissented, agreed. *Id.* at 793 (Gruender, J., dissenting).

of nearly all the amicus briefs that were filed, on both sides.<sup>67</sup> In contrast, noting that “[c]onstitutional questions are decided by this Court, not the parties’ concessions,” she contended that “[t]he 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.”<sup>68</sup>

The Court’s precedents, she argued—running from *Everson* through today—establish a clear rule that “[t]he government may not directly fund religious exercise” and, she insisted, “[n]owhere is this clear rule more clearly implicated than when funds flow directly from the public treasury to a house of worship.”<sup>69</sup> This is especially so given that the church had not provided, and—she asserted—could not provide, “assurances that public funds would not be used for religious activities.”<sup>70</sup> After all, the church’s own materials describe the Learning Center as “a ministry of the church” and its program—which its playground and other facilities, she suggests, serve—is “structured to allow a child to grow spiritually.”<sup>71</sup> Underlining this point—which seems consonant with Judge Gorsuch’s reservation about a sharp distinction between “status” and “use”—she insisted that “[t]he 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.”<sup>72</sup>

What can be seen as Justice Sotomayor’s second dissent was her attack on the Court’s conclusion that “the interests embodied in the Religion Clauses” do not justify “the line drawn in Missouri’s Article

<sup>67</sup> But see, e.g., Brief of Amici Curiae American Civil Liberties Union, et al. in Support of Respondent, at 6 (“The Establishment Clause Prohibits the State from Awarding Direct Grants of Taxpayer Funds to Houses of Worship”); Brief of Amicus Curiae Lambda Legal Defense and Education Fund, Inc., in Support of Respondent, at 12, n.3.

<sup>68</sup> *Trinity Lutheran*, 137 S. Ct. at 228 (Sotomayor, J., dissenting).

<sup>69</sup> *Id.* at 228–29. Justice Sotomayor distinguished this rule from the line of cases “about indirect aid programs in which aid reaches religious institutions ‘only as a result of the genuine and independent choices of private individuals.’” *Id.* at 229 n.2 (quoting *Zelman*, 536 U.S. at 649).

<sup>70</sup> *Id.* at 229. By failing to require such assurances, Justice Sotomayor wrote, the majority had departed from controlling precedents, including *Mitchell v. Helms*, 530 U.S. 793 (2000).

<sup>71</sup> *Id.* at 227–28.

<sup>72</sup> *Id.* at 229.



I, [Section] 7.”<sup>73</sup> That is, any religion-based discrimination involved in Missouri’s policy is, like the prohibition upheld in *Locke v. Davey*, the acceptable result of a permissibly separationist commitment. It is permissible, sometimes, for the law to “single[] out” religious individuals, entities, and activities for distinctive treatment—sometimes to accommodate, sometimes to exclude; what matters are “the reasons that it does so.”<sup>74</sup> The decision reflected in Missouri’s constitution and in the DNR’s policy “has deep roots in our Nation’s history” and “reflects a reasonable and constitutional judgment.”<sup>75</sup>

The Court’s judgment, and its focus on the issue of “discrimination,” Justice Sotomayor contends, creates a “lopsided outcome” where “[t]he government may draw lines on the basis of religious status to grant a benefit to religious persons or entities but it may not draw lines on that basis when doing so would further the interests the Religion Clauses protect in other ways.”<sup>76</sup> She asserted that the majority’s decision, by undermining the separation between “the public treasury” and “religious coffers,” “jeopardizes the government’s ability to remain secular” and—responding explicitly to Justice Gorsuch’s concurring opinion endorsing general principles of broader application—she warned of “what it might enable tomorrow.”<sup>77</sup>

#### IV. *Trinity Lutheran’s* Import and Implications

The observation is familiar that “where one stands depends on where one sits.” The outcome in *Trinity Lutheran* was, again, not a surprise—at least, not after the oral arguments—and—given the

<sup>73</sup> *Id.* at 2031.

<sup>74</sup> *Id.* at 2032.

<sup>75</sup> *Id.* Part III-B of Justice Sotomayor’s dissent presents these “deep roots,” and the similar, longstanding provisions contained in many other state constitutions, in detail. *Id.* at 2032–38. “In the Court’s view,” she complained, “none of this matters.” *Id.* at 2038. It should be noted, however, that her presentation of these “deep roots” is strikingly incomplete for failing to discuss fully these provisions’ background, context, and aims.

<sup>76</sup> *Id.* at 2040 (“[T]he same interests served by lifting government-imposed burdens on certain religious entities may sometimes be equally served by denying government-provided benefits to certain religious entities.”).

<sup>77</sup> *Id.* at 2041, 2040, 2041 n.14. On some justices’ possibly revealing habit of using the term “coffers” to refer to the accounts of religious schools and other entities, see Richard W. Garnett & Benjamin P. Carr, *Drop Coffers*, 10 *Green Bag* 2d 299 (2007).

different places observers “sit”—neither is the fact that the result prompted a wide range of reactions from celebration to condemnation. Now, it could be that a ruling for the Church was overdetermined, given its “good facts” (playground safety and recycling) and framing (unyielding discrimination), the state’s concessions at oral argument, the changes in the Court’s membership since *Locke v. Davey* was decided, and the well-developed, ongoing shift away from strict, no-aid separationism in the Court’s doctrine and legal scholarship. That said, given the various practices, precedents, and provisions set out in Justice Sotomayor’s dissent—putting aside, for the moment, questions about their historical, constitutional, or moral merits<sup>78</sup>—it is striking and significant that a seven-justice majority, in a roiling political environment and a case that is at least adjacent to the culture-war arena, ruled that the Constitution requires the disbursal of funds to a church for its school.

The Court’s judgment in *Trinity Lutheran* was the right one.<sup>79</sup> Indeed, one could argue that it is long overdue.<sup>80</sup> The majority was correct to treat the question presented as controlled primarily by the no-discrimination rule from cases like *Lukumi* and *McDaniel* and to reject an expansive reading of *Locke v. Davey*.<sup>81</sup> Douglas Laycock observed, not long after that ruling, that “the holding is confined to the training of clergy [and] to refusals to fund that are not based on hostility to religion,” but he predicted with regret that these limitations would prove “illusory.”<sup>82</sup> Perhaps not. Missouri’s asserted

<sup>78</sup> See generally, e.g., Steven D. Smith, *The Rise and Decline of American Religious Freedom* (2014); Donald L. Drakeman, *Church, State, and Original Intent* (2010).

<sup>79</sup> See Richard W. Garnett, “Consensus & Uncertainty at the Supreme Court,” *Commonweal*, Aug. 2, 2017 (“All things considered, the justices in the majority had the better of the argument.”), <https://www.commonwealmagazine.org/consensus-uncertainty-supreme-court>.

<sup>80</sup> See, e.g., Garnett & Garnett, *supra* note 9, at 336 n.180, 338–39 n.195.

<sup>81</sup> *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993); *McDaniel v. Paty*, 435 U.S. 618 (1978). Cf. *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1255 (10th Cir. 2008) (“The opinion . . . suggests, even if it does not hold, that the State’s latitude to discriminate against religion is confined to certain ‘historic and substantial state interest[s],’ . . . and does not extend to the wholesale exclusion of religious institutions and their students from otherwise neutral and generally available government support.”).

<sup>82</sup> Douglas Laycock, Comment, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 *Harv. L. Rev.* 155, 184 (2004).

prophylactic interest in “achieving greater separation of church and State than is already ensured under the Establishment Clause”<sup>83</sup>—or, as the chief justice put it, in “skating as far as possible from religious establishment concerns”<sup>84</sup>—is, even if defensible, not weighty enough to justify its categorically exclusionary policy. And, contrary to Justice Sotomayor’s overwrought denunciation,<sup>85</sup> to conclude as much is not at all to slight “this country’s longstanding commitment to a separation of church and state” that is, properly understood, “beneficial to both.”<sup>86</sup>

It is true that the separation—that is, the differentiation—between religious and political authority safeguards religious and political freedom. However, the maintenance of an appropriately secular government does not require the blanket exclusion of churches from generally available (and secular) public benefits or rule out cooperation between governments and religious institutions in advancing the common (and secular) good. It makes sense to protect religious liberty by preventing official interference with strictly religious affairs. It would be unconstitutional for Missouri to pick Trinity Lutheran’s hymns or ordain its pastor, but it is—contrary to the narrative offered by Justice Sotomayor—well within our tradition to allow the church, like anyone else, to apply for help with playground safety.

Regardless of the merits or wisdom of its outcome, though, *Trinity Lutheran’s* meaning, applications, and implications are uncertain and sure to be contested. This is true both because of things said, and left unsaid, in the various opinions. Four matters are particularly worth addressing, even if only briefly: (1) whether “Footnote 3” of Chief Justice Roberts’s opinion will have the effect of limiting the case’s impact in school-choice litigation; (2) how to construe the justices’ complete silence regarding the Blaine Amendments in general and Missouri’s no-aid provision in particular, and what this silence means for future judicial inquiries into “animus”; (3) whether and to what extent “discrimination” by religious entities and employers

<sup>83</sup> 137 S. Ct. at 2024 (quoting *Widmar*, 454 U.S. at 276).

<sup>84</sup> *Id.* at 2024.

<sup>85</sup> See, e.g., 137 S. Ct. at 2041 (“Today’s decision discounts centuries of history and jeopardizes the government’s ability to remain secular.”) (Sotomayor, J., dissenting).

<sup>86</sup> *Id.* at 2027.

constrains or is constrained by their receipt of public funding (note that concerns on this score were hinted at during oral argument and in the dissenting opinion and raised explicitly in at least one amicus brief); and (4) whether the distinction drawn in the case between religious “status” or “identity” (“who one is”), on the one hand, and religious exercise or uses (“what one does”), on the other, will or should be emphasized in future religious-freedom cases.

*A. School Choice and “Footnote Three”*

Throughout the *Trinity Lutheran* litigation and in the commentary and analysis before and since the ruling, the proverbial elephant in the room has been the implications of a win by the church for school-choice programs and education funding more generally.<sup>87</sup> Some courts, relying on broader readings of *Locke v. Davey* than the one given by the *Trinity Lutheran* majority, have rejected the argument that the Constitution requires the evenhanded inclusion and fair participation of religious schools in education-funding experiments. In several states, the existence and interpretation of Blaine Amendments and other no-aid provisions have functioned as barriers to such reform experiments. Given the “basic principle” invoked and applied by the Court, however, a state or local government should not be permitted to exclude a family from the benefits of a tuition-scholarship or tax-credit program simply because parents choose an otherwise qualified religious school as the provider of their child’s education. As Justice Breyer noted in his concurring opinion, “[p]ublic benefits come in many shapes and sizes,”<sup>88</sup> including school vouchers.

But Justice Breyer also said he was “leav[ing] the application of the Free Exercise Clause to other kinds of benefits for another day.”<sup>89</sup> Similarly, perhaps, Footnote 3 of the chief justice’s opinion seemed to distinguish—for present purposes, anyway—between “express

<sup>87</sup> See, e.g., Valerie Strauss, Will the Supreme Court’s Trinity Decision Lead to the Spread of School Voucher Programs?, *Wash. Post.*, June 26, 2017, <https://www.washingtonpost.com/news/answer-sheet/wp/2017/06/26/will-the-supreme-courts-trinity-decision-lead-to-the-spread-of-school-voucher-programs>; Brief Amicus Curiae of the National Education Association in Support of Respondent, at 1; Brief for Amici Curiae Douglas County School District and Douglas County School Board in Support of Petitioner, at 1.

<sup>88</sup> 137 S. Ct. at 2027 (Breyer, J., concurring).

<sup>89</sup> *Id.*

discrimination based on religious identity with respect to playground resurfacing” and “religious uses or funding.” Is the exclusion of religious schools from educational-choice programs meaningfully different from the former? Is the use of tax credits to help send a child to a parochial school an example of the latter?

Certainly, a number of footnotes have become famous and acquired precedential value. It is generally recognized that footnotes are parts of opinions and so should be regarded as part of the reasoning provided in support of a court’s holding.<sup>90</sup> However, Footnote 3 is not part of the Court’s opinion. Justices Gorsuch and Thomas expressly declined to endorse it and Justice Breyer concurred only in the judgment. It is not that these justices believe the footnote says anything wrong—the note’s text is, as Justice Gorsuch concedes, “entirely correct.”<sup>91</sup> What Justices Thomas and Gorsuch appear to reject is an understanding of the case that focuses more on its factual particulars than on the “general principles” applied to them and that “do not permit discrimination against religious exercise—whether on the playground or anywhere else.”<sup>92</sup> And, the majority opinion, like Judge Gorsuch’s concurrence, does indeed speak in terms of general, and generally applicable, nondiscrimination principles. The chief justice reports, for example, that Missouri “require[d] Trinity Lutheran to renounce its religious character . . . to participate in an otherwise generally available public benefit program, for which it is fully qualified.”<sup>93</sup> Certainly, the dissenting justices were aware of “[t]he principle [the decision] establishes” and more worried about “what it might enable tomorrow” than about its particular application in the case.<sup>94</sup>

The meaning of *Trinity Lutheran* and the significance, if any, of Footnote 3 could become clearer soon. The day after the decision, the justices vacated and remanded, for further consideration in light of *Trinity Lutheran*, cases from Colorado and New Mexico in which state courts had applied no-aid provisions of their constitutions to

<sup>90</sup> Cf. *United States v. Denedo*, 556 U.S. 904, 921 (2009) (Roberts, C.J., concurring in part and dissenting in part) (“[F]ootnotes are part of an opinion, too, even if not the most likely place to look for a key jurisdictional ruling.”).

<sup>91</sup> 137 S. Ct. at 2026 (Gorsuch, J., concurring in part).

<sup>92</sup> *Id.*

<sup>93</sup> 137 S. Ct. at 2022.

<sup>94</sup> *Id.* at 2041 n.14.

restrict educational-choice programs.<sup>95</sup> Although there is plenty of room for informed speculation about the vote-securing reasons for Footnote 3 and the various justices' views regarding the reach and limits of the "general principles" applied in the case, it remains to be seen whether lower courts will be guided more by Justice Gorsuch's rejection of "ad hoc improvisations" or by Justice Breyer's emphasis on public benefits' "many shapes and sizes."

*B. The Blaine Amendments and Unconstitutional "Animus"*

There is, as was discussed earlier, a lively academic debate about the aims and causes of the so-called Blaine Amendments and about the relevance, if any, of the anti-Catholicism and nativism that most agree are at least part of these amendments' stories. The questions whether Missouri's particular provision should be regarded as a Blaine Amendment and whether that provision's particular history is tainted by prejudice are also disputed.<sup>96</sup> The commentary leading up to *Trinity Lutheran* regularly emphasized the Blaine Amendments' history, context, and purposes and treated the case as, at least in part, a case "about" them.<sup>97</sup>

Several justices have, in the past, at least acknowledged the Blaine Amendments controversy and the connections among American anti-Catholicism, the 19th century "School Wars," and the proposal and enactment of strict no-aid provisions.<sup>98</sup> Yet the controversy, these connections, and even the word "Blaine" are utterly absent from the various justices' opinions. The opinion of the Court does little more than report that the Missouri no-aid provision exists. Justice Sotomayor's dissent provides lengthy footnoted string-cites as

<sup>95</sup> See Erica L. Green, *Supreme Court Ruling Could Shape Future of School Choice*, N.Y. Times, June 27, 2017, <https://www.nytimes.com/2017/06/27/us/politics/supreme-court-school-choice-ruling.html>.

<sup>96</sup> Compare, e.g., Brief of Amici Curiae, Legal and Religious Historians, in Support of Respondent, at 16, with Brief of the Union of Orthodox Jewish Congregations of America as Amicus Curiae in Support of Petitioner, at 18.

<sup>97</sup> See, e.g., Philip Hamburger, *Prejudice and the Blaine Amendments*, First Things, June 20, 2017, <https://www.firstthings.com/web-exclusives/2017/06/prejudice-and-the-blaine-amendments>; Richard W. Garnett, *Confronting a Nativist Past; Protecting School Choice's Future*, SCOTUSblog, Aug. 10, 2016, <http://www.scotusblog.com/2016/08/symposium-confronting-a-nativist-past-protecting-school-choices-future>.

<sup>98</sup> See *Mitchell v. Helms*, 530 U.S. 793 (2000) (Thomas, J., plurality op.).

evidence that many other similar provisions exist, and have long existed, and—she contends—reflect “principles rooted in this Nation’s understanding of how best to foster religious liberty.”<sup>99</sup> The argument that Missouri’s no-aid provision, or the Blaine Amendments generally, are rendered unconstitutional by virtue of their motives, history, or aims makes no appearance in the decision, even though it is impossible that the justices were unaware of it.<sup>100</sup>

In recent months, advocates and scholars challenging the Trump Administration’s “travel ban” executive order have argued that legislation or official action resulting from hostility or “animus” toward or a “bare desire to harm” a religious minority or politically unpopular group is unconstitutional. That analogous arguments were raised, but ignored, in *Trinity Lutheran* could indicate reservations by some justices regarding judicial doctrines and tests that require close scrutiny and criticism of official actors’ motives and aims.<sup>101</sup> To be sure, such doctrines and tests have developed and been deployed in several constitutional contexts, including cases applying the Equal Protection, Due Process, Free Exercise, and Establishment Clauses. And yet, reservations about this kind of inquiry seem warranted. Not only is the inquiry notoriously difficult, it can invite and reward arguments that attack the character or motives of one’s opponents and contribute to what Steven Smith has called a “jurisprudence

<sup>99</sup> 137 S. Ct. at 2037 (Sotomayor, J., dissenting).

<sup>100</sup> See, e.g., Brief for the Cato Institute as Amicus Curiae Supporting Petitioners, at 4 (noting that a Missouri Senator, during the debate on the Art. I § 7 provision, argued that the Missouri Senate ought to “say in plain English what is intended” by adding ‘Catholic’ to the [proposed amendment].”); Brief for The Union of Orthodox Jewish Congregations of America as Amicus Curiae Supporting Petitioners, at 4, 11 (“Missouri’s Blaine Amendment [Art. I § 7] [] is one of the most restrictive versions of the original Blaine Amendment in the entire United States”); Brief for Council of Christian Colleges and Universities et al. as Amici Curiae Supporting Petitioners, at 19–20 (“Rather than embracing pluralism, [the approach of courts in expansively interpreting *Locke*] reflects a return to the forced orthodoxy and sectarian bias of the Blaine Amendment.”).

<sup>101</sup> Cf. Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. Rev. 1784, 1859 (2008) (“It is safe to say that courts remain cautious about imputing impermissible purposes to duly enacted statutes; even when judges acknowledge both the relevance of legislative motivation to a statute’s constitutionality and the judiciary’s ability to investigate that motivation, they tend to resolve doubts in favor of presuming that the legislature behaved properly.”).

of denigration"<sup>102</sup> and the "discourse of disrespect."<sup>103</sup> The Blaine Amendments' misguided and even bigoted premises and purposes, and the larger history of anti-Catholicism in America, should be confronted and regretted. But it might be better if legal challenges to no-aid provisions' application are resolved, as *Trinity Lutheran* was, on more narrow, simpler non-discrimination grounds.

*C. "Discrimination" by Religious Entities and Employers*

The freedom of religion includes, in some instances, the freedom to "discriminate." The Supreme Court affirmed as much unanimously five years ago in the *Hosanna-Tabor* case.<sup>104</sup> If this statement jars, it is probably because of the notoriously imprecise ways the term "discrimination" is used in contemporary political and legal discourse.<sup>105</sup> Protecting and promoting religious freedom, which American governments may and should do, includes not only tolerating but also preserving the right of religious institutions to engage in forms of "discrimination"—for example, using religious criteria in the hiring and firing of ministerial employers—that would and should be illegal when attempted by governments or commercial entities. A second elephant in the courtroom, then—a not-too-distant relation of the first—was the fear that a victory for the church in *Trinity Lutheran* would lead not only to a requirement that religious schools be allowed to participate in tuition-scholarship and tax-credit programs but also to massive subsidization of objectionable "discrimination" on religious and other grounds.

This fear was expressed most explicitly in an amicus brief filed by the Lambda Legal Defense and Education Fund that asked the Court to ensure that "adequate safeguards prevent channeling government aid to advance religious activities or to support harmful

<sup>102</sup> Steven D. Smith, *The Jurisprudence of Denigration*, 43 U.C. Davis L. Rev. 675 (2014).

<sup>103</sup> Steven D. Smith, *Free Exercise Doctrine and the Discourse of Disrespect*, 65 U. Colo. L. Rev. 519 (1994).

<sup>104</sup> *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012). See generally Richard W. Garnett & John M. Robinson, *Hosanna-Tabor, Religious Freedom, and Constitutional Structure*, 2011–2012 Cato Sup. Ct. Rev. 307 (2012).

<sup>105</sup> See generally Richard W. Garnett, *Religious Accommodations and—among—Civil Rights: Separation, Toleration, and Accommodation*, 88 S. Cal. L. Rev. 493 (2015).



discrimination.”<sup>106</sup> In addition, Lambda Legal contended that “[t]he Establishment Clause prohibits government from providing direct aid to sectarian schools that use the funds or materials for religious purposes or engage in religious discrimination.”<sup>107</sup> Now, although the larger issue is famously complicated, this claim seems to be in tension with the Court’s state-action doctrine, and none of the justices in *Trinity Lutheran* addressed it directly.<sup>108</sup> The 1972 *Moose Lodge* decision held that a private club that discriminated against an African American because of his race was not a state actor simply because it received a license from the state’s liquor board allowing the club to serve alcohol, and emphasized that the state was not “significantly involved with [the] invidious discrimination.”<sup>109</sup> On the other hand, Lambda Legal highlights the statements from *Norwood v. Harrison*, decided the following year, that “the Constitution does not permit the State to aid discrimination” and “[a] State’s constitutional obligation requires it to steer clear . . . of giving significant aid to institutions that practice racial or other invidious discrimination.”<sup>110</sup>

In fact, *Trinity Lutheran* is not transformed into a constitutionally regulated “state actor” by receiving a reimbursement grant to upgrade its playground and the same thing is, or should be, true of a parochial school that receives funds through a school-choice program or that benefits from parents’ tax credits. Putting aside the constitutional question, though, it is clearly the case that the “no public funds for discrimination” slogan carries significant rhetorical and political weight. Activists engaged in policy arguments are not likely to carefully distinguish governments’ invidious uses of suspect or irrelevant criteria from religious institutions’ efforts to hire for religious mission and act with religious integrity. The unconditional-conditions doctrine is, to put it mildly, murky, and its application to

<sup>106</sup> Brief for Lambda Legal as Amicus Curiae Supporting Respondents, at 4.

<sup>107</sup> *Id.* at 11.

<sup>108</sup> Justice Sotomayor, after expressing concern about what the Court’s decision “might enable tomorrow,” quoted the following passage from the Court’s 1963 school-prayer decision, *Abington Township v. Schempp*: “[T]he Free Exercise Clause . . . has never meant that a majority could use the machinery of the State to practice its beliefs.” 137 S. Ct. at 2041 n.14.

<sup>109</sup> *Moose Lodge v. Irvis*, 407 U.S. 163, 177, 173 (1972) (quoting *Reitman v. Mikey*, 387 U.S. 369, 380 (1967)).

<sup>110</sup> 413 U.S. 455, 465–67 (1973).

antidiscrimination regulations tied to direct or indirect public funding is uncertain. *Trinity Lutheran's* rejection of discriminatory exclusion from funding programs could end up mattering very little if voters and elected officials decide that religious institutions' efforts to act with mission-integrity render them unworthy to receive public benefits or cooperate for the public good.

*D. The Merits and Durability of a "Status"/"Use" Distinction*

It was important to Chief Justice Roberts's argument—and, in particular, to his reading and application of *Locke v. Davey*—that Missouri's policy required discrimination "solely on account of religious identity" or "status."<sup>111</sup> As he saw it, Trinity Lutheran was disqualified from competing for a reimbursement grant not because of what it planned to do with the funds—that is, resurface its playground—but "simply because of what it is—a church."<sup>112</sup> It is not clear, as Justice Gorsuch pointed out in dissent, that this distinction is or should be so important. Moreover, it is not clear that the distinction explains why *Locke v. Davey* does not justify Missouri's policy. After all, Chief Justice Rehnquist's opinion for the Court in *Locke* upheld Washington's rule against using public scholarships for devotional-theology degrees not because the rule is about the "use" of funds but because of the historical pedigree of the specific use that Washington ruled out—the training of clergy.<sup>113</sup>

The Free Exercise Clause guarantees, as Justice Gorsuch emphasized, "the free *exercise* of religion, not just the right to inward belief (or status)."<sup>114</sup> To reduce religion to status, class, or "identity" is to lose, or at least to diminish, religious freedom. "Status" does not capture what the First Amendment's Religion Clauses should protect. Certainly, many religious believers would report that their religious beliefs are central to who they "are," but most would also say that their faith commitments require and inspire a range of actions, both pious and mundane, and are lived out in community and in public. The elaboration and application of the chief justice's distinction will and should be closely watched.

<sup>111</sup> *Trinity Lutheran*, 137 S. Ct. at 2019.

<sup>112</sup> *Id.* at 2023.

<sup>113</sup> See *id.*, at 2026 (Gorsuch, J., concurring in part).

<sup>114</sup> *Id.*

## V. Conclusion

*Trinity Lutheran* represents a significant step in the gradual working out of several lines of First Amendment cases. By taking seriously the fact that “Trinity Lutheran is a member of the community too,”<sup>115</sup> the justices appropriately pushed back against the notions that church-state separation precludes cooperation and that maintaining a secular government requires what Father Richard John Neuhaus called a “naked public square.” However, future cases involving official discrimination against religious entities, practices, and beliefs in the context of public-benefit and other programs will almost certainly involve more difficult and divisive facts. Whether the Court will allow governments to use funding, licensing, granting, contracting, and taxing as ways of leveraging their police and other powers into coercive control over religious schools and service providers is a crucial and coming-soon question.

<sup>115</sup> *Id.* at 2022 (Roberts, C.J., majority op.).