

Religion and the Swing Set

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The First Amendment's Establishment and Free Exercise Clauses have coexisted for more than two centuries. Their relationship requires mutual deference. Guaranteeing every individual's right to express a religious belief (or none at all) while ensuring that the government does not establish religion can be a devilishly challenging proposition.

On its last day of the October 2016 Term–when many observers were preoccupied with the Supreme Court's decision to consider the Trump travel ban–the Court issued what may well have been the Term's most significant decision. This time, the establishment versus exercise argument arose on a children's playground.

Trinity Lutheran Church of Columbia, Inc. v. Comer, **No. 15-577 (U.S. June 26, 2017)** involves the Trinity Lutheran Church Child Learning Center (Center), a preschool and daycare in Columbia, Missouri operating under the auspices of Trinity Lutheran Church (Church). In 2012, desiring to better protect its youthful clientele against tumbles from swings and monkey bars, the Center sought funds to replace its pea gravel playground with a rubber surface. It applied to the Missouri Department of Natural Resources (DNR) for a grant under Missouri's Scrap Tire Program, which reimburses qualifying nonprofits that install surfaces made from recycled tires.

Although the Center ranked fifth among 44 applicants seeking a recycled surface grant, DNR declined the Center's request on the basis of its Church affiliation, in obeisance to Article I, Section 7 of the Missouri Constitution, which states:

> That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship.

The Center sued, alleging violation of its Free Exercise rights. The Western District of Missouri dismissed, holding that although the government cannot restrict the exercise of religion, it is not prohibited from withholding an affirmative benefit on account of religion. As support it cited *Locke v. Davey*, 540 U.S. 712 (2004), where the Supreme Court upheld the State of Washington's denial of scholarship monies to an applicant who intended to use the funds to pursue a theology degree.

A divided panel of the Eighth Circuit affirmed, finding that the Free Exercise Clause did not compel Missouri to disregard the broader anti-establishment principles reflected in its own Constitution. The Church successfully petitioned for certiorari.

Although the Governor of Missouri announced in April 2017 that religious entities would henceforth be eligible to compete for DNR grants on the same terms as secular organizations, that declaration did not unequivocally moot the issue. The Court heard argument on April 19 and returned a decision on June 26. Writing for a 7-2 majority, Chief Justice Roberts reversed. He held that the DNR was impermissibly singling out the Center for discriminatory treatment based solely on its religious character. As Roberts framed it, the DNR policy essentially put the Center to a choice: it could either function as a religious entity or it could be eligible to obtain benefits under the playground resurfacing program. The evil that Roberts identified was not merely the denial of funding but the denial of eligibility, based on religion: "The express discrimination against religious exercise here is not the denial of a grant, but rather the refusal to allow the Church—solely because it is a church—to compete with secular organizations for a grant." This practice necessitated the most rigorous review possible: "It has remained a fundamental principle of this Court's free exercise jurisprudence that laws imposing 'special disabilities on the basis of . . . religious status' trigger the strictest scrutiny."

DNR's response did not demonstrate the requisite compelling interest. As Roberts characterized it, DNR could only offer "Missouri's preference for skating as far as possible from religious establishment concerns." This was inadequate in the face of DNRs "clear infringement on free exercise."

Roberts also disagreed that *Locke v. Davey* was controlling. In *Locke*, the scholarship applicant was denied state funding, ostensibly available to any applicant, only because he wanted to apply those funds to a religious education. For Roberts, this was a critical difference, however nebulous: "Davey was not denied a scholarship because of who he was; he was denied a scholarship because of what he proposed to do. Here there is no question that Trinity Lutheran was denied a grant simply because of what it is—a church." Furthermore, in *Locke,* the funding had been requested for a divinity degree–an "essentially religious endeavor." In contrast, resurfacing playgrounds could hardly be characterized as a religious activity.

The majority opinion also included "footnote 3." Although not written by Roberts, the note appeared to limit the scope of the opinion: "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."

Justices Kennedy, Alito, Thomas, Gorsuch and Kagan joined, with Thomas, Gorsuch and Breyer filing concurrences. Justice Breyer was concerned with limiting the scope of the decision, and not setting a precedent where religious entities could begin claiming entitlement to even greater public funding. The Court had said in *Everson* 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." The DNR program

here was similarly general, designed to improve the health and safety of children. But Breyer did not want to expand the decision's scope, and took the opportunity to buttress the sentiments expressed in footnote 3: "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."

On the other hand, Justice Gorsuch evidenced a desire to expand the opinion far beyond Justice Roberts' ring-fencing. He questioned the majority's "status-use" distinction inferred in *Locke*-and implied a willingness to revisit that decision:

> 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 . . .

And he expressly challenged the limitations implied in footnote 3, expressing "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 Court's opinion." Gorsuch asserted that First Amendment principles "do not permit discrimination against religious exercise—whether on the playground or anywhere else."

DISSENT: Justice Sotomayor vehemently disagreed, joined by Justice Ginsburg. This was not, as the majority described, "a simple case about recycling tires to resurface a playground." The decision represented a sea-change in the relationship between religious institutions and the civil government:

> 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.

For Sotomayor, that the funds went to improve a playground did nothing to lessen the fact that the playground was under auspices of the Church, which by its own words "operates . . . for the express purpose of carrying out the commission of . . . Jesus Christ as directed to His church on earth." Its mission is to "make disciples." The Center serves as "a ministry of the Church and incorporates daily religion and developmentally appropriate activities into . . . [its] program." This mission required denial of governmental funding:

> 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.

Sotomayor traced seminal developments in the nation's history as state after state, beginning with James Madison and the Virginia Act for Establishing Religious Freedom, put in place express prohibitions against using taxpayer monies to support religious activity. As she noted, today 38 states have enshrined such measures in their constitutions. Those laws have inherently resulted in religious groups being treated differently on occasion, which the Court has countenanced: "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."

The majority viewed excluding the Center from funding consideration solely because it is a religious entity as crossing a constitutionally impermissible line based on religious "status" that requires strict scrutiny. Sotomayor disagreed, noting that the Constitution itself "creates specific rules that control how the government may interact with religious entities. And so of course a government may act based on a religious entity's 'status' as such."

Although appreciative of Justice Breyer's effort to narrow the majority opinion, Sotomayor found his larger analytical framework to be flawed: "Justice Breyer, like the Court, thinks 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.'" As she pointed out, the scrap tire program was hardly a "generally available benefit," but one only available to a select few recipients each year.

She cautioned that the decision discounted "centuries of history" and put at risk the government's ability to remain secular, and cited *Town of Greece v. Galloway*:

> Just three years ago, this Court claimed to understand that, in this area of law, to 'sweep away what has so long been settled would create new controversy and begin anew the very divisions along religious lines that the Establishment Clause seeks to prevent.'. . . It makes clear today that this principle applies only when preference suits.

Whether *Trinity Lutheran* does in fact signal a barely-perceptible but altogether tectonic shifting of Free Exercise over the venerable Establishment Clause remains to be seen. The decision has already produced significant consternation among some Constitutional scholars, with University of California's Erwin Chemerinsky opining in *Scotusblog* that "Despite a footnote that attempts to limit the scope of this holding, the decision is going to engender a great deal of litigation as religious institutions now will claim a constitutional right to a wide array of benefits provided by the government to non-religious institutions."

It is perhaps noteworthy that, on the same day Justice Roberts issued *Trinity Lutheran*, the Court announced that it would hear the argument of a Colorado baker who refuses to produce a wedding cake for a gay couple—on the grounds of religious exercise. Given the current tenor of the Court, *Masterpiece Cakeshop v. Colorado Civil Rights Commission* may well provide more evidence that individuals' religious rights--and those of religious institutions in general--will exert evermore pressure to bully the Establishment Clause. **ML**