Trinity Lutheran Church of Columbia, Inc. v. Comer and the "Play in the Joints" Between Establishment and Free Exercise of Religion

> No man can serve two masters:
> for either he will hate the one, and love the other;
> or else he will hold to the one, and despise the other.
> Ye cannot serve God and mammon.[1]

I. Introduction

What happens when an irresistible force meets an immovable object? The philosopher will tell us that there is no answer, that it is a paradox. He has the luxury of throwing up his hands. But the irresistible force of Free Exercise has been meeting the immovable object of antiestablishment for 200 years in American courtrooms. And American jurists have had to rough fit an answer. It is no mean feat to weigh two such lofty ideals. We might be more than charitable in accepting and forgiving error made in good faith, were it not thought the importance of the ideals demanded a more rigorous standard.

This past June, the United States Supreme Court handed down its latest landmark decision operating in these interstices of the First Amendment's Religion Clauses. In *Trinity Lutheran Church of Columbia, Inc. v. Comer*,[2] the Court held that Free Exercise requires the state to provide financial benefits to religious entities on equal terms, notwithstanding the state's interest in antiestablishment.[3] More than being merely wrongly decided, *Trinity Lutheran* has the potential to work an unacknowledged revolution in the Court's Religion Clauses jurisprudence. On the one hand, the holding takes the Free Exercise Clause into broad and uncharted new waters that are well beyond the facts and reasoning of seminal precedent. And on the other, the holding threatens long-standing Establishment Clause practice and precedent with a new legal standard under the Free Exercise Clause with which to challenge prevailing government antiestablishment conduct.

In reaching this destabilizing conclusion, the Court commits two primary errors. First, in arriving at its ultimate holding, the Court miscategorizes the case and misapplies Free Exercise precedent. And the judicial whole cloth it invents to distinguish the case is jurisprudentially

1. *Matthew* 6:24 (King James).
2. 137 S. Ct. 2012 (2017).
3. *Id.* at 2024–25.

wanting.[4] Second, to get to the Free Exercise Clause issue in the first place, the Court entirely elides an important threshold Establishment Clause analysis.[5] Thus *Trinity Lutheran* is wrongly decided and conceptually infirm, and should be limited and reversed in the future.

II. Facts and Procedural Background

In an effort to reduce the number of used rubber tires that end up in landfills and dump sites, the State of Missouri, through the State's Department of Natural Resources (Department), introduced the Scrap Tire Program.[6] The Program offers reimbursement grants to nonprofit organizations that purchase playground surfaces made from recycled tires.[7] The Department awards grants on a competitive basis to those applicants that score highest on a selection of criteria including population poverty level and the applicant's plan to promote recycling.[8] In 2012, the Trinity Lutheran Church Child Learning Center[9] applied to participate in the Scrap Tire Program to attain funds to replace a large portion of the surface beneath a playground that is part of the Center's facilities.[10] Despite ranking fifth among forty-four applicants, the Department rejected the Learning Center's application.[11] Because the Learning Center was operated by the Trinity Lutheran Church, it was deemed categorically ineligible to receive such a grant pursuant to Article I, Section 7 of the Missouri Constitution, which purported to deny such financial assistance directly to a church.[12]

In response to this categorical denial, Trinity Lutheran filed suit against the Department, alleging the failure to approve its application based on its religious affiliation violated the First Amendment's Free Exercise Clause.[13]

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4. *See infra* Parts IV–V.
5. *See infra* Part VI.
6. *Trinity Lutheran*, 137 S. Ct. at 2017.
7. *Id.*
8. *Id.*
9. The Learning Center was originally established as an independent, nonprofit organization in 1980 before merging with the Trinity Lutheran Church in 1985. *Id.* The Learning Center currently operates under the "auspices" of the Church and on Church property. *Id.*
10. *Id.*
11. *Id.* at 2018. Fourteen grants were ultimately awarded in 2012 as part of the Scrap Tire Program. *Id.*
12. *Id.* Article 1, Section 7 of the Missouri constitution provides in full:

> 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.

MO. CONST. art. I, § 7.

13. Trinity Lutheran Church of Columbia, Inc. v. Pauley, 976 F. Supp. 2d 1137, 1140 (W.D. Mo. 2013); *see also* U.S. CONST. amend. I ("Congress shall make no law . . . prohibiting the free exercise [of religion] . . . .").

Trinity Lutheran asked for a declaratory judgment and injunctive relief that would prevent the Department from discriminating against the Church in future grant applications on the basis of its religious affiliation.[14] Finding the present case "nearly indistinguishable"[15] from *Locke v. Davey*,[16] the District Court held that Free Exercise "does not prohibit withholding an affirmative benefit on account of religion[,]" and thus did not require the State to make funds like those provided by the Scrap Tire Program available to a religious institution like the Trinity Lutheran Church.[17] Echoing *Locke*'s principle that there is "play in the joints" between the First Amendment's Religion Clauses,[18] the Eighth Circuit affirmed.[19] It recognized that while Missouri *could* award a grant to Trinity Lutheran without infringing on the Establishment Clause, Free Exercise did not *compel* Missouri to ignore the antiestablishment principle reflected in its constitution.[20]

III. Holding

In a 7–2 opinion authored by Chief Justice Roberts, the Supreme Court reversed, applying what it considered to be the basic principle that "[t]he Free Exercise Clause 'protect[s] religious observers against unequal treatment,'"[21] to conclude 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.'"[22] In reaching this conclusion, the Court relied primarily on *McDaniel v. Paty*,[23] which "struck down under the Free Exercise Clause a Tennessee statute disqualifying ministers from serving as delegates to the State's constitutional

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14. *Trinity Lutheran*, 137 S. Ct. at 2018.

15. *Trinity Lutheran*, 976 F. Supp. 2d at 1151.

16. 540 U.S. 712 (2004).

17. *Trinity Lutheran*, 137 S. Ct. at 2018; *see also Trinity Lutheran*, 976 F. Supp. 2d at 1151 (holding that "even assuming that providing a tire scrap grant to Trinity would not violate the Establishment Clause, this Court cannot conclude that the exclusion of a religious preschool from this aid program is constitutionally suspect under the Free Exercise Clause" due to "the longstanding and substantial concerns about direct payment of public funds to sectarian schools").

18. *See Locke*, 540 U.S. at 718 (quoting Walz v. Tax Comm'n of City of New York, 397 U.S. 664, 669 (1970)) (remarking that although "the Establishment Clause and the Free Exercise Clause[] are frequently in tension[,] . . . we have long said that 'there is room for play in the joints' between them"); *see also* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

19. Trinity Lutheran Church of Columbia v. Pauley, 788 F.3d 779, 784–85 (8th Cir. 2015).

20. *Id.* It is worth noting that despite its Establishment Clause conclusion, in reaching its Free Exercise conclusion, the Eighth Circuit somewhat paradoxically also acknowledged such a monetary grant to a religious institution to be a "hallmark[] of an 'established' religion." *Id.* at 785 (quoting *Locke*, 540 U.S. at 722).

21. *Trinity Lutheran*, 137 S. Ct. at 2019 (quoting Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 533, 542 (1993)).

22. *Id.* (quoting McDaniel v. Paty, 435 U.S. 618, 628 (1978) (plurality opinion)).

23. 435 U.S. 618 (1978) (plurality opinion).

convention."[24] Because the statute at issue in *McDaniel* meant that "McDaniel could not seek to participate in the convention while also maintaining his role as a minister,"[25] the law impermissibly infringed on McDaniel's constitutional liberties.[26] In the view of Chief Justice Roberts, the Department's policy disqualifying Trinity Lutheran from a public benefit only on account of Trinity's "religious status," was "[l]ike the disqualification statute in *McDaniel*" in that it "put[] Trinity Lutheran to a choice: It may participate in an otherwise available benefit program or remain a religious institution."[27] But the "imposition of such a condition upon even a gratuitous benefit inevitably deter[s] or discourage[s] the exercise of First Amendment rights."[28] And "the Free Exercise Clause protects against 'indirect coercion or penalties on the free exercise of religion.'"[29]

In reaching his conclusion, Chief Justice Roberts had one further job in front of him: distinguishing the *Locke* decision that had formed the basis of the lower courts' decisions[30] and that the Department had argued controlled the outcome of the case.[31] *Locke* had upheld, against a Free Exercise challenge, a provision of the Washington Constitution similar to the Missouri provision at issue in the instant case that had been applied to prohibit a state scholarship recipient from applying the scholarship funds to pursue a devotional theology degree.[32] In so doing, *Locke* had established a "play in the joints" principle.[33] There were some state actions that were not prohibited by the Establishment Clause, but neither were they required by the Free Exercise Clause. Applying *Locke*, the Department argued,[34] and the District

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24. *Trinity Lutheran*, 137 S. Ct. at 2020; *see also McDaniel*, 435 U.S. at 618.

25. *Trinity Lutheran*, 137 S. Ct. at 2020.

26. *See McDaniel*, 435 U.S. at 634 (concluding that "because the challenged provision requires [McDaniel] to purchase his right to engage in the ministry by sacrificing his candidacy it impairs the free exercise of his religion").

27. *Trinity Lutheran*, 137 S. Ct. at 2021–22.

28. *Id.* at 2022 (quoting Sherbert v. Verner, 374 U.S. 398, 405 (1963)).

29. *Id.* (quoting Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 450 (1988)).

30. *See* Trinity Lutheran Church of Columbia v. Pauley, 976 F. Supp. 2d 1137, 1151 (W.D. Mo. 2013) ("Nonetheless, the existence of a longstanding and legitimate antiestablishment interest makes this case nearly indistinguishable from *Locke*."); *see also* Trinity Lutheran Church of Columbia v. Pauley, 788 F.3d 779, 785 (8th Cir. 2015) ("Therefore, . . . we conclude that *Locke* reinforces our decision.").

31. *See Trinity Lutheran*, 137 S. Ct. at 2022–23 ("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*.").

32. Locke v. Davey, 540 U.S. 712, 716, 725 (2004) (upholding "as currently operated by the State of Washington," a post-secondary scholarship program whose funds could not be used to "pursue a degree in theology" because of Article 1, § 11 of the Washington Constitution).

33. *See id.* at 719 ("[T]here are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause.").

34. *Trinity Lutheran*, 137 S. Ct. at 2021–22.

Court and Eighth Circuit held,[35] that Missouri could allow churches to participate in the Scrap Tire Program, but was not required to. To distinguish *Locke*, Roberts derived a status–use distinction between *Locke* and the case before him.[36] According to the Chief Justice, "[the respondent in *Locke*] 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."[37] In contrast, "[h]ere there is no question that Trinity Lutheran was denied a grant simply because of what it is—a church."[38] But *Locke* is not so readily distinguishable as the Chief Justice asserts.[39]

IV. *Trinity Lutheran*'s Conflation of the Jurisprudential Background

The fundamental problem with Chief Justice Roberts's analysis is that in reaching his result, he conflates two fundamentally different types of Free Exercise challenges: those actively inhibiting self-determined religious devotion and those merely denying an affirmative benefit. Given the historical purposes of the Clause, it is no surprise that most Free Exercise cases arise in the context of the government imposing an active burden on the individual's actual practice of his faith. Perhaps the most paradigmatic example of such a case is *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[40] In a transparent attempt to discourage, if not outright prohibit, the practices of the Santeria Church, the city of Hialeah, Florida enacted certain laws, under the guise of public welfare ordinances, that severely restricted animal slaughter.[41] But a component aspect of the practice of Santeria is the ritual sacrifice of animals as part of religious rights and observances.[42] Importantly, and revelatory of the inherently discriminatory purpose of such laws, exemptions were given to the ritualistic slaughter of animals in other

35. *See Trinity Lutheran*, 976 F. Supp. 2d at 1155 ("[T]here is no basis for concluding that the decision to exclude religious institutions from this program did violate the Free Exercise Clause. Accordingly, Trinity's Free Exercise claim is dismissed."); *Trinity Lutheran*, 788 F.3d at 785 ("[W]e conclude that the district court correctly dismissed Trinity Church's federal constitutional claims.").

36. *Trinity Lutheran*, 137 S. Ct. at 2023; *see also id.* at 2025 (Gorsuch, J., concurring) (discussing the majority's "distinction . . . between laws that discriminate on the basis of religious *status* and religious *use*").

37. *Id.* at 2023.

38. *Id.*

39. *See infra* Part V.

40. 508 U.S. 520 (1993).

41. *See id.* at 526, 527 (remarking that because "[t]he prospect of a Santeria church in their midst was distressing to many members of the Hialeah community . . . the city council adopted three substantive ordinances addressing the issue of religious animal sacrifice").

42. *See id.* at 525 ("[In the Santeria faith, animal s]acrifices are performed at birth, marriage, and death rites, for the cure of the sick, for the initiation of new members and priests, and during an annual celebration.").

religious practices, such as the Kosher butchery of observant Jews.[43] Although such laws were purported to be facially neutral,[44] the Court saw through this pretext[45] and struck down the laws as an attempt to disfavor one particular religious practice that was distasteful to the local residents.[46] Such intentionally gerrymandered laws, designed to burden one discrete and disfavored minority religious practice, go precisely to the core of what the Free Exercise Clause is intended to prohibit.[47]

Although lacking the clear animus present in *Lukumi*, in a similar case the Supreme Court applied the "ministerial exception"[48] doctrine to employment decisions regarding teachers at parochial schools.[49] Recognizing that teachers serve a similar function to ordained and denominated ministers in the course of parochial instruction,[50] the court exempted such teachers from the requirements of equal opportunity in employment laws of general application.[51] To impose such secular constraints on such decisions would be to deny religious practitioners the prerogative to decide for and amongst themselves who would serve as the spiritual leaders and educators in their faith, a core component of self-deterministic religious adherence.[52] Cases like these represent the essential core of the principal of religious liberty; the freedom to direct the substantive practice of your faith as you see fit, without interference from the governing majority.

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43. *See id.* at 536 ("The definition [of slaughter used by the city] excludes almost all killings of animals except for religious sacrifice, and the primary purpose requirement narrows the proscribed category even further, in particular by exempting kosher slaughter.").

44. *See id.* at 532 (beginning the opinion's Free Exercise analysis by discussing the neutrality of the ordinances).

45. *See id.* at 540 (concluding that "the ordinances were enacted 'because of,' not merely 'in spite of,' their suppression of Santeria religious practice") (quoting Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979)).

46. *See id.* at 547 ("Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices. The laws here in question were enacted contrary to these constitutional principles, and they are void.").

47. *See id.* at 545–46 (quoting Florida Starr v. B.J.F., 491 U.S. 524, 542 (1989) (Scalia, J., concurring in part and concurring in judgment)) ("The ordinances 'ha[ve] every appearance of a prohibition that society is prepared to impose upon [Santeria worshippers] but not upon itself.' This precise evil is what the requirement[s of Free Exercise principles are] designed to prevent." (third alteration added)).

48. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 188 (2012) (finding "the existence of a 'ministerial exception,' grounded in the First Amendment, that precludes application of such legislation [as Title VII of the Civil Rights Act of 1964] to claims concerning the employment relationship between a religious institution and its ministers").

49. *See id.* at 192 (finding the teacher at issue was covered by the ministerial exception).

50. *See id.* ("[The teacher's] job duties reflected a role in conveying the Church's message and carrying out its mission.").

51. *Id.*

52. *See id.* at 196 ("[Society's interest in enforcing] employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission. . . . The church must be free to choose those who will guide it on its way.").

A second strand of subtly different but principally identical cases concerns the denial of what we might call universal societal benefits based on religious practices. Decided under the Establishment Clause, *Everson v. Board of Education*[53] announced the principle that "cutting off" religious groups "from such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks" is antithetical to the protections guaranteed by the First Amendment.[54] Nominally, such services could be deemed affirmative state benefits as opposed to active inhibitions on practice. But their universality and essentiality to functioning in civil society should more than suffice in demonstrating that their denial, based on an individual's religious practice, speaks, once again, to the essential substance of Free Exercise protections. The individual in such cases is being asked to forsake the precepts of his faith to participate fully and equally in society in ways he is otherwise entitled. Thus, although nominally benefits, such denials are better conceived of legally and conceptually as burdens on religious practice.

More than a few cases have been decided under essentially this rubric.[55] Most importantly, the case relied on primarily by the majority in *Trinity Lutheran*, *McDaniel*, is one such case. Recall that *McDaniel* "struck down under the Free Exercise Clause a Tennessee statute disqualifying ministers from serving as delegates to the State's constitutional convention."[56] At first blush it might be possible to conceive, as with the provision of police and firefighters or the availability of unemployment benefits, that the ability to hold public office is an affirmative benefit provided by the state. But a moment's reflection ought to make apparent that in a democratic republic, in

53. 330 U.S. 1 (1947).

54. *Id.* at 17–18.

55. *See, e.g.*, Emp't Div., Dept. of Human Res. of Or. v. Smith, 494 U.S. 872, 897 (1990) (describing the denial of unemployment benefits on the basis of using peyote for religious sacramental purposes as a "burden imposed by government on religious practices or beliefs"); Sherbert v. Verner, 374 U.S. 398, 403 (1963) (asking whether disqualification from unemployment benefits by refusing to work on one's observed Sabbath "imposes any burden on the free exercise of . . . religion"); Braunfeld v. Brown, 366 U.S. 599, 607 (1961) (describing a state's Sunday Closing Law that prevented a business owner from being open on the days of his choosing, including the weekend day that was not his personal Sabbath, as a "burden on the observance of religion"). But in distinction from cases like *Lukumi*, where the Court is satisfied the Free Exercise infringements are pursuant to the application of neutral laws of generalized application, the Court has often upheld such laws against free exercise challenges. *See, e.g.*, *Emp't Div.*, 494 U.S. at 879 (finding the Free Exercise Clause does not mandate an exemption from valid and neutral laws of general applicability); *Braunfeld*, 366 U.S. at 607 ("[I]f the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance . . . ."). But where the burden is too direct and too great, the Court has struck down such laws. *See, e.g.*, *Sherbert*, 374 U.S. at 404 (striking down a law that forced the appellant "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand").

56. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2020 (2017).

which the people are sovereign, and governed of, by, and for themselves, such a proposition cannot withstand the most basic scrutiny. To hold that civic participation in the mechanisms of government should be considered under the law to be but a privilege accorded by the state and not the inalienable right of a free citizen in civil society turns the entire premise of the American Experiment on its head.[57] It is too great a refutation of ordered liberty to be maintained. Therefore, Chief Justice Roberts is incorrect to conceive of *McDaniel* as a case dealing with the denial of an affirmative benefit from the government based on religious practice and observance. In truth, *McDaniel* is thus best conceived of as one imposing an active burden on the functional practice of one's religious faith.

The second category of Free Exercise cases that Chief Justice Roberts fails to distinguish is, as previously identified, those that instead merely deny some form of benefit that the government has chosen of its own prerogative and on its own accord to selectively provide. The Scrap Tire Program grants at issue in *Trinity Lutheran* are beyond a doubt of this second variety of cases. Accepting the premise that denying civic participation to ministers is not merely withholding a benefit but burdening religious faith by imposing a penalty on its pursuit, *McDaniel* is easily distinguishable from *Trinity Lutheran*.[58] In contrast, *Locke v. Davey*, the case that Chief Justice Roberts was forced to distinguish in reaching his holding, arises in the almost identical context of the denial of a monetary grant based on the State's antiestablishment interest.[59]

V. *Locke* and the Status–Use Distinction

Similar to the facts in *Trinity Lutheran*, *Locke* involved the provision of a selective public benefit to a limited number of recipients. High-achieving students could be awarded funds to pursue post-secondary education as part

57. However, that is of course not to say that certain legitimate requirements and qualifications on holding office cannot be imposed. All civil rights are subject to certain contours defining their rational extents and boundaries. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (acknowledging that Free Speech does not protect speech "directed to inciting or producing imminent lawless action and [that] is likely to incite or produce such action"). And of course, the Constitution itself, no less, recognizes this fact. *See* U.S. CONST. art. I, §§ 2–3 (identifying qualifications for service as Representatives and Senators).

58. Such a distinction also seems facially apparent. *McDaniel* dealt with the ability to participate in democratic self-governance, the essence of liberty in our civic system, whereas *Trinity Lutheran* dealt with the infinitely more mundane issue of a few thousand dollars to build one playground space. Even Chief Justice Roberts recognized this distinction in his opinion. *See Trinity Lutheran*, 137 S. Ct. at 2024–25 ("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.").

59. *Compare* Locke v. Davey, 540 U.S. 712, 716–17 (2004) (noting Washington's policy of denying funding for the pursuit of a devotional degree), *with Trinity Lutheran*, 137 S. Ct. at 2017 (noting Missouri's policy of denying funding to a religious entity based on an antiestablishment policy compelled by its constitution).

of the Promise Scholarship Program.[60] Among other eligibility requirements, however, a student could "not pursue a degree in theology . . . while receiving the scholarship," though was free to study at accredited religiously affiliated universities.[61] The statute did not expressly define what a degree in theology meant. But it was acknowledged by the parties and by the Court that the statute simply purported to codify the State's constitutional prohibition on providing public money to support or further religious instruction.[62]

Respondent Davey was initially awarded such a scholarship and was interested in pursuing a course of study that included a degree in "pastoral ministries," a concededly theological degree.[63] Upon learning that to receive the scholarship funds he had to certify that he was not pursuing any such degree, he refused, so forfeited any scholarship funds, and filed suit alleging several constitutional violations, including of his right to free exercise of religion.[64] The District Court initially rejected Davey's claims and granted the State's motion for summary judgment.[65] But the Court of Appeals for the Ninth Circuit reversed, concluding that "the State had singled out religion for unfavorable treatment," relying heavily on the approach taken by the Court in *Lukumi*.[66] In this way, the Ninth Circuit in *Locke* reached much the same conclusion as the Supreme Court did in *Trinity Lutheran*. Yet, in *Locke*, seven members of the Supreme Court found this reasoning unpersuasive.[67]

Moreover, Davey had asked the Court to conclude much as the Court in *Trinity Lutheran* ultimately did, that a law "is presumptively unconstitutional because it is not facially neutral with respect to religion."[68] Yet as goes entirely unmentioned by the *Trinity Lutheran* majority, the *Locke* majority expressly refused to do so.[69] Instead, the Court in *Locke* "reject[ed] [t]his claim of presumptive unconstitutionality, . . . to do otherwise would extend the *Lukumi* line of cases well beyond not only their facts but their reasoning."[70] The laws at issue in *Lukumi* sought to suppress the Santeria faith itself.[71] Regarding the law at issue in *Locke*, which merely denied

60. *Locke*, 540 U.S. at 715–16.

61. *Id.* at 716; *see also* WASH. REV. CODE ANN. § 28B.92.100 (West 2014) ("No aid shall be awarded to any student who is pursuing a degree in theology.").

62. *Locke*, 540 U.S. at 716; *see also* WASH CONST. art. I, § 11 ("No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment[.]").

63. *Locke*, 540 U.S. at 717.

64. *Id.* at 717–18.

65. *Id.* at 718.

66. *Id.*

67. *Id.* at 725.

68. *Id.* at 720.

69. *Id.*

70. *Id.*

71. *See supra* notes 40–46 and accompanying text.

monetary funds just as were denied in *Trinity Lutheran*,[72] "the State's disfavor of religion (if it can be called that) [was] of a far milder kind."[73] It imposed "neither criminal nor civil sanctions on any type of religious service or rite."[74] And in its very next breath the Court drew a clear distinction between the denial of financial benefits nearly identical to those in *Trinity Lutheran* and "deny[ing] to ministers the right to participate in the political affairs of the community,"[75] precisely the case relied on so heavily by the majority for its outcome, *McDaniel*.[76] As went entirely unrecognized or unremarked upon by the *Trinity Lutheran* Court, the holding in *Locke* is as much of an express disavowal of precisely the argument put forward by Chief Justice Roberts in *Trinity Lutheran* as could be imagined.

Worse yet for the *Trinity Lutheran* majority, it makes extreme light of a state's compelling antiestablishment interest[77] that is treated as next to sacred in a very similar context in *Locke*. Discussing the "procuring [of] taxpayer funds to support church leaders" the *Locke* majority could "think of few areas in which a State's antiestablishment interests come more into play."[78] The funds in *Trinity Lutheran* were not merely to go to "support church leaders," they were to go to support the very church itself, in the form of improved church facilities.[79] In light of "the historic and substantial state interest at issue"[80] concerning antiestablishment in the American system of government,[81] the Court found nothing "that suggests animus toward religion" and refused to "conclude that the denial of funding . . . alone is

72. *See supra* note 60–61 and accompanying text.

73. *Locke*, 540 U.S. at 720.

74. *Id.*

75. *Id.*

76. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2020–22 (2017).

77. *See id.* at 2024 ("[T]he Department offers nothing more than Missouri's policy preference for skating as far as possible from religious establishment concerns.").

78. *Locke*, 540 U.S. at 722.

79. While the money was to be used for a playground, is there any meaningful difference between building a playground as part of a church complex and building the physical structure itself? Certainly, the approach taken by the *Trinity Lutheran* majority admits of no such fine distinctions.

80. *Locke*, 540 U.S. at 725.

81. *See, e.g.*, FRANK LAMBERT, THE FOUNDING FATHERS AND THE PLACE OF RELIGION IN AMERICA 188 (2003) ("In defending their religious liberty against overreaching clergy, Americans in all regions found that . . . state-supported clergy undermined liberty of conscience and should be opposed."); *see also, e.g.*, GA. CONST. of 1789, art. IV, § 5 ("All persons shall have the free exercise of religion, without being obliged to contribute to the support of any religious profession but their own."); PA. CONST. of 1776, art. II ("[N]o man ought or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against, his own free will and consent."); DEL. CONST. of 1792, art. I, § 1 (similar); KY. CONST. of 1792, art. XII, § 3 (similar); N.J. CONST. of 1776, art. XVIII (similar); OHIO CONST. of 1802, art. VIII, § 3 (similar); TENN. CONST. of 1796, art. XI, § 3 (similar); VT. CONST. of 1793, ch. I, art. 3 (similar).

inherently constitutionally suspect."[82] Because the State's antiestablishment interest was "substantial" and the burden imposed by the denial of the scholarship funds was "relatively minor," the respondent's claim "must fail."[83] Tellingly, the majority in *Trinity Lutheran*, by contrast, declined to engage in any such analysis.[84] Because if the majority did, it would have been forced to conclude that Missouri's antiestablishment interest was similarly substantial, the church's burden in having to pay for its own playground surface was similarly minimal, and thus the church's claim must similarly fail.

And as noted earlier, Chief Justice Roberts was only able to distinguish *Locke* by deriving a status–use distinction.[85] The respondent in *Locke* was denied the benefit of the State of Washington's scholarship funds because he proposed to use the money to fund a devotional degree.[86] Here in contrast, according to the Chief Justice, the Trinity Lutheran Church was denied the State of Missouri's money because of what it is, namely a church.[87] But not only is this status–use distinction invented out of whole cloth,[88] it is conceptually wanting. As reasonable as this distinction appears superficially, a deeper analysis reveals the distinction to be more than somewhat facile. To begin with, the respondent in *Locke* was not truly denied the scholarship because he was certain to use the funds to pursue a ministerial degree, but instead because he refused to certify to the State that he would not.[89] In essence, he was denied the scholarship because he was unwilling to foreclose the *possibility* that he would use the funds in such a way. The distinction may seem minor, but it begins to chip away at the logic of *Locke*'s being decided based purely on conduct, as opposed to status. The respondent in *Locke* was a religious student with an interest in pursuing a devotional degree in accordance with his faith.[90] Described in this way, the denial of the scholarship can begin to look more like one based on status than use.

82. *Locke*, 540 U.S. at 725.

83. *Id.*

84. Instead the Court chose to resuscitate and, contra *Locke*, validate the "inherently constitutionally suspect" argument advanced by the respondent in *Locke* and decisively disavowed by that Court. *See supra* notes 61, 75 and accompanying text.

85. *See supra* Part III.

86. *Locke*, 540 U.S. at 717.

87. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2016 (2017).

88. No such distinction is discussed in *Locke*, nor is one in any way implicated by the decision. Instead, *Locke* makes clear that pursuing antiestablishment interests by prohibiting public funds from aiding religion fails to suggest "animus towards religion." *Locke*, 540 U.S. at 725.

89. *Trinity Lutheran*, 137 S. Ct. at 2023.

90. *See Locke*, 540 U.S. at 717 ("Davey had 'planned for many years . . . for a lifetime of ministry, specifically as a church pastor.'").

Even in concurring with the Chief Justice's opinion and ultimate holding, Justice Gorsuch was able to recognize this conceptual infirmity.[91] Justice Gorsuch admitted that he "harbor[ed] doubts about the stability of such a line."[92] He rhetorically wondered whether it was "a religious group that built the playground[, o]r did a group build the playground so it might be used to advance a religious mission?"[93] The newest member of the Court considered "reliance on the status-use distinction [insufficient] to distinguish *Locke v. Davey*" because "[o]ften enough the same facts can be described both ways" depending on perspective and "[t]he distinction blurs . . . when stared at too long."[94] As just described, the situations in both *Locke* and *Trinity Lutheran* can be described in both use and status terms, depending on the perspective one chooses to take in approaching and defining the issue. As hit on by Justice Gorsuch, the fundamental problem with the Chief Justice's logic is that these fine distinctions begin to blur at the margins. And in which category an issue is placed becomes greatly a matter of interpretation and idiosyncratic application. Such shifting tides are hardly the judicial bedrock upon which successful jurisprudence is based.[95]

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91. Although writing to concur with the Chief Justice, Justice Gorsuch's true heart appeared to be in overruling *Locke* entirely. *See Trinity Lutheran*, 137 S. Ct. at 2026 (Gorsuch, J., concurring) ("[T]he general principles here do not permit discrimination against religious exercise—whether on the playground or anywhere else.").

92. *Id.* at 2025.

93. *Id.*

94. *Id.* at 2025–26. To add color and rhetorical flourish to this point, Justice Gorsuch gave the example of "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)." *Id.*

95. The difficulty is all the more compounded because this decision threatens an unacknowledged revolution in the Court's Establishment Clause jurisprudence. Religious status is the sine qua non of cases arising under the Establishment Clause. It is the challenge to laws of conduct on the basis of their religious implications or character that brings them under the Establishment Clause's ambit in the first place. State action pursuant to the rules laid down in many long-since-decided cases might not be able to withstand renewed judicial analysis if challenged before a court under Chief Justice Roberts's reformulation of Free Exercise principles. In *McCollum v. Board of Education*, private religious teachers were prohibited from providing religious education to students on public school grounds during school hours. 333 U.S. 203, 206, 212 (1948). Were these teachers prohibited because they wanted to teach religious doctrine, or were they prohibited because they were religious people who wanted to teach children? In *Edwards v. Aguillard*, a public education law was struck down because it required teaching creation science if evolutionary theory were also to be taught. 482 U.S. 578, 581–82 (1987). Was the law at issue held to be improper because it required teaching a religious doctrine or because the particular doctrine it concerned was a religious one? In *County of Allegheny v. ACLU*, the display of a nativity scene in a courthouse was held to be unconstitutional. 492 U.S. 573, 601–02 (1989). Was this religious iconography improper because it was being used to share a religious message, or was it improper because the message it shared was religious? Although we might content ourselves by saying such cases fall on the use side of the Chief Justice's ledger, as Justice Gorsuch cautions and as these examples demonstrate, the distinctions blur at the margins, and all it might take would be the right facts and the right framing, and a receptive court. After all, compare the diametrically opposite conclusions reached in *Locke* and *Trinity Lutheran* despite shockingly similar fact patterns.

VI. *Trinity Lutheran*'s Glossing Over of the Establishment Clause

But one more aspect of the *Trinity Lutheran* decision demands discussion: the Establishment Clause. It is not even certain that *Trinity Lutheran* properly belongs in the "play in the joints" between the Religion Clauses established by *Locke* in the first place. The Court seemed content to proceed from the premise that it was to be taken for granted that the State of Missouri *could* have awarded Scrap Tire Program grants to religious institutions like Trinity Lutheran Church without infringing the Establishment Clause; the parties themselves had stipulated to no less.[96] But as perceptively reminded by Justice Sotomayor in dissent, "[c]onstitutional questions are decided by [the Supreme Court], not the parties' concessions."[97]

If the Establishment Clause stands for anything, it is the basic premise that public funds cannot be used for the financial support of religious activities.[98] As no less than Thomas Jefferson wrote, it was intended to erect "a wall of separation between Church and State."[99] Since the founding of the Republic, direct procurement of taxpayer funds was considered "one of the hallmarks of 'established' religion."[100] The recognized danger, in the words of James Madison,[101] was that "the same authority which can force a citizen to contribute three pence only of his property for the support of any one

96. *Trinity Lutheran*, 137 S. Ct. at 2019.

97. *Id.* at 2028 (Sotomayor, J., dissenting).

98. *See* Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947) ("Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*."); *see also* Mitchell v. Helms, 530 U.S. 793, 840 (2000) (O'Connor, J., concurring) (quoting Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 847 (1995)) ("[O]ur decisions 'provide no precedent for the use of public funds to finance religious activities.'").

99. Reynolds v. United States, 98 U.S. 145, 164 (1878).

100. Locke v. Davey, 540 U.S. 712, 722 (2004). In one famous example, during the Confederation era, Patrick Henry had proposed before the Virginia Legislature "A Bill Establishing A Provision for Teachers of the Christian Religion" that would assess a tax for "Christian teachers" for the purposes of supporting them in their function as teachers of Christianity. *Id.* at 722 n.6; James Madison, *Memorial and Remonstrance Against Religious Assessments, [ca. 20 June] 1785*, NAT'L ARCHIVES, https://founders.archives.gov/documents/Madison/01-08-02-0163#JSMN-01-08-02-0163-fn-0001 [https://perma.cc/N79K-VFR9] [hereinafter *Memorial and Remonstrance*]. After a public outcry, this act was rejected, and in its stead was enacted the "Virginia Bill for Religious Liberty," written by Thomas Jefferson and providing "that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever." *Locke*, 540 U.S. at 722 n.6. This statute would become the conceptual model for the Religion Clauses contained within the First Amendment. Merrill D. Peterson, *Jefferson and Religious Freedom*, ATLANTIC MONTHLY (Dec. 1994) https://www.theatlantic.com/past/docs/issues/96oct/obrien/peterson.htm [https://perma.cc/BUE8-TZPX].

101. Madison is of course widely regarded as the "Father of the Constitution" as "[n]o other delegate was better prepared for the Federal Convention of 1787, and no one contributed more than Madison to shaping the ideas and contours of the document or to explaining its meaning." Colleen Sheehan, *James Madison: Father of the Constitution*, 8 MAKERS OF AMERICAN POLITICAL THOUGHT 1 (2013).

establishment, may force him to conform to any other establishment."[102] Basically, if the government possesses the authority to force you to pay for a church, it can force you to abide by its precepts and engage in its observances. Since the Founders believed faith to be "a personal matter, entirely between an individual and his god,"[103] such a notion amounted to no less than spiritual tyranny, perhaps the worst kind of tyranny imaginable, and hostile to religious freedom.[104] But such cautions were not thought to be merely in aid of the freedom of conscience, but of the vitality of religious practice itself. Government mandated support for all or any religion was thought only to weaken the faithfuls' "confidence in [their faith's] innate excellence."[105] It would also create "suspicion that its friends are too conscious of its fallacies to trust it to its own merits."[106]

In light of this history, it is no surprise that a line of Supreme Court cases have held that when public funds flow directly from public coffers to houses of worship, the Establishment Clause has been infringed. Houses of worship, such as churches, are a core component of religious expression and activity. Within their walls, the faithful, united by shared belief, convene "to shape [their] own faith and mission,"[107] and to evangelize to the as-yet unconverted. "When a government funds a house of worship, it underwrites this religious exercise."[108]

In *Agostini v. Felton*,[109] the Court announced that government aid that has the "'effect' of advancing . . . religion" violates the Establishment Clause.[110] For instance, the federal program at issue in *Tilton v. Richardson*[111] provided grants to colleges and universities for facilities construction. But it contained a prohibition on using those grants to construct facilities "used for sectarian instruction or as a place for religious worship. . . ."[112] To enforce this provision, the government was permitted to recover the value of the grant if within twenty years the grantee reneged and used a building so constructed

102. *Memorial and Remonstrance*, *supra* note 100.

103. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2033 (2017) (Sotomayor, J., dissenting).

104. *See Memorial and Remonstrance*, *supra* note 100 (arguing that a bill to establish "a provision for Teachers of the Christian Religion" was incompatible with the "free exercise of Religion according to the dictates of Conscience").

105. *Id.* at 83.

106. *Id.*; *see also* John Leland, *The Rights of Conscience Inalienable*, *in* THE SACRED RIGHTS OF CONSCIENCE 337–40 (Daniel Dreisbach & Mark D. Hall eds., 2009) (arguing that "truth gains honor; and men more firmly believe it" when faith is arrived at by means of "cool investigation and fair argument").

107. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188 (2012).

108. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2029 (2017) (Sotomayor, J., dissenting).

109. 521 U.S. 203 (1997).

110. *Id.* at 222–23.

111. 403 U.S. 672 (1971).

112. *Id.* at 675 (quoting 20 U.S.C. § 751(a)(2)(C) (2012)).

for such impermissible purposes.[113] This time limitation was held unconstitutional because "the original federal grant w[ould] in part have the effect of advancing religion" as it permitted the grantee to "convert[] [the facility] into a chapel or otherwise use [it] to promote religious interests" after the twenty years had elapsed.[114] Instead, in *Trinity Lutheran*, the Court expressly condones using public money to promote and improve the facilities of a church as such.

It is true that a separate line of cases permits government funding to sectarian institutions where that funding is to be used for purely secular purposes.[115] Presumably to this end, the Scrap Tire Program at issue in *Trinity Lutheran* required an applicant to certify that it would put the program's funds only to a secular use.[116] But Trinity Lutheran had "not offered any such assurances to this Court."[117] Instead, Trinity Lutheran[118] states proudly that its Learning Center functions as "a ministry of the church and incorporates daily religion and developmentally appropriate activities into . . . [its] program" and that "[t]hrough the Learning Center, the Church teaches a Christian world view to children of members of the Church, as well as children of non-member residents."[119] And in fact as part of its very application to the Department to participate in the Scrap Tire Program, Trinity Lutheran specified that the Learning Center's mission was "to provide a safe, clean, and attractive school facility in conjunction with an educational program structured to allow a child to grow *spiritually*, physically, socially, and cognitively."[120] It is by no means beyond reason that "developmentally appropriate" religious education encouraging the "spiritual" growth of elementary school students could very well take place on a playground. Nor is it unreasonable to think that the religiously oriented community the Church seeks to manifest[121] finds expression and reinforcement between and amongst children, their teachers, and their parents, on the playground. Given the

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113. *Id.*

114. *Id.* at 683.

115. *See, e.g.*, Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 13–14 (1993) (allowing publically funded sign language interpreters for students in parochial schools).

116. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2029 n.3 (2017) (Sotomayor, J., dissenting).

117. *Id.* at 2030 n.3.

118. The Trinity Lutheran Church represents that it "operates . . . for the express purpose of carrying out the commission of . . . Jesus Christ as directed to His church on earth." *Our Story*, TRINITY LUTHERAN CHURCH, http://www.trinity-lcms.org/story [https://perma.cc/CT3Q-QNQ2].

119. *Trinity Lutheran*, 137 S. Ct. at 2027 (Sotomayor, J., dissenting). The Church further holds a "sincere religious belief . . . to use [the Learning Center] to teach the Gospel to children of its members, as well to bring the Gospel message to non-members." *Id.* at 2027–28.

120. *Trinity Lutheran*, 137 S. Ct. at 2018 (emphasis added).

121. *See Mission-Vision-Motto*, TRINITY LUTHERAN CHURCH, https://www.trinity-lcms.org/mission [https://perma.cc/5QLJ-8TEN] ("Trinity Lutheran Church will grow as a loving, caring, nourishing, family-oriented, and connected community as we share in the Gospel, the Sacraments, and church life.").

pervasive religious mission of the Learning Center, there is no certainty that the use of the new playground could be limited to secular purposes any more than the use of any of its other facilities.[122] The invasive nature of ensuring religiously oriented institutions like the Learning Center do not put public funds to parochial uses evokes exactly the sort of excessive entanglements disavowed by the Court in announcing its famous "*Lemon* Test" in *Lemon v. Kurtzman*.[123] The majority should have acknowledged this danger and at the very least engaged in an Establishment Clause analysis before simply proceeding to the Free Exercise issue simply on the say-so of the parties.

VII. Conclusion

The Court's opinion in *Trinity Lutheran* is thus wrong on two fronts. First, it glosses over the significant Establishment Clause considerations lurking under the surface. The Founders of our country knew of the dangers of state-sanctioned and state-established churches. They wrote into the Bill of Rights a provision designed exactly to curtail such practices. The Founders were directly motivated by exactly what was at issue in *Trinity Lutheran*: the provision of public funds directly from public coffers to support churches as institutions. Two hundred years' jurisprudence has drawn contours and distinctions around an otherwise absolute prohibition. But the Court neglected to do even its due diligence in addressing these concerns and explaining why in its view requiring the State of Missouri to provide funds to improve facilities on church grounds was not improper under the Establishment Clause. Even if the Court were ultimately to have concluded the requirement was not thereby improper, it owed the American people an explanation, if for no other reason than to settle further the doctrines to be applied in future cases.

Second, Chief Justice Roberts's opinion misapprehends the nature of *Locke v. Davey* and its holding. *Locke* was not concerned with the kind of facile distinctions between status and use that the majority derived to argue its way out of binding, on-point precedent. Instead, *Locke* spoke to the far broader issue of balancing the inherent tension that exists between prohibiting the establishment of religion by the state on the one hand, and guaranteeing religion's free exercise by the individual on the other. This balance does not resolve itself through such hairsplitting distinctions represented by *Trinity Lutheran*, as recognized by Justice Gorsuch. Instead, as *Locke* properly stands for, when the government denies direct financial

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122. *See* Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 774 (1973) ("No attempt is made to restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes, nor do we think it possible within the context of these religion-oriented institutions to impose such restrictions.").

123. 403 U.S. 602 (1971). The third prong of the *Lemon* Test is that the government conduct "must not foster 'an excessive government entanglement with religion.'" *Id.* at 613 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).

backing to a religious institution out of its interest in antiestablishment, it does not thereby evince the kind of hostility towards religion that is the hallmark of free exercise ideals. To paraphrase Justice Scalia's concurrence in *Pleasant Grove City v. Summum*,[124] the state ought not fear that escaping the establishment frying pan by upholding core antiestablishment principles through denying religion direct aid propels it into the free exercise fire.[125] The conclusion of the Court in *Trinity Lutheran* was therefore incorrect and ought to be revised and reversed in the future.

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124. 555 U.S. 460 (2009).
125. *Id.* at 482 (Scalia, J., concurring).