# 2017 Supplement to

# American Constitutional Law and History (2d ed.)

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*Insert in Chapter 1 § D.1.a. at page 64*:

**TOWN OF CHESTER V. LAROE ESTATES, INC**., 581 U.S. ___, 137 S. Ct. 1645 (2017)—A unanimous Court, in an opinion by Justice Alito, held that an intervenor in a federal civil action, even when intervening as a matter of right under the Federal Rules of Civil Procedure, must meet Article III standing requirements. If an intervenor requests relief in addition to that sought by a party possessing standing, the intervenor must demonstrate constitutional standing.

*Insert in Chapter 1§ E. at page 76*:

In the Appendix to Chief Justice Roberts's 2016 Year-End Report on the Federal Judiciary, the Supreme Court listed a decrease from the previous year in the number of filings. A total of 6,475 cases were filed in the Court during the 2015 Term. The decline was accounted for by a decrease in the *in forma pauperis* docket to 4,926. The number of paid filings in the 2015 Term was 1,549, almost exactly the same as the previous Term. The Court heard arguments in 82 cases, 70 of which were disposed of, 62 of which were by by signed opinion. The signed opinions were slightly higher in number than in the 2014 Term. Twelve cases were not argued, but decided by *per curiam* opinion.

*Insert in Chapter 6 § A. at page 368*:

**BECKLES V. UNITED STATES**, 580 U.S. ___, 136 S. Ct. 2510 (2017)—Beckles was convicted of unlawfully possessing a firearm as a previously convicted felon. He challenged his sentence, based in part on a residual clause in the guidelines from the United States Sentencing Commission, as void for vagueness. The Court held that the advisory guidelines were not subject to a vagueness challenge under the Due Process Clause. The majority opinion by Justice Thomas concluded a vagueness challenge under the Due Process Clause could be made to "laws that *define* criminal offenses and laws that *fix the permissible sentences* for criminal offenses." In *Johnson v. United States*, 576 U.S. ___, 135 S. Ct. 2551 (2015), the Court held violative of the Due Process Clause a statute that fixed permissible sentences "in an impermissibly vague way." *Johnson* was irrelevant, the Court concluded, because in Beckles's case, the advisory guidelines "do not fix the permissible range of sentences." Instead, the guidelines "merely guide the exercise of a court's discretion in choosing an appropriate sentence within the statutory range."

Although unanimous, Justices Kennedy, Ginsburg, and Sotomayor wrote opinions concurring in the judgement. The latter two opinions took issue with the breadth of the Court's conclusion. Justice Ginsburg concluded that the commentary stating possession of a sawed-off shotgun by a felon was a crime of violence was authoritative, making Beckles's claim inapt in his case. Because his conduct was clearly prohibited, Beckles was not permitted to complain on behalf of others. Justice Sotomayor's dissent concluded that, in some instances, the guidelines should be subject to vagueness challenges, because of "the central role that the Guidelines play at sentencing." In reaching this conclusion, Justice Sotomayor focused on the crucial functional role the Guidelines play in sentencing, not its formal role as advisory rather than binding statements of law.

**NELSON V. COLORADO**, 581 U.S. ___, 137 S. Ct. 1249 (2017)—Nelson was convicted of several crimes in Colorado state court. She was sentenced and fined. Her conviction was reversed on appeal, and at the retrial she was acquitted. Nelson demanded a return of money she had paid Nelson's state-held account while a prisoner was withheld from her after her acquittal. In an opinion by Justice Ginsburg, the Court held Colorado's action violated the Due Process Clause. Using the balancing test in *Matthews v. Eldridge*, the Court decided the interests of the individuals were great in receiving back their money, and the state's interest negligible.

Concurring in the judgment, Justice Alito rejected the *Matthews* test in favor of the "fundamental and deeply rooted principle of justice" test in *Medina v. California*, 505 U.S. 437 (1992).

Justice Thomas dissented, arguing Nelson lacked a substantive entitlement to the money. In his view, once Nelson paid the state money required by their conviction, it became public funds, and the Due Process Clause provided no substantive right to its return.

*Insert in Chapter 6 § D.1. at page 524*:

**MURR V. WISCONSIN**, 582 U.S. ___, 137 S. Ct. 1933 (2017)—Murr family members claimed the Wisconsin Department of Natural Resources (DNR) regulated the use of their real property to such an extent that it constituted a regulatory taking. The Murrs owned two lots along the Lower St. Croix river. The DNR prohibited the Murrs and others with undeveloped land to build on the land if the amount of suitable land was less than one acre. The lots owned were each 1.25 acres, but the suitable land for building on each was 0.98 acres. In a 5-3 opinion (Justice Gorsuch did not participate), the Court, in an opinion by Justice Kennedy, held that no regulatory taking existed. The Court noted that the trial court found the Murrs had not been "deprived of all economic value of their property," and also that the regulations caused a decrease in its value of less than 10 percent, because it looked at the two lots as one whole parcel. The Court used "a number of factors," including the physical characteristics of the land, the prospective value of the regulated land, the reasonable expectations of the landowners, and background customs and the whole of our legal tradition, in reaching its conclusion. This test was "objective." The Court rejected the request by both parties for a "formalistic rule to guide the parcel inquiry," and affirmed the lower court's holding in favor of the state based on its multi-factor test of the two lots as one parcel.

Chief Justice Roberts dissented, concluding the Court went "astray" in its broad definition of private property. The Takings Clause protected "*established* property rights," those rights to property as created and defined by state law. Instead of looking at the two lots as one contiguous whole, which he calls applying "a takings-specific definition of the property at issue," courts should look at the lots under "general state law principles," and thus, as "legally distinct parcels of land."

Justice Thomas also dissented, and raised the issue of whether regulatory takings was a concept found in the original meaning of the Takings Clause.

*Insert in Chapter 7 § E. at page 644*:

**SESSIONS V. MORALES-SANTANA**, 582 U.S. ___, 137 S. Ct. 1678 (2017)—Morales-Santana was born in the Dominican Republic. His mother was a citizen of the Dominican Republic. His father, Jose Morales, was born in Puerto Rico and lived there until 20 days before his nineteenth birthday, when he moved to the Dominican Republic for work. Decades later, Morales fathered Morales-Santana, and a decade after the birth of Morales-Santana, the couple married. Morales-Santana lived in the Dominican Republic until moving to the United States (first Puerto Rico, then New York City) when he was thirteen. After several convictions, Morales-Santana was made subject to removal proceedings. He claimed American birth citizenship based on his father's status as an American citizen. Under federal law, because Jose Morales left Puerto Rico before spending five years in the United States after the age of fourteen, Jose Morales was not an American citizen, and therefore, neither was Morales-Santana. If Morales-Santana's mother had been an American citizen, and given birth while unwed, Morales-Santana would have received American citizenship based on his mother's citizenship. The Court held that Morales-Santana could "vindicate his father's right to the equal protection of the laws." It held an exception existed to the rule that a party can protect or advance only one's own rights, for there was a "close relationship" between father and son and the Jose Morales's failure to assert his own claims to American citizenship created a "hindrance" to Morales-Santana's ability to effectuate his own interests in claiming American citizenship. The gender-based distinction in according citizenship to the children of mothers and fathers was unconstitutional as it reflected overbroad gender stereotypes. Although the law violated the Equal Protection Clause, the Court reversed the Second Circuit because it disagreed with the remedy to be applied.

*Insert in Chapter 8 § A.4. at page 660*:

**PACKINGHAM V. NORTH CAROLINA**, 582 U.S. ___, 137 S. Ct. 1730 (2017)—Registered sex offenders in North Carolina committed a felony if they gained "access [to] a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages." Packingham created a Facebook account and was prosecuted for and convicted of violating the act. The Court held the law violated the First Amendment's Free Speech Clause. The act contradicted the "fundamental principle of the First Amendment [] that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more." The unanimous opinion for the Court was written by Justice Kennedy. The Court concluded the statute was "unprecedented in the scope of First Amendment speech it burdens." Even if the Court adopted intermediate scrutiny, the law was unconstitutional because it was not narrowly tailored and burdened substantially more speech than necessary to effectuate the government's interests.

Justice Alito, joined by Chief Justice Roberts and Justice Thomas, concurred in the judgment. They agreed the statute's "staggering reach" and "extraordinary breadth" made it unconstitutional, but rejected the Court's "undisciplined dicta," which incorrectly suggested "that the States are largely powerless to restrict even the most dangerous sexual predators from visiting any internet sites, including, for example, teenage dating sites and sites designed to permit minors to discuss personal problems with their peers." Though the state possessed a compelling interest in preventing sexual abuse of children, the act swept so broadly that it banned registered sex offenders from accessing "a large number of websites that are most unlikely to facilitate the commission of a sex crime against a child," such as Amazon.com and WebMD. The concurrence also disagreed with the Court's analogy of cyberspace to public streets and parks. In Justice Alito's view, parents were much more able to monitor the physical locations their children visited than cyberspace locations, and it was easier for the public to visually observe a sex offender loitering in a public space than cyberspace.

**MATAL V. TAM**, 582 U.S. ___, 137 S. Ct. 1744 (2017)—The Patent and Trademark Office (PTO) refused to register as a trademark "THE SLANTS," which is the name of a rock band consisting of Asian-Americans. The band wanted to "reclaim" this derogatory name for persons of Asian descent. The PTO justified its decision on a federal statute, which prohibited the registration of any trademark that may "disparage ... or bring ... into contemp[t] or disrepute" any persons living or dead. The Court, in an opinion by Justice Alito, held this provision violated the Free Speech Clause. Two pluralities differed on the justifications for this conclusion. The Court was unanimous that the speech regulated by federal law was private speech, not government speech. PTO registration does not indicate governmental approval of a message, nor does it convey a public message. It also differed from *Walker* because speciality license plates messages have been long used by states to convey messages, are identified with the state in the public mind, and the state maintains control over the messages conveyed. The unanimous Court then suggested that holding registrations of trademarks government speech might implicate the registration of copyrights, which were clearly understood to be private speech. For Justice Alito, the law unconstitutionally banned speech "on the ground that it expresses ideas that offend." For a plurality, Justice Alito concluded this case was unlike any case

in which the government provided a cash subsidy or other financial support for the speech. Third, Justice Alito rejected for his plurality a speech doctrine related to "cases involving a "government program." Finally, Justice Alito rejected the argument that the disparagement provision was constitutional because it regulated commercial speech alone. The plurality decided that, even if trademarks were commercial speech, the law failed the *Central Hudson* test regarding when commercial speech may be regulated.

Justice Kennedy, joined by Justices Ginsburg, Sotomayor, and Kagan, concurred in part and concurred in the judgement. They agreed with the conclusion that the law was unconstitutional viewpoint discrimination, and expanded on the reasons "why the First Amendment's protections against viewpoint discrinmination apply to the trademark here." That discussion led Justice Kennedy to ignore "other questions raised by the parties." The government "singled out a subset of messages for disfavor based on the views expressed," for the registrant could register a "positive or benign mark but not a derogatory one." This disapproval of a particular message "is the essence of viewpoint discrimination."

*Insert in Chapter 8 § B.7.a. at page 764*:

**EXPRESSIONS HAIR DESIGN V. SCHNEIDERMAN**, 581 U.S. ___, 137 S. Ct. 1144 (2017)—New York law regulated differential pricing by merchants. It allowed them to discount the sales price if the customer paid with cash, but prohibited merchants from exacting a surcharge if the customer used a credit card. The Court held the law regulated speech, not just conduct, and remanded the case for a determination whether that regulation violated the Free Speech Clause.

Justice Breyer concurred in the judgment, noting that "it is often wiser not to try to distinguish between 'speech' and 'conduct,' " for "virtually all government regulation affects speech," as "[h]uman relations take place through speech." Deciding what level of review should occur was a more profitable approach than determining the line between speech and conduct. Justice Sotomayor, joined by Justice Alito, also concurred in the judgment. She noted that the case was difficult because the breadth of the New York law had not been determined by New York courts, and suggested the question of the statute's meaning be certified to the New York Court of Appeals for a determinative interpretation.

*Insert in Chapter 9 § C. at page 892*:

**Trinity Lutheran Church of Columbia v. Comer**
582 U.S. ___, 137 S. Ct. 2012 (2017)

Chief Justice Roberts delivered the opinion of the Court, except as to footnote 3.

The Missouri Department of Natural Resources offers state grants to help public and private schools, nonprofit daycare centers, and other nonprofit entities purchase rubber playground surfaces made from recycled tires. Trinity Lutheran Church applied for such a grant for its preschool and daycare center and would have received one, but for the fact that Trinity Lutheran is a church. The Department had a policy of categorically disqualifying churches and other religious organizations from receiving grants under its playground resurfacing program. The question presented is whether the Department's policy violated the rights of Trinity Lutheran under the Free Exercise Clause of the First Amendment.

I

A

The Trinity Lutheran Church Child Learning Center is a preschool and daycare center open throughout the year to serve working families in Boone County, Missouri. [T]he Center merged with Trinity Lutheran Church in 1985 and operates under its auspices on church property. The Center admits students of any religion, and enrollment stands at about 90 children ranging from age two to five.

The Center includes a playground that is equipped with the basic playground essentials. Almost the entire surface beneath and surrounding the play equipment is coarse pea gravel.

In 2012, the Center sought to replace a large portion of the pea gravel with a pour-in-place rubber surface by participating in Missouri's Scrap Tire Program.

[T]he Department cannot offer grants to all applicants and so awards them on a competitive basis to those scoring highest based on several criteria, such as the poverty level of the population in the surrounding area and the applicant's plan to promote recycling. When the Center applied, the Department had a strict and express policy of denying grants to any applicant owned or controlled by a church, sect, or other religious entity. That policy, in the Department's view, was compelled by Article I, Section 7 of the Missouri Constitution.

The Center ranked fifth among the 44 applicants in the 2012 Scrap Tire Program. [T]he Center was deemed categorically ineligible to receive a grant [due to] the Missouri Constitution. [The Center sued and lost. The Court granted certiorari, and reversed.]

II

The parties agree that the Establishment Clause does not prevent Missouri from including Trinity Lutheran in the Scrap Tire Program. That does not, however, answer the question under the Free Exercise Clause, because we have recognized that there is "play in the joints" between what the Establishment Clause permits and the Free Exercise Clause compels.

The Free Exercise Clause "protect[s] religious observers against unequal treatment" and subjects to the strictest scrutiny laws that target the religious for "special disabilities" based on their "religious status." *Church of Lukumi Babalu Aye, Inc. v. Hialeah*. Applying that basic principle, this Court has repeatedly confirmed that denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest "of the highest order."

In *Everson v. Board of Education*, for example, we upheld against an Establishment Clause challenge a New Jersey law enabling a local school district to reimburse parents for the public transportation costs of sending their children to public and private schools, including parochial schools. [W]e explained that a State "cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it,* from receiving the benefits of public welfare legislation."

Three decades later, in *McDaniel v. Paty,* the Court struck down under the Free Exercise Clause a Tennessee statute disqualifying ministers from serving as delegates to the State's constitutional convention. Writing for the plurality, Chief Justice Burger acknowledged that Tennessee had disqualified ministers from serving as legislators since the adoption of its first Constitution in 1796, and that a number of early States had also disqualified ministers from legislative office. This historical tradition, however, did not change the fact that the statute discriminated against McDaniel by denying him a benefit solely because of his "*status* as a 'minister.'" McDaniel could not seek to participate in the convention while also maintaining his role as a minister; to pursue the one, he would have to give up the other.

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

In *Employment Division v. Smith,* we rejected a free exercise claim brought by two members of a Native American church denied unemployment benefits because they had violated Oregon's drug laws by ingesting peyote for sacramental purposes. [W]e held that the Free Exercise Clause did not entitle the church members to a special dispensation from the general criminal laws on account of their religion. At the same time, we again made clear that the Free Exercise Clause *did* guard against the government's imposition of "special disabilities on the basis of religious views or religious status."

Finally, in *Church of Lukumi Babalu Aye,* we struck down three facially neutral city ordinances that outlawed certain forms of animal slaughter.

III

A

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

Like the disqualification statute in *McDaniel,* the Department's policy puts Trinity Lutheran to a choice: It may participate in an otherwise available benefit program or remain a religious institution. Of course, Trinity Lutheran is free to continue operating as a church, just as McDaniel was free to continue being a minister. But that freedom comes at the cost of automatic and absolute exclusion from the benefits of a public program for which the Center is otherwise fully qualified. And when the State conditions a benefit in this way, *McDaniel* says plainly that the State has punished the free exercise of religion.

The Department contends that merely declining to extend funds to Trinity Lutheran does not *prohibit* the Church from engaging in any religious conduct or otherwise exercising its religious rights. In this sense, says the Department, its policy is unlike the ordinances struck down in *Lukumi*. Here the Department has simply declined to allocate to Trinity Lutheran a subsidy the State had no obligation to provide in the first place.

It is true the Department has not criminalized the way Trinity Lutheran worships or told the Church that it cannot subscribe to a certain view of the Gospel. But, as the Department itself acknowledges, the Free Exercise Clause protects against "indirect coercion or penalties on the free exercise of religion, not just outright prohibitions." As the Court put it more than 50 years ago, "[i]t

is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Sherbert*.

Trinity Lutheran is not claiming any entitlement to a subsidy. It instead asserts a right to participate in a government benefit program without having to disavow its religious character. The "imposition of such a condition upon even a gratuitous benefit inevitably deter[s] or discourage[s] the exercise of First Amendment rights." *Sherbert*. 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. Trinity Lutheran is a member of the community too, and the State's decision to exclude it for purposes of this public program must withstand the strictest scrutiny.

B

The Department attempts to get out from under the weight of our precedents by arguing that the free exercise question in this case is instead controlled by our decision in *Locke v. Davey*. It is not. In *Locke,* the State of Washington created a scholarship program to assist high-achieving students with the costs of postsecondary education. The scholarships were paid out of the State's general fund, and eligibility was based on criteria such as an applicant's score on college admission tests and family income. While scholarship recipients were free to use the money at accredited religious and non-religious schools alike, they were not permitted to use the funds to pursue a devotional theology degree—one "devotional in nature or designed to induce religious faith." Davey was selected for a scholarship but was denied the funds when he refused to certify that he would not use them toward a devotional degree. He sued, arguing that the State's refusal to allow its scholarship money to go toward such degrees violated his free exercise rights.

This Court disagreed. It began by explaining what was *not* at issue. Washington's selective funding program was not comparable to the free exercise violations found in the "*Lukumi* line of cases," including those striking down laws requiring individuals to "choose between their religious beliefs and receiving a government benefit." At the outset, then, the Court made clear that *Locke* was not like the case now before us.

Washington's restriction on the use of its scholarship funds was different. According to the Court, the State had "merely chosen not to fund a distinct category of instruction." Davey was not denied a scholarship because of who he *was*; he was denied a scholarship because of what he proposed *to do*—use the funds to prepare for the ministry. Here there is no question that Trinity Lutheran was denied a grant simply because of what it is—a church.

The Court in *Locke* also stated that Washington's choice was in keeping with the State's antiestablishment interest in not using taxpayer funds to pay for the training of clergy; in fact, the

Court could "think of few areas in which a State's antiestablishment interests come more into play." Here nothing of the sort can be said about a program to use recycled tires to resurface playgrounds.

Relying on *Locke,* the Department nonetheless emphasizes Missouri's similar constitutional tradition of not furnishing taxpayer money directly to churches. But *Locke* took account of Washington's antiestablishment interest only after determining, as noted, that the scholarship program did not "require students to choose between their religious beliefs and receiving a government benefit." As the Court put it, Washington's scholarship program went "a long way toward including religion in its benefits." Students in the program were free to use their scholarships at "pervasively religious schools." Davey could use his scholarship to pursue a secular degree at one institution while studying devotional theology at another. He could also use his scholarship money to attend a religious college and take devotional theology courses there. The only thing he could not do was use the scholarship to pursue a degree in that subject.

In this case, there is no dispute that Trinity Lutheran *is* put to the choice between being a church and receiving a government benefit. The rule is simple: No churches need apply.[3]

C

The State in this case expressly requires Trinity Lutheran to renounce its religious character in order to participate in an otherwise generally available public benefit program, for which it is fully qualified. Our cases make clear that such a condition imposes a penalty on the free exercise of religion that must be subjected to the "most rigorous" scrutiny.

The State has pursued its preferred policy to the point of expressly denying a qualified religious entity a public benefit solely because of its religious character. Under our precedents, that goes too far. The Department's policy violates the Free Exercise Clause.

The Missouri Department of Natural Resources has not subjected anyone to chains or torture on account of religion. And the result of the State's policy is nothing so dramatic as the denial of political office. The consequence is, in all likelihood, a few extra scraped knees. But the exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution all the same, and cannot stand.

Justice GORSUCH, with whom Justice THOMAS joins, concurring in part.

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[3]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.

Missouri's law bars Trinity Lutheran from participating in a public benefits program only because it is a church. I agree this violates the First Amendment. I offer only two modest qualifications.

First, the Court leaves open the possibility a useful distinction might be drawn between laws that discriminate on the basis of religious status and religious use. Respectfully, I harbor doubts about the stability of such a line. Does a religious man say grace before dinner? Or does a man begin his meal in a religious manner? Is it a religious group that built the playground? Or did a group build the playground so it might be used to advance a religious mission? The distinction blurs in much the same way the line between acts and omissions can blur when stared at too long, leaving us to ask (for example) whether the man who drowns by awaiting the incoming tide does so by act (coming upon the sea) or omission (allowing the sea to come upon him). Often enough the same facts can be described both ways.

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

For these reasons, reliance on the status-use distinction does not suffice for me to distinguish *Locke v. Davey*.

Second and for similar reasons, I am unable to join [footnote 3.] Of course the footnote is entirely correct, but I worry that some might mistakenly read it to suggest that only "playground resurfacing" cases, or only those with some association with children's safety or health, or perhaps some other social good we find sufficiently worthy, are governed by the legal rules recounted in and faithfully applied by the Court's opinion. Such a reading would be unreasonable for our cases are "governed by general principles, rather than ad hoc improvisations." And the general principles here do not permit discrimination against religious exercise—whether on the playground or anywhere else.

Justice BREYER, concurring in the judgment.

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

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

Justice SOTOMAYOR, with whom Justice GINSBURG joins, dissenting.

This case is about nothing less than the relationship between religious institutions and the civil government—that is, between church and state. The Court today profoundly changes that relationship by holding, for the first time, that the Constitution requires the government to provide public funds directly to a church. Its decision slights both our precedents and our history, and its reasoning weakens this country's longstanding commitment to a separation of church and state beneficial to both.

II

[T]his is a case about whether Missouri can decline to fund improvements to the facilities the Church uses to practice and spread its religious views. This Court has repeatedly warned that funding of exactly this kind—payments from the government to a house of worship—would cross the line drawn by the Establishment Clause. The Establishment Clause does not allow Missouri to grant the Church's funding request because the Church uses the Learning Center, including its playground, in conjunction with its religious mission.

A

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

Nowhere is this rule more clearly implicated than when funds flow directly from the public treasury to a house of worship. A house of worship exists to foster and further religious exercise. When a government funds a house of worship, it underwrites this religious exercise.

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.

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

B

When the Court last addressed direct funding of religious institutions, in *Mitchell* [*v. Helms*], it adhered to the rule that the Establishment Clause prohibits the direct funding of religious activities. At issue was a federal program that helped state and local agencies lend educational materials to public and private schools, including religious schools. The controlling concurrence [by Justice O'Connor] assured itself that the program would not lead to the public funding of religious activity.

Today's opinion suggests the Court has made the leap the *Mitchell* plurality could not. For if it agrees that the funding here will finance religious activities, then only a rule that considers that fact irrelevant could support a conclusion of constitutionality. It has no basis in the history to which the Court has repeatedly turned to inform its understanding of the Establishment Clause. It permits direct subsidies for religious indoctrination, with all the attendant concerns that led to the Establishment Clause. And it favors certain religious groups, those with a belief system that allows them to compete for public dollars and those well-organized and well-funded enough to do so successfully.

III

Even assuming the absence of an Establishment Clause violation and proceeding on the Court's preferred front—the Free Exercise Clause—the Court errs. It claims that the government may not draw lines based on an entity's religious "status." But we have repeatedly said that it can.

A

The Establishment Clause prohibits laws "respecting an establishment of religion" and the Free Exercise Clause prohibits laws "prohibiting the free exercise thereof." "[I]f expanded to a logical extreme," these prohibitions "would tend to clash with the other." *Walz*. Even in the absence of a violation of one of the Religion Clauses, the interaction of government and religion can raise concerns that sound in both Clauses. For that reason, the government may sometimes act to accommodate those concerns, even when not required to do so by the Free Exercise Clause, without

violating the Establishment Clause. And the government may sometimes act to accommodate those concerns, even when not required to do so by the Establishment Clause, without violating the Free Exercise Clause. "[T]here is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Id.* This space between the two Clauses gives government some room to recognize the unique status of religious entities and to single them out on that basis for exclusion from otherwise generally applicable laws.

Invoking this principle, this Court has held that the government may sometimes relieve religious entities from the requirements of government programs. A State need not, for example, require nonprofit houses of worship to pay property taxes. Nor must a State require nonprofit religious entities to abstain from making employment decisions on the basis of religion. But the government may not invoke the space between the Religion Clauses in a manner that "devolve[s] into an unlawful fostering of religion." *Cutter v. Wilkinson*.

[T]his Court has held that the government may sometimes close off certain government aid programs to religious entities. The State need not, for example, fund the training of a religious group's leaders. It may instead avoid the historic "antiestablishment interests" raised by the use of "taxpayer funds to support church leaders." *Locke*.

B

Missouri has decided that the unique status of houses of worship requires a special rule when it comes to public funds.

Missouri's decision, which has deep roots in our Nation's history, reflects a reasonable and constitutional judgment.

1

This Court has consistently looked to history for guidance when applying the Constitution's Religion Clauses. This case is no different.

This Nation's early experience with, and eventual rejection of, established religion—defies easy summary.

Despite this rich diversity of experience, the story relevant here is one of consistency. The use of public funds to support core religious institutions can safely be described as a hallmark of the States' early experiences with religious establishment. Every state establishment saw laws passed to raise public funds and direct them toward houses of worship and ministers. And as the States all disestablished, one by one, they all undid those laws.

Those who fought to end the public funding of religion based their opposition on a powerful set of arguments, all stemming from the basic premise that the practice harmed both civil government and religion. The civil government, they maintained, could claim no authority over religious belief. For them, support for religion compelled by the State marked an overstep of authority that would only lead to more. Equally troubling, it risked divisiveness by giving religions reason to compete for the State's beneficence. Faith, they believed, was a personal matter, entirely between an individual and his god. Religion was best served when sects reached out on the basis of their tenets alone, unsullied by outside forces, allowing adherents to come to their faith voluntarily. Over and over, these arguments gained acceptance and led to the end of state laws exacting payment for the support of religion.

[The dissent then discusses the history of disestablishment in Virginia, Maryland and New England.]

The course of this history shows that those who lived under the laws and practices that formed religious establishments made a considered decision that civil government should not fund ministers and their houses of worship.

2

Like the use of public dollars for ministers at issue in *Locke*, turning over public funds to houses of worship implicates serious antiestablishment and free exercise interests. The history just discussed fully supports this conclusion. As states disestablished, they repealed laws allowing taxation to support religion because the practice threatened other forms of government support for, involved some government control over, and weakened supporters' control of religion. A state can reasonably use status as a "house of worship" as a stand-in for "religious activities." Inside a house of worship, dividing the religious from the secular would require intrusive line-drawing by government, and monitoring those lines would entangle government with the house of worship's activities. And so while not every activity a house of worship undertakes will be inseparably linked to religious activity, "the likelihood that many are makes a categorical rule a suitable means to avoid chilling the exercise of religion." Finally, and of course, such funding implicates the free exercise rights of taxpayers by denying them the chance to decide for themselves whether and how to fund religion. If there is any "'room for play in the joints' between" the Religion Clauses, it is here. *Locke*.

As was true in *Locke*, a prophylactic rule against the use of public funds for houses of worship is a permissible accommodation of these weighty interests. The rule has a historical pedigree identical to that of the provision in *Locke*. Almost all of the States that ratified the Religion Clauses operated under this rule. Today, thirty-eight States have a counterpart to Missouri's Article I, § 7. The provisions, as a general matter, date back to or before these States' original Constitutions. That so many States have for so long drawn a line that prohibits public funding for houses of worship,

based on principles rooted in this Nation's understanding of how best to foster religious liberty, supports the conclusion that public funding of houses of worship "is of a different ilk." *Locke*.

Missouri has recognized the simple truth that, even absent an Establishment Clause violation, the transfer of public funds to houses of worship raises concerns that sit exactly between the Religion Clauses. To avoid those concerns, and only those concerns, it has prohibited such funding. In doing so, it made the same choice made by the earliest States centuries ago and many other States in the years since. The Constitution permits this choice.

3

In the Court's view, none of this matters. The Court describes this as a constitutionally impermissible line based on religious "status" that requires strict scrutiny. Its rule is out of step with our precedents in this area, and wrong on its own terms.

The Constitution 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. It is that very status that implicates the interests protected by the Religion Clauses. Sometimes a religious entity's unique status requires the government to act. *Hosanna–Tabor*. Other times, it merely permits the government to act.

Start where the Court stays silent. Its opinion does not acknowledge that our precedents have expressly approved of a government's choice to draw lines based on an entity's religious status. Those cases did not deploy strict scrutiny to create a presumption of unconstitutionality, as the Court does today. Instead, they asked whether the government had offered a strong enough reason to justify drawing a line based on that status.

The Court takes two steps to avoid these precedents. First, it recasts *Locke* as a case about a restriction that prohibited the would-be minister from "us[ing] the funds to prepare for the ministry." A faithful reading of *Locke* gives it a broader reach. *Locke* stands for the reasonable proposition that the government may, but need not, choose not to fund certain religious entities (there, ministers) where doing so raises "historic and substantial" establishment and free exercise concerns. Second, it suggests that this case is different because it involves "discrimination" in the form of the denial of access to a possible benefit. But in this area of law, a decision to treat entities differently based on distinctions that the Religion Clauses make relevant does not amount to discrimination. To understand why, keep in mind that "the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all." *Wallace v. Jaffree*. If the denial of a benefit others may receive is discrimination that violates the Free Exercise Clause, then the accommodations of religious entities we have approved would violate the free exercise rights of nonreligious entities. We have, with good

reason, rejected that idea, and instead focused on whether the government has provided a good enough reason, based in the values the Religion Clauses protect, for its decision.

The Court offers no real reason for rejecting the balancing approach in our precedents in favor of strict scrutiny, beyond its references to discrimination. A State's decision not to fund houses of worship does not disfavor religion; rather, it represents a valid choice to remain secular in the face of serious establishment and free exercise concerns. That does not make the State "atheistic or antireligious." It means only that the State has "establishe[d] neither atheism nor religion as its official creed."

At bottom, the Court creates the following rule today: The 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. Nothing supports this lopsided outcome. Not the Religion Clauses. Not precedent. And not reason.

Today's decision discounts centuries of history and jeopardizes the government's ability to remain secular. Just three years ago, this Court claimed to understand that. It makes clear today that this principle applies only when preference suits.

IV

The Court today dismantles a core protection for religious freedom provided in these Clauses. History shows that the Religion Clauses separate the public treasury from religious coffers as one measure to secure the kind of freedom of conscience that benefits both religion and government. If this separation means anything, it means that the government cannot, or at the very least need not, tax its citizens and turn that money over to houses of worship. The Court today blinds itself to the outcome this history requires and leads us instead to a place where separation of church and state is a constitutional slogan, not a constitutional commitment. I dissent.

**AFTERWORD**

The Court categorizes Missouri's action as singling out "churches and other religious organizations" for disparate and thus discriminatory treatment. By stating the issue in those terms, the case raises Free Exercise concerns. And when a state engages in religious discrimination, strict scrutiny is the constitutional standard of review. The precedential hurdle for the Court is *Locke v. Davey*. In *Locke*, the state constitutional provision was similar to the provision at issue in this case. But the Court held that Davey's Free Exercise claim failed. *Locke* is distinguished from Trinity Lutheran's claim, suggests Chief Justice Roberts's opinion for the Court, because *Locke* was not like other religious discrimination cases (*Church of the Lukumi Babalu Aye* and *McDaniel v. Paty* and *Sherbert v. Verner*) because it did not require a person to "choose between their religious beliefs and receiving a government benefit." Instead, narrowing the level of generality, *Locke* merely concerned

a state's decision "not to fund a distinct category of instruction." The majority's conclusion that the law violates the Free Exercise Clause makes irrelevant any discussion of the Nonestablishment Clause.

The dissent by Justice Sotomayor is premised on a very different view of the Religion Clause, one hearkening back to the Court's "separation of church and state" standard largely created in *Everson* in 1947 and abandoned by 1970 in *Walz v. Tax Commission* and in 1971 by *Lemon v. Kurtzman*. The wall of separation metaphor frames issues initially in light of the Nonestablishment Clause. Only if a law passes muster under that Clause will the Court turn to Free Exercise claims. Thus, Justice Sotomayor frames the issue as government refusing to directly fund religious exercise. Because the playground is used by a religious organization as part of its evangelization, or as a demonstration of living out its religious faith, any funds given to the Learning Center for improving safety in the playground is a direct funding of religious activity. That is why the Establishment Clause should justify the state's refusal to award any funds to Trinity Lutheran (see § II). In § III of the dissent, Justice Sotomayor begins by declaring the Establishment and Free Exercise Clauses, if expanded to a logical extreme, would tend to clash (quoting *Walz*). The Court so argued this seeming paradox in the 1960s and 1970s, and Justice Stewart declared that such a conclusion was itself illogical, for it suggested the Framers drafted a Constitution that conflicted with itself. Instead, Justice Stewart believed, the Court's interpretations of the two Clauses were to source of the problem, not the provisions themselves. But the dissent believes that, based on history, the state may deny benefits to religious institutions which are available to similar non-religious institutions, as part of the "play in the joints." The historical argument raises the stakes, suggesting that the Court is headed down a dangerously incorrect path. The play in the joints argument also analogizes this case to *Locke*. In both, the dissent claims, the "prophylactic rule" "is a permissible accommodation of" the interests in protecting against a merger of church and state. The dissent also attacks the Court's status/action distinction, concluding that some forms of religious "status" may be used to draw lines protecting both Free Exercise and Nonestablishment Clause interests. It cleverly uses the *Hosanna-Tabor* case as one urging caution. This is clever both because Chief Justice Roberts wrote the Court's opinion in that case, and also because *Hosanna-Tabor*, which broadly protected Free Exercise, is used to promote Nonestablishment Clause interests instead of Free Exercise interests.

One problem with the dissent's historical argument is the absence of any discussion of the reason for Blaine Amendment provisions found in many of the 38 states: it was part of an anti-Roman Catholic effort that began in the 1840s and continued through much of the remainder of the nineteenth century. In common or public schools in the 1840s and 1850s, the Protestant King James Bible was used to aid in reading comprehension and general knowledge. Catholics objected to the use of that Bible, and when their arguments that Catholic students should be permitted to read from the Catholic Bible rather than the King James Bible were rejected, Catholics created their own schools in major cities such as New York, Philadelphia, and Boston, and later, throughout the nation. The Blaine Amendment was a failed constitutional amendment first proposed by Representative James G. Blaine in 1875. In part it declared that "no money raised by taxation in any State for the support of public schools … shall ever be under the control of any religious sect." Thus, no Catholic school could ever be categorized as a public school, and public schools would continue to use the

King James Bible. Though it failed in the Senate, it was introduced each session of Congress through 1907, and after 1876, Congress required all territories entering the Union as states to include language requiring the state to maintain public schools free from sectarian control and not to aid any church directly or indirectly. This was part of Washington's Constitution and the subject of *Locke*. Missouri entered the Union well before this time, but Article I, § 7 required "That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion," and that language is analogous to Blaine Amendment language. The history of discrimination against Roman Catholics, who operated their own schools, is part of the puzzle of understanding both the Nonestablishment and Free Exercise Clauses.