Are All Religious Discriminations Created Equal?

Welcome to *Constitutional Context*. This is Professor Glenn Smith with another "five-minute bite of background about the Court and Constitution."

For the second month in a row, this podcast focuses on religious discrimination. But this month's context is very different.

Last month we explored the legal path that opponents of the controversial Trump Administration travel-ban must tread to show that the ban should be treated as religious discrimination.

By contrast, this month's religious-discrimination focus stems from an ordinary lawsuit that worked methodically through the federal courts and wound up at the Supreme Court for oral argument the middle of last month. The constitutional controversy started from an un-dramatic factual setting (a state program making grants available for playground upgrades). But the decision the Court will likely render in late June or early July could dramatically alter the constitutional doctrines protecting religious freedom.

At issue in *Trinity Lutheran Church v. Comer* is whether Missouri and other states with especially strong separation-of-church-and-state limits in their state constitutions can deny public funding to otherwise qualified recipients based on their religious status. The controversy began when Trinity Lutheran's school applied for state monies under a taxpayer-funded program helping non-profit organizations replace dangerous concrete playgrounds with more forgiving rubber surfaces made from recycled tires. On the criteria state officials use for assessing applicant worthiness, Trinity Lutheran scored well. However, state officials ultimately rejected funding because of the Missouri constitution's stricture that "no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church."

On its face, the rejection of Trinity Lutheran's application solely based on its religious status seems to be "religious discrimination" putting Missouri to the toughest constitutional test government can face. As noted in last month's podcast, the Court applied this "strict scrutiny" standard in the 1992 *Church of Lukumi-Babalu* decision to invalidate a Florida city ordinance selectively targeting animal sacrifices by adherents to a non-mainstream Afro-Caribbean religion. The city failed to show that its discrimination served a compelling interest that could not be achieved through less discriminatory alternatives.

Yet, as often happens in constitutional law, a later Supreme Court decision (*Locke v. Davey,* in 2004) significantly muddied the waters. *Locke* upheld a Washington State scholarship program helping students pursue a wide range of undergraduate courses of study, but denying a student seeking to become a minister funding to earn a theology degree.

The *Locke* Court could have reasoned conventionally, upholding Washington's religious discrimination as the narrowest way to advance a compelling interest dating to the country's founding – that is, avoiding the use of taxpayer funds to support churches and their leaders. (Can you say "Church of England"?)

Instead, the *Locke* majority sowed seeds of confusion by saying that strict scrutiny did not apply because the Washington program involved disfavor "of a far milder kind." The majority noted that religious believers faced no criminal or civil penalties. Nor were believers forced "to choose between their religious beliefs and receiving a government benefit." (This is because student *Locke* could major in something else and still take theology *courses*.) The majority applied a much more forgiving constitutional standard so states would have "play in the joints" to accommodate the tensions between the often-competing constitutional commands not to favor, but also not to disfavor, religious persons and entities.

Thus, when the Court decides *Trinity Lutheran*, it will likely be doing much more than deciding the fate of a playground program. The Court could clarify whether there should be different *kinds* of religious discrimination warranting different *degrees* of judicial skepticism. In the process, a Court that now includes new Justice Neil Gorsuch, who has a special interest in religious-freedom matters, may send a more general signal about just how willing it is to give religious free exercise a preferred position in the pantheon of constitutional values.