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Trinity Lutheran Church v. Comer: Playing "in the Joints" and on the Playground

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TRINITY LUTHERAN CHURCH V. COMER: PLAYING "IN THE JOINTS" AND ON THE PLAYGROUND

ABSTRACT

In Trinity Lutheran Church of Columbia v. Comer, *the Supreme Court determined that a state could not deny a church generally available benefits because of its religious character. In doing so, the* Trinity Lutheran *decision disregarded Missouri's long-standing constitutional provision that denies state funds to religiously affiliated organizations and ignored Supreme Court precedent such as* Locke v. Davey, *which determined that states have discretion over the extent to which they want to use state tax dollars to support religion. Before* Trinity Lutheran, *the Supreme Court consistently recognized that there is a "play in the joints" between the Establishment Clause and Free Exercise Clause, meaning that some state government actions are neither prohibited by the Establishment Clause nor required by the Free Exercise Clause. Issues concerning tax exemptions and state funding are consistently held to fall within the "play in the joints." This "play in the joints" permits state and local governments to refuse to fund religious institutions, even if funding them would be constitutionally permissible.*

The Trinity Lutheran *decision significantly limits the freedom of state and local governments to have and enforce state constitutional provisions prohibiting the use of public funds to aid religion. This Comment argues that the* Trinity Lutheran *decision is problematic because it undercuts the federalism at work in* Locke v. Davey. Locke v. Davey *is the proper interpretation of the relationship between First Amendment religion clauses and state tax dollars because it recognizes the importance of state antiestablishment interests and federalism and leaves religious funding issues for the states to resolve. Thus, the* Trinity Lutheran *Court should have followed the decision in* Locke, *leaving state tax issues sub-constitutional.*

INTRODUCTION

In *Trinity Lutheran Church of Columbia v. Comer*, a church that operates a preschool applied for a state grant that provides funds for resurfacing playgrounds with rubberized material.[1] Missouri denied Trinity Lutheran Church's application because Article I, Section 7 of the Missouri Constitution states, "no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion."[2] Missouri refused to provide a grant to the church based on its state constitutional policy of denying grants to religiously affiliated organizations—a policy that is rooted in the fundamental principle that the government must not "establish" an official religion, but rather maintain the separation of church and state.[3] In refusing the grant, the state was upholding a long-standing state policy of enforcing the state's antiestablishment interests. As the Eighth Circuit observed, Missouri "has a long history of maintaining a very high wall between church and state."[4]

However, contrary to Missouri's antiestablishment concerns, the Supreme Court in *Trinity Lutheran* determined that the state could not deny generally available benefits to the church because of its religious character.[5] While the decision initially appears limited in scope due to its narrow holding about a rubberized playground surface and a cryptic footnote,[6] the consequences for federalism are concerning. *Trinity Lutheran* significantly curtails the freedom of state governments to have and enforce their state constitutional provisions forbidding the use of public funds to aid religious institutions.

Federalism has been an essential part of American government since the time of the Framers.[7] Federalism principles endeavor to ensure that the federal government holds specific enumerated powers and the states retain broad discretion over the remaining matters.[8] Federalism is essential because it allows states to act as laboratories to formulate the most effective solutions to important

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[1] Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2017 (2017).

[2] *Id*. (quoting MO. CONST. art. I, § 7).

[3] *See* U.S. CONST. amend. I.; MO. CONST. art. I, § 7.

[4] Trinity Lutheran Church of Columbia, Inc. v. Pauley, 788 F.3d 779, 783 (8th Cir. 2015) (quoting Luetkemeyer v. Kaufmann, 364 F. Supp. 376, 383–84 (W.D. Mo. 1973), *aff'd*, 419 U.S. 888 (1974)).

[5] *Trinity Lutheran Church*, 137 S. Ct. at 2025.

[6] *Id.* at 2024 n.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.").

[7] *See* Stuart D. Poppel, *Federalism, Fundamental Fairness, and the Religion Clauses*, 25 CUMB. L. REV. 247, 250 (1995) (citing Note, *Rethinking the Incorporation of the Establishment Clause: A Federalist View*, 105 HARV. L. REV. 1700, 1705 (1992)).

[8] *Id.* at 250–51.

problems the entire country faces.[9] Furthermore, federalism allows individuals to choose to live in a state that closely aligns with their ideals and addresses these problems in a way they find desirable.[10] Thus, if the federal government refuses to defer to state autonomy on important issues, it eliminates the variety of state solutions to local problems and diminishes individual freedom.[11]

In recent decades, state constitutional law has reemerged as a source of individual rights independent of the federal Constitution.[12] As Justice Brennan noted, "more and more state courts are construing state constitutional counterparts of provisions of the Bill of Rights as guaranteeing citizens of their states even more protection than the federal provisions, even those identically phrased."[13] Many state court decisions stand for the proposition that state constitutions can provide greater protection for individual rights and that the state constitutional provisions should be interpreted independently, instead of in relation to their federal counterparts.[14] The independence of state constitutions has been particularly true with regard to state constitutional protections of religious freedom.[15]

Specifically, many state constitutions have stricter prohibitions of public funding of religion than is required by the federal Establishment Clause. Such prohibitions are not a violation of the constitutional right to "free exercise" of religion because, as the Supreme Court has consistently recognized, there is a "play in the joints" between the Establishment and Free Exercise Clauses of the First Amendment.[16] That is, some government actions are neither prohibited by the Establishment Clause nor required by the Free Exercise Clause. This "play in the joints" permits state governments to deny funding to religious institutions even if funding them would be constitutionally permissible under the federal Establishment Clause.

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[9] *See* Charles J. Cooper, *Federalism*: *Importance of the States*, 19 UPDATE ON L.-RELATED EDUC. 35, 35 (1995).

[10] *Id.*

[11] *Id.*

[12] *See* Brief Amicus Curiae of the National Education Ass'n in Support of Respondents at 3, Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017) (No. 15-577).

[13] *See id.* at 3–4 (quoting William J. Brennan, Jr. *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495 (1977)).

[14] *See, e.g.*, Doe v. State, 189 P.3d 999, 1004–05 (Alaska 2008); People v. Scott, 593 N.E.2d 1328, 1342 (N.Y. 1992); Brief Amicus Curiae of the National Education Ass'n, *supra* note 12.

[15] *See* Brief Amicus Curiae of the National Education Ass'n, *supra* note 12, at 2.

[16] Walz v. Tax Comm'n of New York, 397 U.S. 664, 669 (1970).

The leading case in this area of First Amendment jurisprudence, *Locke v. Davey*,[17] recognizes the necessity of the "play in the joints" and the importance of federalism to protect state autonomy and antiestablishment interests without violating the federal religion clauses. In *Locke*, the Court held that a Washington state program was constitutional even though it offered state tax-funded scholarships to secular, but not religious, studies.[18] Washington refused to provide scholarships to students pursuing degrees in vocational theology because a state constitutional provision prohibited the use of public funds for "any religious worship, exercise or instruction, or the support of any religious establishment."[19] The *Locke* Court found that Washington could have permitted students to receive scholarships for religious studies and it would not have violated the Establishment Clause; yet at the same time, denying funds for a religious degree did not violate the Free Exercise Clause.[20] Thus, the *Locke* framework implies that tax questions fall within the "play in the joints" and gives states discretion regarding the extent to which they want to use state tax dollars to support religion.[21]

This Comment argues that the Supreme Court's decision in *Trinity Lutheran* is problematic because it undercuts the federalism at work in *Locke*. The *Locke* framework is the correct interpretation of the First Amendment's religion clauses because it recognizes the importance of federalism and state antiestablishment interests and leaves religious funding issues for state legislatures to resolve rather than the judiciary. To this end, this Comment proceeds in three Parts. Part I provides an overview of the historical role federalism has played in the First Amendment's religion clause jurisprudence, describes Supreme Court precedent in relation to government funding of religion, and explains the concept of the "play in the joints" between the Establishment Clause and Free Exercise Clause. Part II examines the *Trinity Lutheran* decision, how the Supreme Court distinguished the case from *Locke*, why the Court reached this result, and what the implications may be going forward. Part III shows how the *Trinity Lutheran* decision disregards federalism and state antiestablishment interests and why that is problematic. This Comment concludes that state programs that do not promote blatant inequality and viewpoint discrimination of religion or clear favoritism of religion should fall within the "play in the joints" and be left to state discretion such as in *Locke.*

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17 540 U.S. 712, 719 (2004).

18 *Id.* at 715.

19 *See* WASH. CONST. art. I, § 11.

20 *Locke*, 540 U.S. at 719.

21 *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1332 (5th ed. 2015).

Accordingly, the *Trinity Lutheran* Court should have followed the decision in *Locke*, leaving state tax issues sub-constitutional.

I. OVERVIEW OF FEDERALISM AND RELIGIOUS LIBERTY

Federalism plays a significant role in First Amendment religion clause jurisprudence. Notably, for much of American history, there were minimal restrictions on state actions concerning religion. This Part traces the role that federalism has played in the First Amendment's religion clause jurisprudence since the framing of the U.S. Constitution until the incorporation of the Free Exercise and Establishment Clauses and significant Supreme Court precedent such as *Locke v. Davey*.[22] Section A discusses the historical significance that federalism has played in religious liberty, as the religion clauses were not believed to restrict state action regarding religion from the time of the framing of the U.S. Constitution up until precedent such as *Hamilton v. Regents of the University of California*, where the Court recognized that the Due Process Clause of the Fourteenth Amendment included aspects of religious liberty.[23] Section B discusses the incorporation of the Free Exercise and Establishment Clauses and their application to the states, demonstrating that even though the Constitution became applicable to the states, the states still retained their federalism interests. Section C provides a brief overview of the Supreme Court religion clause precedent in relation to government funding of religion and introduces the concept of the "play in the joints" that was coined in *Walz v. Tax Commission of New York*,[24] which concluded that specific government actions are neither prohibited by the Establishment Clause nor required by the Free Exercise Clause. This section also examines the issue of state variations on religious aid caused by the Blaine Amendments. Section D discusses *Locke v. Davey*, specifically discussing its federalist proposition that tax issues must be sub-constitutional and left to the states rather than the federal courts.

A. Religious Liberty: From the Framing to the Incorporation of the Fourteenth Amendment

The First Amendment of the U.S. Constitution states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[25] The Amendment's two clauses, known as the "Establishment

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[22] 540 U.S. 712.

[23] 293 U.S. 245, 265 (1934) (Cardozo, J., concurring).

[24] 397 U.S. 664, 669 (1970).

[25] U.S. CONST. amend. I.

Clause" and the "Free Exercise Clause," complement each other, protecting religious beliefs and actions,[26] while simultaneously ensuring that no single religion is given preferential treatment over other faiths.[27] The First Amendment religion clauses are the backbone of religious freedom of both belief and actions in America.[28] America's emphasis on religious liberty is firmly rooted in its history,[29] predating even the Free Exercise and Establishment Clauses.

The importance of federalism in religious liberty dates back to the time of the Framers, who did not intend the religion clauses to apply to the states.[30] In fact, it has been said that "the only consensus among the Framers of the First Amendment about the appropriate relationship between church and state was to allow the states to decide the issue themselves."[31] The Tenth Amendment confirmed the states could exercise all government powers except those reserved to Congress or prohibited by the Constitution.[32] On its face, the First Amendment and its religion clauses applied only to Congress, so during the time of the Framers, there were virtually no limitations on state actions concerning religion.[33] In fact, the text of the First Amendment itself begins "Congress shall make no law . . . ."[34] Notably, the First Amendment lacks any mention of the states,[35] implying that the Framers did not intend for the First Amendment to impose restrictions on state action regarding religion.

Moreover, in the late 1700s, the lack of limitation on state actions concerning religion went so far as to allow state establishment of religion.[36] Many states had government-established churches, some of which continued until the early 1800s.[37] A prominent Supreme Court Justice at the time, Justice Joseph Story, stated: "The whole power over the subject of religion is left exclusively to the state governments, to be acted upon according to their own sense of justice and the State Constitutions."[38] Throughout the next fifty years or so, the Supreme

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[26] CHEMERINSKY, *supra* note 21, at 1248.

[27] *See* JOHN WITTE, JR. & JOEL A. NICHOLS, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 154 (4th ed. 2016).

[28] CHEMERINSKY, *supra* note 21, at 1248.

[29] *Id.*

[30] *See* Poppel, *supra* note 7.

[31] *Id.* (quoting Note, *supra* note 7).

[32] U.S. CONST. amend. X.

[33] Poppel, *supra* note 7.

[34] U.S. CONST. amend. I.

[35] *Id.*

[36] *See* Poppel, *supra* note 7, at 252.

[37] *See id.* For example, Vermont did not disestablish until 1807; Connecticut until 1818; Hew Hampshire until 1819; and Massachusetts until 1833. *Id.* at 252 n.30.

[38] *Id.* (quoting JOSEPH STORY, 2 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 597 (2d

Court faced several cases regarding the religion clauses and the Bill of Rights as a whole, and each time it determined that they did not bind the states.[39] In particular, in *Permoli v. Municipality No. 1 of New Orleans*, the Court determined that "[t]he Constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws: nor is there any inhibition imposed by the Constitution of the United States in this respect on the states."[40] These early cases, such as *Permoli*, make clear that before the ratification of the Fourteenth Amendment, the religion clauses were not believed to restrict state action regarding religion.[41]

However, following Reconstruction and the adoption of the Fourteenth Amendment, a debate was ignited concerning whether the religion clauses restricted state regulation of religion.[42] To this day, scholars and courts debate whether the Framers of the Fourteenth Amendment meant to make all or certain provisions of the Bill of Rights, including the religion clauses, applicable to the states through the Due Process Clause or Privileges and Immunities Clause.[43] There are proponents in favor of the idea that the Framers intended total incorporation, but many believe the Fourteenth Amendment was only intended to incorporate certain provisions.[44] The Supreme Court rejected the theory of total incorporation of the Bill of Rights but applied many of the provisions to the states through the Due Process Clause of the Fourteenth Amendment, eventually including the First Amendment religion clauses.[45]

The Court first implied a limitation on state regulation of religion in the dictum of *Meyer v. Nebraska*,[46] where it noted that liberty as defined under the Fourteenth Amendment includes the right "to worship God according to the

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ed. 1851)).

[39] *See, e.g.*, Pervear v. Massachusetts, 72 U.S. (5 Wall.) 475, 479–80 (1866); Withers v. Buckley, 61 U.S. (20 How.) 84, 89–91 (1857); Smith v. Maryland, 59 U.S. (18 How.) 71, 76 (1855); Town of East Hartford v. Hartford Bridge Co., 51 U.S. (10 How.) 511, 539–40 (1850); Permoli v. Municipality No. 1 of New Orleans, 44 U.S. (3 How.) 589 (1845); Barron v. City of Baltimore, 32 U.S. (7 Pet.) 243 (1833).

[40] 44 U.S. (3 How.) at 609.

[41] *See* Poppel, *supra* note 7, at 251.

[42] *Id.* at 254–55.

[43] *Id.*

[44] *Id.*

[45] *Id.* at 255–57.

[46] 262 U.S. 390 (1923). This case held that a Nebraska law, requiring public and private school instruction to be in English and prohibited students who had not completed the eighth grade from studying a foreign language, was a denial of equal protection of the law. *Id.* at 393. A teacher at a private Lutheran school was convicted for teaching Bible stories in German. *Id.* at 396–97. The Supreme Court reversed the conviction, primarily due to the rights of the parents to control their children's education, but they also noted the right to worship according to an individual's own conscience in the decision's dictum. *Id.* at 399–400.

dictates of his own conscience."[47] The Supreme Court made this theory of fundamental religious liberty even more explicit in *Hamilton v. Regents of the University of California*.[48] In *Hamilton*, state university students challenged mandatory military training, which they believed violated their religious-based refusal to participate in war.[49] The objecting students claimed that their religious beliefs, including the refusal to participate in war, were protected by the liberty guaranteed in the Fourteenth Amendment's Due Process Clause.[50] The *Hamilton* Court rejected the substance of the students' appeal, but held that the Due Process Clause of the Fourteenth Amendment included "the right to entertain the beliefs, to adhere to the principles and to teach the doctrines on which these students base their objections to the order prescribing military training."[51] Thus, *Hamilton* finally recognized that aspects of religious liberty are protected from state action by the Due Process Clause, which paved the way for the incorporation of the Free Exercise and Establishment Clauses.[52]

B. The Incorporation of the Free Exercise and Establishment Clauses

The Supreme Court had "never applied the religion clauses of the First Amendment to the states" until *Cantwell v. Connecticut*.[53] That case[54] was the first time the Free Exercise Clause was applied to the states through its incorporation into the Due Process Clause of the Fourteenth Amendment.[55] In *Cantwell*, a Connecticut ordinance required licenses for individuals soliciting for "any alleged religious, charitable or philanthropic cause."[56] The ordinance gave discretion to local administrative officials to approve or deny licenses based on their determination of whether the cause was "a bona fide object of charity or philanthropy."[57] A group of Jehovah's Witnesses did not obtain a license before preaching door-to-door and was convicted of violating the city ordinance.[58] They argued that the license process violated their right to the free exercise of religion.[59] The Court determined that regulations on solicitation

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47 *Id.* at 399.
48 293 U.S. 245, 265 (1934).
49 *Id.* at 262.
50 *Id.*
51 *Id.* at 261–62.
52 Poppel, *supra* note 7, at 259.
53 *Id.* at 260 (quoting JOHN T. NOONAN, JR., THE BELIEVERS AND THE POWERS THAT ARE xiii (1987)).
54 310 U.S. 296 (1940).
55 U.S. CONST. amend. XIV.
56 *Cantwell*, 310 U.S. at 301–02.
57 *Id.* at 302.
58 *Id.* at 300.
59 *Id.*

based on religious beliefs were forbidden, and ruled in favor of the Jehovah's Witnesses.[60] In this landmark case, the Court incorporated the First Amendment's Free Exercise Clause into the Fourteenth Amendment's Due Process Clause, making the free exercise principles applicable not only to federal laws, but state and local laws as well.[61]

Just seven years later, the Establishment Clause was also incorporated into the Due Process Clause and applied to the states in *Everson v. Board of Education*.[62] In *Everson*, the Court held that a local law that reimbursed parents for transportation to parochial schools did not violate the constitutional prohibition against state support of religion.[63] Justice Black wrote:

> The broad meaning given the [First] Amendment by these earlier cases has been accepted by this Court in its decisions concerning an individual's religious freedom rendered since the Fourteenth Amendment was interpreted to make the prohibitions of the First applicable to state action abridging religious freedom. There is every reason to give the same application and board interpretation to the "establishment of religion" clause.[64]

Thus, the Court followed the footsteps of its *Cantwell* decision and held that the Due Process Clause made the Establishment Clause binding on the states.[65]

The incorporation of the First Amendment religion clauses in *Cantwell* and *Everson* shifted central authority over religious liberty from state courts to federal courts,[66] and in this Author's opinion, further strengthened the "wall between church and state."[67] Since the incorporation of the religion clauses, the primary force shaping American religious liberty has been the federal courts, particularly the Supreme Court.[68] Despite the Framers' intent, the Court has frequently failed to take note of the idea that "civil authority in religious matters, to the extent it could be exercised, was a state function."[69]

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60 *Id.* at 303.

61 *Id.*

62 330 U.S. 1, 8 (1947); WITTE, JR. & NICHOLS, *supra* note 27, at 114.

63 *Everson*, 330 U.S. at 18.

64 *Id.* at 15.

65 *See* WITTE, JR. & NICHOLS, *supra* note 27, at 114.

66 *Id.* at 117.

67 *Everson*, 330 U.S. at 18.

68 *See* Poppel, *supra* note 7, at 247–48.

69 *Id.* at 249 (quoting ARLIN M. ADAMS & CHARLES J. EMMERICH, A NATION DEDICATED TO RELIGIOUS LIBERTY: THE CONSTITUTIONAL HERITAGE OF THE RELIGION CLAUSES 45 (1990)).

Once the religion clauses became binding on the states in the 1940's, most laws that affected religion became subject to First Amendment authority.[70] But this new subjection did not preclude states from passing laws affecting religious institutions, including rules governing the subsidization of religious property and schools, religious expression, taxation and tax exemptions, and more.[71] Thus, even after incorporation, states were able to legislate around these issues, and federalism still laid at the core of the First Amendment. The newly incorporated First Amendment became a limitation on federal power in the same way it acts as a limitation on state power.[72] Since the 1990s, the authority over American religious liberty has somewhat shifted from the federal government to the states and away from courts to legislatures, due in part to the Supreme Court's emphasis on separation of powers and federalism,[73] as highlighted in precedent such as *Employment Division v. Smith*.[74]

C. Recent Religion Clause Jurisprudence and the "Play in the Joints"

Federalism issues continue to play a significant role in recent religion clause jurisprudence, as evident in *Walz v. Tax Commission of New York*[75] and *Lemon v. Kurtzman*.[76] One of the federalism issues the Supreme Court faces is the tension between the Free Exercise and Establishment Clauses, meaning that sometimes the promotion of free exercise of religion may clash with the Establishment Clause, and enforcement of the Establishment Clause may stifle the free exercise of religion.

This tension between the religion clauses was explored in *Walz*.[77] Here, the plaintiffs argued that the tax exemption for religious property that was used exclusively for religious worship violated the Establishment Clause.[78] However, the Court upheld the New York law that gave property tax exemptions for "real

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70 *See* WITTE, JR. & NICHOLS, *supra* note 27, at 117.

71 *Id.*

72 *See* Poppel, *supra* note 7, at 247.

73 WITTE, JR. & NICHOLS, *supra* note 27, at 117, 149, 240.

74 494 U.S. 872 (1990). In this case, the claimants were members of a Native American Church who ingested peyote, a hallucinogenic drug, as part of a sacramental ritual and were fired from their employment at a drug rehabilitation center. *Id.* at 874. The Court rejected the notion that free exercise of religion required an exemption from an otherwise valid and neutrally applicable law. *Id.* at 872. The Court also stated that those seeking religious exemptions from laws should look to the political process rather than the courts. *Id.* at 890. The *Smith* framework remains the controlling test for free exercise cases to this day, and demonstrates the Court's hesitancy to favor religious justifications for exemptions over secular justifications.

75 *See* 397 U.S. 664, 669–70 (1970).

76 *See* 403 U.S. 602, 625 (1971).

77 397 U.S. at 669–70.

78 *Id.* at 664; *see* CHEMERINSKY, *supra* note 21, at 1299.

or personal property used exclusively for religious, educational, or charitable purposes."[79] The Court reasoned that the tax exemptions created "minimal and remote involvement between church and state and far less than taxation of churches," because it reduced the financial involvement of the state and the church.[80]

Most notably, the *Walz* Court established the concept of a "play in the joints" between the Free Exercise Clause and Establishment Clause.[81] Chief Justice Burger wrote: "We will not tolerate either governmentally established religion or government interference with religion. Short of those expressly proscribed government acts, there is ample room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference."[82] Specifically, *Walz* confirmed that tax exemptions of religious organizations are not forbidden by the Establishment Clause if similar organizations are also exempt; and taxation of religious organizations is permitted under the Free Exercise Clause, as long as similar organizations are taxed as well.[83] In other words, the *Walz* Court recognized that there are state actions that are *neither* prohibited by the Establishment Clause *nor* required by the Free Exercise Clause. Since *Walz*, the Supreme Court has consistently treated religious taxation issues as falling "in the joints" between the religion clauses.[84]

Following *Walz*, the Court heard *Lemon v. Kurtzman*, in which it adopted a formal three-prong test for the Establishment Clause.[85] The *Lemon* test further underscores the tension between the Free Exercise and Establishment Clauses.[86] Under the *Lemon* test, the government violates the Establishment Clause if its primary purpose is to advance religion, or if the primary effect is to aid or inhibit religion, or there is excessive entanglement with the government.[87] Whenever the government acts in a way that promotes the free exercise of religion, its primary purpose is advancing or aiding religion, which is said to violate the *Lemon* test.[88] If the government creates an exemption to a law solely for a religious organization or entity, one can argue that it violates the Establishment

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79 N.Y. CONST. art. XVI, § 1; *Walz*, 397 U.S. at 680; *see also* CHEMERINSKY, *supra* note 21, at 1299.

80 *Walz*, 397 U.S. at 676.

81 *Id.* at 669.

82 *Id.*

83 *See* WITTE, JR. & NICHOLS, *supra* note 27, at 240.

84 *Id.*

85 *Lemon*, 403 U.S. 602, 612–14 (1971).

86 *See* CHEMERINSKY, *supra* note 21, at 1250.

87 *Lemon*, 403 U.S. at 612–13; *see also* CHEMERINSKY, *supra* note 21, at 1249–50.

88 CHEMERINSKY, *supra* note 21, at 1250.

Clause, but on the other hand, if the government does not create an exemption for religion, it can also be argued that it violates the Free Exercise Clause.[89] This tension demonstrates the necessity of the "play in the joints," meaning that states should have discretion in determining how they want to treat religion, particularly when it concerns state funds.

The "play in the joints" logic coined by the *Walz* Court gives states latitude in determining how they want to spend taxpayer money and whether they want to exempt religious organizations or use taxpayer funds to support religious entities. However, many states have stricter constitutional restrictions than the federal government regarding aid to religious institutions and individuals.[90] These stricter restrictions are due to the "Blaine Amendments,"[91] state constitutional provisions that prohibit public funding of religion.[92] While the exact wording of the Blaine Amendments differs among states, the common purpose is to prevent public money from supporting religious education and institutions.[93] Many states passed these amendments due to anti-Catholic sentiment caused by the significant number of Roman Catholic parochial schools that were emerging.[94]

Today, thirty-seven states have adopted Blaine Amendments, and thus have stricter prohibitions on religious funding than the First Amendment religion clauses themselves.[95] Courts in states with Blaine Amendments have adopted various methods of interpretation.[96] Some courts have strictly enforced the amendments, and some have interpreted them more leniently to allow certain forms of aid.[97] The different approaches across states raise the issue of whether these Blaine Amendments fall within the "play in the joints," and whether they impair free exercise by favoring non-religion over religious practice.[98]

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[89] *Id.* (citing Suzanna Sherry, Lee v. Weisman: *Paradox Redux*, 1992 SUP. CT. REV. 123 ("arguing that the tension between the [E]stablishment and [F]ree [E]xercise [C]lauses is inherent and difficult to reconcile")).

[90] *See* KENT GREENAWALT, WHEN FREE EXERCISE AND NONESTABLISHMENT CONFLICT 76 (2017).

[91] Blaine Amendments are named after a failed U.S. Constitution amendment introduced by Senator James Blaine of Maine in 1875. *See* Michael Bindas & Tim Keller, *Answers to Frequently Asked Questions About Blaine Amendments*, INST. FOR JUSTICE, http://ij.org/issues/school-choice/blaine-amendments/answers-frequently-asked-questions-blaine-amendments/ (last visited Mar. 26, 2019). Although the proposed amendment failed to pass in the Senate, many newly formed and existing states included similar language in their state constitutions. *Id.*

[92] *See* GREENAWALT, *supra* note 90.

[93] *Id.*

[94] *Id.* at 58.

[95] *Id.* at 76.

[96] *Id.* at 78.

[97] *Id.*

[98] *Id.* at 77.

D. Locke v. Davey *and State Funding of Religion*

Locke v. Davey was the first time the Court expressly considered whether the Blaine Amendments were constitutional.[99] In *Locke*, the Court considered the constitutionality of a Washington state program that offered Promise Scholarships to children who were high achievers but could not afford college.[100] The program, which was funded by state tax dollars, allowed recipients to go to any accredited college, take any classes, and choose any major except for a "devotional" major—one that provides training to become a minister.[101] Washington prohibited using scholarships to pursue a devotional major because its state constitution stated that "[n]o public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or the support of any religious establishment."[102]

The claimant, Joshua Davey, qualified for a Promise Scholarship and wanted to pursue a double major in business administration and theology.[103] However, he was refused a scholarship for his theology major.[104] He argued that the scholarship program violated the Free Exercise Clause by allowing students to receive a scholarship if they pursued secular, but not religious studies.[105] Davey claimed this unfairly targeted religious majors.[106] Washington State argued the program was defined as narrowly as possible, and even allowed recipients to take theology courses or attend a religious college.[107]

In its decision, the *Locke* Court found that the scholarship was a neutral, generally applicable law and did not show animus towards religion.[108] The Court determined that the state did not interfere with Davey's free exercise rights because he could still receive training to be a pastor without subsidization by the government.[109] The *Locke* Court noted the tension between the Establishment Clause and Free Exercise Clause—that "[g]overnment actions to facilitate free exercise might be challenged as impermissible establishments of religion, and government efforts to refrain from establishing religion might be objected to as

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99 *Id.*
100 Locke v. Davey, 540 U.S. 712, 715–16 (2004).
101 *Id.* at. 717.
102 WASH. CONST. art. I, § 11.
103 *Locke*, 540 U.S. at 717.
104 *Id.*
105 *Id.* at 718.
106 *See* WITTE, JR. & NICHOLS, *supra* note 27, at 148.
107 *Locke*, 540 U.S. at 716.
108 *Id.* at 725.
109 *Id.* at 720–21 n.4.

denying the free exercise of religion."[110] The majority specifically noted that the state of Washington could have permitted students receiving scholarships to pursue a devotional major if they had wished and it would not have violated the Establishment Clause.[111] At the same time, denying Davey scholarship money to pursue a devotional degree did not violate the Free Exercise Clause.[112] Thus, the Court held that this issue fell within the "play in the joints" between the Establishment and Free Exercise Clauses.[113] *Locke*'s holding is significant in that it means that states have the choice of how they want to spend tax money and the extent to which they wish to support religion financially.[114] *Locke* supports the proposition that tax questions need to be sub-constitutional and are best left to the state political processes rather than the federal judiciary.[115] However, the *Trinity Lutheran Church v. Comer* decision seems to contradict this proposition directly.[116]

II. THE *TRINITY LUTHERAN CHURCH V. COMER* DECISION

In the *Trinity Lutheran Church v. Comer* decision, the Court departed from its precedent, specifically *Locke v. Davey*, and held that in spite of Missouri's state constitutional provision forbidding government aid to religious institutions, Missouri could not deny a state reimbursement grant to a church because of its religious status.[117] The *Trinity Lutheran* decision has prompted a wide range of responses, from celebration to condemnation.[118] Many have touted the decision as a "significant victory for religious liberty,"[119] an "affirm[ation of] the founding principle[s]"[120] and a "critical victory [for religious groups] in trying to attain a level playing field when it comes to generally available public

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110 CHEMERINSKY, *supra* note 21, at 1249.

111 *Locke*, 540 U.S. at 719.

112 *Id.* at 719–20.

113 *Id.* at 719.

114 CHEMERINSKY, *supra* note 21.

115 *Id.*

116 137 S. Ct. 2012 (2017).

117 *Id.* at 2024–25.

118 *See, e.g.*, Erwin Chemerinsky, *Symposium: The Crumbling Wall Separating Church and State*, SCOTUSBLOG (June 27, 2017, 10:18 AM), http://www.scotusblog.com/2017/06/symposium-crumbling-wall-separating-church-state/; Erin Morrow Hawley, *Symposium: Putting Some Limits on the "Play in the Joints"*, SCOTUSBLOG (June 26, 2017, 5:28 PM), http://www.scotusblog.com/2017/06/symposium-putting-limits-play-joints/.

119 *See* Fred Yarger, *Symposium: The Justices Reach Broad Agreement, but on a Narrow Question*, SCOTUSBLOG (June 27, 2017, 11:13 AM), http://www.scotusblog.com/2017/06/symposium-justices-reach-broad-agreement-narrow-question/.

120 *See* Nathan Diament, *Symposium: Court Ruling Bolsters Religious Liberty . . . Beyond the Playground*, SCOTUSBLOG (June 26, 2017, 6:13 PM), http://www.scotusblog.com/2017/06/symposium-court-ruling-bolsters-religious-liberty-beyond-playground/.

benefits."[121] On the other hand, others have criticized the decision as "oversimplified,"[122] "a significant step towards dismantling the wall that separates church and state,"[123] and a "serious threat to religious freedom."[124]

This Part examines the *Trinity Lutheran* decision and how the Supreme Court distinguished the case from *Locke*, and explains why the Court reached this result and what the implications may be going forward. Section A provides an overview of *Trinity Lutheran*'s facts and procedural history. Section B examines the Supreme Court's decision, including the Justices' dissents and concurrences, and discusses why the Court decided the way it did and what factors likely contributed to the outcome. Section C examines the likely implications the *Trinity Lutheran* decision will have on state sovereignty, federalism, religious freedom levels of scrutiny, and school voucher programs, and addresses its devastating impact on federalism.

A. The Facts and History of Trinity Lutheran

The Trinity Lutheran Church Child Learning Center is a preschool and day care facility in Missouri that is operated by Trinity Lutheran Church.[125] Trinity Lutheran had a playground with a "coarse pea gravel surface" below the playground equipment.[126] In 2012, Trinity Lutheran applied to replace the pea gravel surface with a rubber surface through Missouri's Scrap Tire Program.[127] Missouri's Department of Natural Resources ran the program and offered grants to qualifying nonprofit organizations that install playground surfaces made of recycled tires.[128] However, the Department of Natural Resources had a strict policy of denying grants to applicants controlled by religious entities, including churches.[129]

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[121] *See* Hillary Byrnes, *Symposium: The Constitution Provides a Level Playing Field for People of Faith*, SCOTUSBLOG (June 27, 2017, 10:56 AM), http://www.scotusblog.com/2017/06/symposium-constitution-provides-level-playing-field-people-faith/.

[122] *See* Leslie Griffin, *Symposium: Bad News from Trinity Lutheran – Only Two Justices Support the Establishment Clause*, SCOTUSBLOG (June 26, 2017, 5:44 PM), http://www.scotusblog.com/2017/06/symposium-bad-news-trinity-lutheran-two-justices-support-establishment-clause/.

[123] Chemerinsky, *supra* note 118.

[124] *See Trinity Lutheran Church of Columbia v. Comer: A Serious Threat to Religious Freedom*, AMS. UNITED FOR SEPARATION CHURCH & ST., https://www.au.org/content/trinity-lutheran-church-of-columbia-v-comer-a-serious-threat-to-religious-freedom/ (last visited Mar. 26, 2019).

[125] Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2017 (2017).

[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] *Id.*

The Department's policy was based on a Missouri constitutional provision that prohibits financial assistance directly to religious entities:

> [N]o 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.[130]

The constitutional provision had a strict separationist policy and prevented the state from providing funding to any religious entity.[131] Pursuant to this state constitutional provision, the Missouri Department of Natural Resources denied Trinity Lutheran's application, although the department awarded fourteen grants and Trinity Lutheran was ranked fifth out of the forty-four applicants.[132]

Trinity Lutheran sued in federal district court, alleging that the Department's denial of a grant based solely on religious status violated the Free Exercise Clause of the First Amendment.[133] The district court dismissed the suit and equated the case to *Locke v. Davey*, where the Supreme Court upheld against a Free Exercise Clause challenge Washington state's decision not to fund devotional theology degrees.[134] The district court held that the Free Exercise Clause did not require Missouri to provide the grant to Trinity Lutheran.[135]

The Eighth Circuit affirmed,[136] determining that the State of Missouri had discretion whether to provide a grant to Trinity Lutheran and other religious entities.[137] In the view of the Eighth Circuit, the State could award grants to religious entities without violating the Establishment Clause and could refuse to provide grants to religious institutions without violating the Free Exercise Clause.[138] In other words, the Eighth Circuit believed this issue fell within the "play in the joints." In response to the Eighth Circuit's decision, the Trinity Lutheran Church filed a petition for a writ of certiorari, alleging that the public benefit at issue—a grant for rubberized playground surfaces was "[far] removed from the state's antiestablishment concerns," as it "serve[s] no religious function

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130 *Id.* (quoting MO. CONST. art. I, § 7).
131 *Id.*
132 *Id.* at 2018.
133 Trinity Lutheran Church of Columbia, Inc. v. Pauley, 976 F. Supp. 2d 1137, 1140 (W.D. Mo. 2013).
134 *Id.* at 1140, 1147 (citing Locke v. Davey, 540 U.S. 712, 715 (2004)).
135 *Id.* at 1155.
136 Trinity Lutheran Church of Columbia, Inc. v. Pauley, 788 F.3d 779, 785 (8th Cir. 2015).
137 *Id.*
138 *Id.*

or purpose."[139] Additionally, numerous interested parties filed amicus curiae briefs in support of both the Trinity Lutheran Church and the Missouri Department of Natural Resources.[140] Their assertions ranged from concerns that the government was discriminating solely on the basis of religion[141] to objections to the use of taxpayer funds to support religious activities.[142]

B. The Supreme Court Decision

On January 15, 2016, the U.S. Supreme Court granted Trinity Lutheran's petition for certiorari *sub nom.*[143] Unfortunately, just a month after the Supreme Court granted certiorari, Justice Antonin Scalia passed away.[144] With an eight-member Court, it was uncertain how the case would be decided.[145] But this turned out to be of no concern since the case remained in limbo until Justice Gorsuch's confirmation.[146] Just twelve days after his confirmation, the Supreme Court heard oral arguments for the case.[147] With a complete panel of nine Justices, the Court reversed, with a 7–2 decision in favor of Trinity Lutheran Church.[148]

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[139] Petition for a Writ of Certiorari at 1–2, Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017) (No. 15-577).

[140] *See, e.g.*, Amicus Brief of the American Center for Law & Justice in Support of Petitioners, *Trinity Lutheran Church*, 137 S. Ct. 2012 (No. 15-577); Brief of Amicus Curiae American Civil Liberties Union et al. in Support of Respondent, *Trinity Lutheran Church*, 137 S. Ct. 2012 (No. 15-577); Brief of Amicus Curiae Ethics & Religious Liberty Commission in Support of Petitioner, *Trinity Lutheran Church*, 137 S. Ct. 2012 (No. 15-577); Brief of Religious & Civil Rights Organizations as Amici Curiae in Support of Respondent, *Trinity Lutheran Church*, 137 S. Ct. 2012 (No. 15-577).

[141] *See, e.g.*, Brief of Amicus Curiae Ethics & Religious Liberty Commission, *supra* note 140, at 15.

[142] *See, e.g.*, Brief of Amicus Curiae American Civil Liberties Union et al., *supra* note 140, at 19.

[143] *Trinity Lutheran Church of Columbia, Inc. v. Comer*, SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/trinity-lutheran-church-of-columbia-inc-v-pauley/ (last visited Mar. 26, 2019).

[144] Richard W. Garnett & Jackson C. Blais, *Religious Freedom and Recycled Tires: The Meaning and Implications of* Trinity Lutheran, 2016 CATO SUP. CT. REV. 105, 111 (2016–2017); Eva Ruth Moravec et al., *The Death of Antonin Scalia: Chaos, Confusion and Conflicting Reports*, WASH. POST (Feb. 14, 2016), https://www.washingtonpost.com/politics/texas-tv-station-scalia-died-of-a-heart-attack/2016/02/14/938e2170-d332-11e5-9823-02b905009f99_story.html?utm_term=.09018f133903.

[145] *See* Ron Elving, *On the Docket, in Limbo: Scalia's Death Casts Uncertainty on Key Cases*, NPR (Feb. 14, 2016, 11:00 PM), http://www.npr.org/2016/02/14/466752491/on-the-docket-in-limbo-scalias-death-casts-uncertainty-on-key-cases.

[146] *See* Lisa Mascaro & David G. Savage, *Senate Confirms Neil Gorsuch, Trump's Supreme Court Nominee*, L.A. TIMES (Apr. 7, 2017, 2:10 PM), http://www.latimes.com/politics/la-na-pol-gorsuch-confirmed-20170407-story.html.

[147] *See* Jeffrey Toobin, *The Conservative Agenda for Gorsuch's First Week*, NEW YORKER (Apr. 18, 2017), https://www.newyorker.com/news/daily-comment/the-conservative-agenda-for-gorsuchs-first-week.

[148] Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2025 (2017).

The opinion of the Court was delivered by Chief Justice Roberts, except as to footnote three.[149] In the opinion, the Court determined that the Department's policy discriminated against "otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character."[150] The State of Missouri argued that the State's decision to "merely declin[e] to extend funds" and provide the grant did not pose any substantial burden on the Trinity Lutheran Church's free exercise rights because it left it able to practice its religious beliefs.[151] Chief Justice Roberts rejected the State's argument.[152] The Court distinguished the *Locke v. Davey* decision on which the lower courts relied:

> 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.[153]

The Court used this "who you are" versus "what you do" distinction and emphasized that the student in *Locke* was still able to obtain a secular degree using the scholarship while studying devotional theology at another school.[154] In this case, however, the Court framed the issue to say that Trinity Lutheran was put to a choice of "participat[ing] in an otherwise available benefit program or remain[ing] a religious institution."[155] Citing *Church of Lukumi Babalu Aye, Inc. v. Hialeah* and *McDaniel v. Paty*, the Court determined that this kind of policy triggers "the most exacting scrutiny."[156] Because the State was unable to offer any "state interest of the highest order,"[157] the Court held that the Department's policy violated the Free Exercise Clause.[158] Despite the evident federalism concerns implicated by the Court's choice to override the State of Missouri's decision, the Court failed to acknowledge the underlying federalism concerns in its decision. Interestingly, several Justices who are members of the Federalist Society were indifferent to Missouri's state prohibitions on public funding of religion.[159] Despite this seemingly broad holding, the opinion

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149 *Id.* at 2016. Footnote three will be discussed below.

150 *Id.* at 2027.

151 *Id.* at 2022; *see also* Garnett & Blais, *supra* note 144, at 114.

152 *Trinity Lutheran Church*, 137 S. Ct. at 2022; *see also* Garnett & Blais, *supra* note 144, at 114.

153 *Trinity Lutheran Church*, 137 S. Ct. at 2023.

154 *Id.*; *see also* Garnett & Blais, *supra* note 144, at 115.

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

156 *Id.* at 2021. *See generally* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (reasoning that certain laws that burden religious practices must be evaluated under strict scrutiny standard); McDaniel v. Paty, 435 U.S. 618 (1978) (applying "close" scrutiny to a statute prohibiting ministers from serving as delegates to state's constitutional conventions).

157 *Trinity Lutheran Church*, 137 S. Ct. at 2024 (citing *McDaniel*, 435 U.S. at 628).

158 *Trinity Lutheran Church*, 137 S. Ct. at 2024–25.

159 *See* Ira C. Lupu & Robert W. Tuttle, Trinity Lutheran Church v. Comer*: Dodging on the Playground*,

included a mysterious footnote three which purported to limit the decision: "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."[160] Despite its attempt to limit the decision's breadth, footnote three was only joined by four Justices and is not the opinion of the Court.[161]

In a short concurrence, Justice Thomas joined the Court's opinion except as to footnote three, stating that even a "mil[d] kind" of discrimination against religion is troubling and that the Court properly construed *Locke* narrowly.[162] Justice Gorsuch also joined the Court's opinion except for footnote three, stating that "the general principles here do not permit discrimination against religious exercise—whether on the playground or anywhere else."[163] Justice Breyer also concurred in the judgment, emphasizing that the scrap tire program was designed to improve the safety and health of children.[164] He likened the "public benefit" at issue to government services such as police and fire protection, and argued Trinity Lutheran should not be excluded from the public benefit.[165] However, Justice Breyer limited his decision and wanted to "leave the application of the Free Exercise Clause to other kinds of public benefits for another day."[166]

Justice Sotomayor dissented, with only Justice Ginsburg joining her dissent.[167] Justice Sotomayor believed the requirement of state funding to a religious institution violated the Establishment Clause:

> 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 precedent and our history, and its reasoning weakens

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GEO. WASH. L. REV. ON THE DOCKET (July 5, 2017), http://www.gwlr.org/trinity-lutheran-church-v-comer/.

160 *Trinity Lutheran Church*, 137 S. Ct. at 2024 n.3.

161 *Id.* at 2016, 2024 n.3.

162 *Id.* at 2025 (Thomas, J., concurring in part) (quoting Locke v. Davey, 540 U.S. 712, 720 (2004)); *see* Garnett & Blais, *supra* note 144, at 116.

163 *Trinity Lutheran Church*, 137 S. Ct. at 2026 (Gorsuch, J., concurring in part); *see also* Garnett & Blais, *supra* note 144, at 116–17.

164 *Trinity Lutheran Church*, 137 S. Ct. at 2026–27 (Breyer, J., concurring in the judgment).

165 *Id.* at 2027.

166 *Id.*; *see also* Garnett & Blais, *supra* note 144, at 117.

167 *Trinity Lutheran Church*, 137 S. Ct. at 2027 (Sotomayor, J., dissenting).

> this country's longstanding commitment to a separation of church and state beneficial to both.[168]

Thus, in Justice Sotomayor's perspective, *Trinity Lutheran* is more than just a case about playground resurfacing; it is a decision holding that the Constitution requires the government to provide public funds directly to a church, which weakens the separation between church and state.[169]

Justice Sotomayor made two key points. First, she argued that contrary to both the Church and the Department's concessions, "[t]he Establishment Clause does not allow Missouri to grant the Church's funding request because the Church uses the Learning Center, including its playground, in conjunction with its religious mission."[170] She argued that the Court's precedent establishes that "[t]he government may not directly fund religious exercise" and thus the grant would violate the Establishment Clause.[171] Second, Justice Sotomayor argued that Missouri's religion-based line-drawing was acceptable, and compared the case to *Locke v. Davey*.[172] "As was true in *Locke*, a prophylactic rule against the use of public funds for houses of worship is a permissible accommodation of those weighty interests [of taxpayers]."[173] Thus, she believed the refusal to provide the grant to the church was not in violation of the Establishment Clause.

Justice Sotomayor argued that the Court's judgment created the rule that "[t]he government may draw lines on the basis of religious status to grant a benefit to religious persons or entities but it may not draw lines on that basis when doing so would further the interests the religion clauses protect in other ways."[174] From her perspective, this "lopsided outcome" brushes aside centuries of judicial history and "jeopardizes the government's ability to remain secular."[175] Finally, Justice Sotomayor warned of what the *Trinity Lutheran* decision "might enable tomorrow," fearing that the decision could be manipulated to enable government funding of religion in other ways.[176]

On its face, the issue presented in *Trinity Lutheran* seems relatively simple: whether the State of Missouri must provide a reimbursement grant to replace pea

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168 *Id.*
169 *Id.*
170 *Id.* at 2028.
171 *Id.*
172 *Id.* at 2036.
173 *Id.*
174 *Id.* at 2040.
175 *Id.* at 2040–41.
176 *Id.* at 2041 n.14.

gravel with scrap tire on a church-run preschool's playground.[177] As Chief Justice Roberts wrote, the literal consequence of this policy "is, in all likelihood, a few extra scraped knees."[178] However, as Justice Sotomayor's dissent pointed out, the issue is much more complex. The *Trinity Lutheran* decision raised the question of whether state Blaine Amendments should be constitutionally invalid or whether the Supreme Court should embrace the "play in the joints" approach adopted in *Locke v. Davey* and allow states discretion in providing aid to religious institutions.[179] In other words, the question is whether the First Amendment allows states to deny an otherwise-available benefit to a religious institution because of its religious status.[180]

Specific external factors likely shaped the outcome in favor of Trinity Lutheran Church. First, the case included the ideal set of facts in favor of the church—children, health, and safety. It is very challenging to issue an opinion in opposition to those interests.[181] Second, in addition to the set of "good facts," the Church's argument was framed in terms of discrimination,[182] which likely helped Chief Justice Roberts win over some of the more moderate and left-leaning Justices. Third, the inclusion of footnote three was also a probable factor in obtaining the approval of those Justices.[183] Finally, the shift in the Supreme Court's membership since *Locke v. Davey*, particularly the addition of Justice Gorsuch contributed to the decision's outcome. It is striking to note, particularly in the current tumultuous political climate, that, as some would characterize it, a seven-Justice plurality ruled that the Constitution requires the government to provide funding directly to a church.

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177 *Id.* at 2014.

178 *Id.* at 2024–25.

179 *Id.* at 2019.

180 *Id.* at 2015.

181 *See* Mark Sherman, *Playground Case Touches on Separation of Church and State*, HAMODIA (Apr. 20, 2017, 3:19 PM), https://hamodia.com/2017/04/20/playground-case-touches-separation-church-state/ ("All we're talking about is a safer surface on the playground for when kids play."); Nina Totenberg, *Supreme Court Rules Religious Schools Can Use Taxpayer Funds for Playground*, NPR (June 26, 2017, 10:28 AM), https://www.npr.org/2017/06/26/534084013/supreme-court-rules-religious-school-can-use-taxpayer-funds-for-playground ("[T]he government in this case 'is not being asked to fund a religious activity. It's funding the playground where students play.'").

182 *Trinity Lutheran Church*, 137 S. Ct. at 2021.

183 Amy Howe, *Argument Analysis: Justices Leaning Toward a Ruling for* Trinity Lutheran *on the Merits*, SCOTUSBLOG (Apr. 19, 2017, 2:14 PM), https://www.scotusblog.com/2017/04/argument-analysis-justices-leaning-toward-ruling-trinity-lutheran-merits/.

C. Implications Going Forward

The *Trinity Lutheran* decision is likely to have far-reaching implications for the Supreme Court's religion clause jurisprudence. The decision is likely to have a detrimental impact on federalism and state sovereignty, potentially implies a doctrinal shift to a level of stricter scrutiny over free exercise cases, and has a potential impact on school voucher programs and school choice initiatives.

First, one of the most notable implications is the impact the *Trinity Lutheran* ruling will have on state sovereignty and federalism, particularly regarding states' ability to limit the funding they provide to religious organizations and institutions. The decision means that religious organizations cannot be denied government aid simply because of their religious character, despite state opposition to providing funding or a state constitutional provision that dictates otherwise. Thirty-eight states have constitutional provisions restricting aid to religious institutions, and *Trinity Lutheran* suggests that those provisions may no longer be constitutional.[184] It is uncertain what the future holds for these state constitutional provisions, including Blaine Amendments. As it currently stands, the decision created a lack of clarity on how states may provide funding or refuse to provide funding without violating the Free Exercise Clause.

Second, the decision seems to imply a doctrinal shift to a level of stricter scrutiny over free exercise cases, as also evidenced by the recent decisions of *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*[185] and *Burwell v. Hobby Lobby Stores, Inc*.[186] In *Hosanna-Tabor* the Supreme Court created a "ministerial exception" and upheld the right of religious organizations to have autonomy to hire and fire people as they see fit.[187] In *Hobby Lobby*, the Court held that Hobby Lobby, a closely held corporation, had standing as a "person" under the statutory definition of the Religious Freedom Restoration Act (RFRA) and thus was not required to provide its employees with mandatory health insurance covering four contraceptive methods that target fertilized eggs.[188] *Hobby Lobby* is significant because it expanded religious freedom claims under RFRA to for-profit corporations.[189] These recent decisions, coupled with *Trinity Lutheran*, seem to suggest a sea change, a deviation from *Smith* neutrality to a return of a stricter scrutiny regime and a movement towards

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184 *See* Charles J. Russo & William E. Thro, *Blessed Trinity: Implications of* Trinity Lutheran Church of Columbia v. Comer *for Religious Liberty*, 44 RELIGION & EDUC. 247, 256 (2017).

185 565 U.S. 171 (2012).

186 134 S. Ct. 2751 (2014).

187 565 U.S. at 195–96.

188 134 S. Ct. at 2755.

189 *Id.*

accommodation of religion. However, it remains to be seen how far the Court will go towards a return to a stricter scrutiny regime. Thus, the uncertainty from the decision is likely to generate an influx of litigation to determine the exact extent of the decision and where the relationship between the Establishment Clause and Free Exercise Clause stands.

Third, the decision will likely have a vast impact on school voucher programs and school choice initiatives. After *Trinity Lutheran*, it seems that if state programs choose to provide special benefits to private schools, they must provide religiously affiliated private schools the same treatment on an equal basis.[190] This requirement will necessitate that already scarce taxpayer dollars must cover students enrolled in religious private schools in addition to nonreligious schools.[191] Whenever a state has a voucher program for nonreligious private schools, *Trinity Lutheran* suggests that religiously affiliated schools must also be included.[192] While footnote three purported to limit the judgment to playground resurfacing and emphasized that the decision does not apply to school vouchers or other forms of funding,[193] the Court's actions following the decision seem to suggest otherwise. Strikingly, the day after the decision was handed down, the Supreme Court issued grant and vacate orders in four school voucher cases for "further consideration in light of *Trinity Lutheran*."[194] These cases construed state constitutions to exclude the use of vouchers at religious schools.[195] One was a case from the Supreme Court of New Mexico and the other three were from the Supreme Court of Colorado.[196] The vacated New Mexico Supreme Court decision, *Moses v. Skandera*, ruled that the State's donation of free textbooks to private school students violated the state constitutional provision prohibiting state mineral funds to be used for the support of sectarian, denominational, or private schools.[197] On remand, the court determined that in light of *Trinity Lutheran*, the textbook loan program provides

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190 *See* Russo & Thro, *supra* note 184, at 257.

191 *Id.*

192 *Id.*

193 Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2024 n.3 (2017).

194 *See* Order List: Certiorari – Summary Dispositions, 582 U.S. (2017), https://www.supremecourt.gov/orders/courtorders/062717zr_6537.pdf.

195 Lupu & Tuttle, *supra* note 159.

196 *See* Russo & Thro, *supra* note 184, at 257; Arianna Prothero, *Why We Should Expect More Lawsuits Over Private School Vouchers*, EDUC. WK. BLOG (June 30, 2017, 9:00 AM), http://blogs.edweek.org/edweek/charterschoice/2017/06/expect_more_lawsuits_over_private_school_vouchers.html?cmp=soc-edit-tw&print=1.

197 367 P.3d 838, 839 (N.M. 2015), *cert. granted*, *vacated sub nom.* N.M. Ass'n of Nonpub. Sch. v. Moses, 137 S. Ct. 2325 (2017).

a generally available public benefit to students and does not result in the use of public funds in support of private schools and is therefore constitutional.[198]

The vacated Colorado Supreme Court decision in *Taxpayers for Public Education v. Douglas County School District*[199] was dismissed by the Colorado Supreme Court following the Court's remand.[200] In that case, the Colorado Supreme Court ruled that a voucher program in Douglas County was unconstitutional because it allowed students to use public funds towards tuition at private schools, and over 90% of the scholarship recipients attended religious schools.[201] The Colorado Supreme Court found that the scholarship program violated the Colorado Constitution, which barred governmental assistance to religious schools.[202] Following the Court's remand, the Colorado Supreme Court dismissed the case due to the newly elected Douglas County school board's decision to end the voucher program and the pending litigation.[203] Although the *Trinity Lutheran* Court failed to provide clear guidance on when a state violates the Free Exercise Clause regarding government support of religion, the facts of *Trinity Lutheran* are very different from the *Douglas County* facts.[204]

Despite the outcomes of *Moses* and *Douglas County*, the remanding of these cases begs the question of whether the *Trinity Lutheran* decision will aid the school choice movement that has been hampered in the past by state constitutional provisions, including Blaine Amendments.[205] The decision is likely to invite an influx of litigation regarding school choice. While the *Trinity Lutheran* ruling does not necessarily mean that these constitutional provisions will be nullified across the states, it will undoubtedly encourage challenges to constitutional provisions and state laws that prohibit school choice programs. For instance, if *Trinity Lutheran* is interpreted as Justices Gorsuch and Thomas would like, religiously affiliated charter schools that are supported with public funding may have a free exercise right to engage in religious practice and

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198 Moses v. Ruszkowski, No. S-1-SC-34974, 2018 WL 6566646, at *1 (N.M. Dec. 13, 2018).

199 351 P.3d 461 (Colo. 2015), *cert. granted*, *vacated sub nom.* Doyle v. Taxpayers for Pub. Educ., 137 S. Ct. 2324 (2017).

200 Liz Hayes, *Colorado Supreme Court Ends Douglas County School Voucher Lawsuit, a Win for Public Education and Religious Freedom*, AMS. UNITED FOR SEPARATION CHURCH & ST. (Jan. 26, 2018), https://www.au.org/blogs/wall-of-separation/colorado-supreme-court-ends-douglas-county-school-voucher-lawsuit-a-win.

201 *Douglas Cty.*, 351 P.3d at 466.

202 *Id.* at 475.

203 Hayes, *supra* note 200.

204 *Compare Douglas Cty.*, 351 P.3d at 475, *with* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2017–18 (2017).

205 *See* Richard D. Komer, Trinity Lutheran *and the Future of Educational Choice: Implications for State Blaine Amendments*, 44 MITCHELL HAMLINE L. REV. 551 (2018).

teaching.[206] The ruling could also potentially extend to higher education and universities, and contrary to *Locke*, may require states to provide funding for religious institutions or religious degree programs.

Interestingly, in March 2019, the Supreme Court avoided an opportunity to expand on the *Trinity Lutheran* ruling when it denied certiorari to *Morris County Board of Chosen Freeholders v. Freedom from Religion Foundation*.[207] The denial of certiorari leaves in place a New Jersey Supreme Court ruling that prohibited a county from using public funds to provide historical preservation grants to religious institutions.[208] In light of the denial of certiorari, conservative Justices Kavanaugh, Gorsuch, and Alito issued a statement in opposition of the lower court ruling: "Barring religious organizations because they are religious from a general historic preservation grants program is pure discrimination against religion."[209] This statement seems to indicate that although certiorari was denied in this particular case, the Justices would invite a future opportunity to expand on the *Trinity Lutheran* decision in the future, potentially providing religious institutions with greater opportunities to receive public funding.[210]

III. HOW THE *TRINITY LUTHERAN* DECISION UNDERMINES FEDERALISM

Despite the seeming consensus of the Justices, the Court reached the wrong conclusion in the *Trinity Lutheran* judgment. The decision undercuts the federalism at work in *Locke v. Davey* and undermines the separation between religious freedom and governmental authority. The majority opinion weakens state sovereignty concerning state antiestablishment interests. Although the dissent reached the correct result in determining that Missouri was not required to provide the grant to the church, the dissent incorrectly based its argument on the proposition that the grant violated the Establishment Clause, rather than recognizing that the discretion of whether to provide the grant should be left to the state.

Section A discusses Missouri's antiestablishment interests in its decision to refuse to provide state tax funds to a religious organization as well as the new federalist revolution in the Court's general jurisprudence in the past generation.

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206 *Id.*

207 Andrew Chung, *U.S. High Court Turns Away Religious Rights Case Over Church Grants*, REUTERS (Mar. 4, 2019, 9:47 AM), https://www.reuters.com/article/us-usa-court-religion/u-s-high-court-turns-away-religious-rights-case-over-church-grants-idUSKCN1QL1I1; *see* Morris Cty. Bd. of Chosen Freeholders v. Freedom from Religion Found., 139 S. Ct. 909 (2019) (mem.).

208 Chung, *supra* note 207.

209 *Morris Cty. Bd. of Chosen Freeholders*, 139 S. Ct. at 911; *see also* Chung, *supra* note 207.

210 Chung, *supra* note 207.

Section B discusses the proposition that federal courts should leave discretion for tax issues to the states unless there is clear favoritism or bald discrimination of religion, neither of which occurred in *Trinity Lutheran*. Section C compares *Trinity Lutheran* to precedent that held state programs do not promote clear favoritism or bald discrimination of religion, and instead fall within the "play in the joints," such as *Walz v. Tax Commission of New York* and *Locke v. Davey*. Section D explores how the Court in *Trinity Lutheran* allowed the church to use the Free Exercise Clause as a "heckler's veto" of state spending in accordance with its state constitutional Blaine Amendment restrictions. Section E addresses other federalism concerns caused by the *Trinity Lutheran* decision, such as the importance of local autonomy and the ability of state and local governments to conduct fact-finding and implement tailored policies. This Comment argues that the choice of how to use state taxpayer money should be left to each state's discretion unless a state is displaying bald favoritism of religion or bald discrimination against religion.[211]

A. State Antiestablishment Interests and New Federalism

In *Trinity Lutheran*, the State of Missouri's refusal to provide a grant to a church for a rubberized playground surface based on its state constitutional provision of denying grants to religious institutions was neither bald discrimination against religion nor favoritism. In refusing the grant, the state was upholding a long-standing state policy to enforce the state's antiestablishment interests. As the Court of Appeals observed, the State of Missouri "has a long history of maintaining a very high wall between church and state."[212] The *Trinity Lutheran* opinion did not adequately address the antiestablishment issues, remarking only that "[t]he parties agree that the Establishment Clause of [the First] Amendment does not prevent Missouri from including Trinity Lutheran in the Scrap Tire Program."[213] However, just because "the parties agree" that there was no Establishment Clause violation does not mean that the state does not have an important antiestablishment interest in preventing the funds from going to a religious organization. Faithfulness to the state's antiestablishment ideal requires the state to draw lines between religious and nonreligious institutions. This line drawing is necessary and is not based on animus or intentional discrimination against any particular religion, or against religion in general.

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[211] *Cf.* Ira C. Lupu & Robert W. Tuttle, *Federalism and Faith*, 56 EMORY L.J. 19, 67–83 (2006); Jesse R. Merriam, *Finding a Ceiling in a Circular Room:* Locke v. Davey*, Federalism, and Religious Neutrality*, 16 TEMP. POL. & C.R. L. REV. 103, 106 (2006).

[212] Trinity Lutheran Church of Columbia, Inc. v. Pauley, 788 F.3d 779, 783 (8th Cir. 2015) (quoting Luetkemeyer v. Kaufmann, 364 F. Supp. 376, 383–84 (W.D. Mo. 1973), *aff'd*, 419 U.S. 888 (1974)).

[213] Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2019 (2017).

The way in which the First Amendment religion clauses are applied to the states determines the amount and manner of control over religion-based and religion-influenced policies of state and local governments.[214] In failing to address Missouri's Establishment Clause concerns, the *Trinity Lutheran* majority disregards the State's antiestablishment interests and considerations of federalism more broadly. Federalism is the principle that power should be divided between the federal government and the state governments.[215] The Tenth Amendment provides that the powers not delegated to the federal government or prohibited to the states are expressly reserved to the states.[216] Constitutional provisions specify separate domains of authority for both state and federal governments.[217] While the exact division of authority is up for debate, it is necessary for the federal government to leave some autonomy to the states, for reasons such as the promotion of political participation, self-government, integration of public policy and local views, reasons of comity, and avoidance of concentration of powers.[218] Taxation is a concurrent power, one of the powers that is shared by both state and federal governments.[219]

In the past generation, there has been a neo-federalist revolution in the Supreme Court's general jurisprudence.[220] Many recent seminal cases, such as *United States v. Lopez*,[221] *Seminole Tribe v. Florida*,[222] *Alden v. Maine*,[223] *Printz v. United States*,[224] and *City of Boerne v. Flores*[225] are decisions in which the Court has limited federal power to subject states to congressional control.[226] These cases demonstrate the Court's commitment to "new federalism" arising

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214 *See* Ira C. Lupu, *Federalism and Faith Redux*, 33 HARV. J.L. & PUB. POL'Y 935, 935 (2010).

215 *See* ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, M-149, A FRAMEWORK FOR STUDYING THE CONTROVERSY CONCERNING THE FEDERAL COURTS AND FEDERALISM 13 (1986).

216 U.S. CONST. amend. X.

217 ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, *supra* note 215.

218 *Id.*

219 *See Federalism*, USLEGAL, https://system.uslegal.com/federalism/ (last visited Mar. 26, 2019).

220 *See* Sandra L. Lynch & Christopher DeFrancis, *The New Federalism*, 44 BOS. B.J. 8, 8 (2000).

221 *See generally* 514 U.S. 549 (1995) (striking down an act of Congress as falling outside its Commerce Clause authority). The *Lopez* decision was the first in almost sixty years to reach this conclusion. *See* Allison H. Eid, *Teaching New Federalism*, 49 ST. LOUIS U. L.J. 875, 875 (2005).

222 *See generally* 517 U.S. 44 (1996) (holding that Congress cannot abrogate the states' Eleventh Amendment immunity when acting under its Article I powers); *see also* Lynch & DeFrancis, *supra* note 220.

223 *See generally* 527 U.S. 706 (1999) (holding that Article I does not provide Congress with the power to subject nonconsenting states to private suits in state court); *see also* Lynch & DeFrancis, *supra* note 220.

224 *See generally* 521 U.S. 898 (1997) (holding that the federal government cannot make state officials carry out federal policy); *see also* Leon Friedman, *Supreme Court Federalism Decisions*, 16 TOURO L. REV. 243, 246 (2000).

225 *See generally* 521 U.S. 507 (1997) (holding that Congress exceeded its Section 5 power when it enacted RFRA); *see also* Lynch & DeFrancis, *supra* note 220.

226 *See* Lynch & DeFrancis, *supra* note 220.

from the Commerce Clause, the Tenth and Eleventh Amendments, and Section Five of the Fourteenth Amendment, which all limit congressional power.[227] Chief Justice Rehnquist has described these cases as determining the "distinction between what is truly national and what is truly local."[228] This federalist resurgence has been reflected in the Court's weakening of the Free Exercise and Establishment Clauses after *Employment Division v. Smith* in 1990.[229] Since *Smith*, the authority over religious liberty has shifted from the federal government to the states and away from courts to legislatures, due in part to the Supreme Court's recent emphasis on separation of powers and federalism.[230]

In fact, Justices such as Justice Thomas have pressed for the selective disincorporation of the Establishment Clause, suggesting that the Framers intended the Establishment Clause to leave full discretion and no limitations regarding religion to the states.[231] Disincorporation of the First Amendment religion clauses would occur if the Supreme Court held that the states were no longer bound by either or both of the religion clauses.[232] While a total disincorporation of the First Amendment religion clauses would not adequately ensure religious liberty in the United States, it would be favorable if the federal government relaxed its control over religion-based state and local policies and left the discretion to the states, particularly regarding states' own tax dollars. It is essential to recognize the importance of federalism and states' interests in prohibiting funding of religion in the way that the Establishment Clause itself does.

The issue of state taxes and government funding of religion presented in *Trinity Lutheran* should fall in the "play in the joints" space. In other words, providing a state-funded grant for a religious organization's playground would not violate the Establishment Clause, but the denial of a grant to a religious organization would not violate the Free Exercise Clause either. The Supreme Court has consistently treated religious taxation issues as falling "in the joints" between the Free Exercise and Establishment Clauses.[233] In other words, tax exemptions of religious organizations are not forbidden by the Establishment Clause if similar organizations are also exempt; and taxation of religious

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227 *See* Theodore W. Ruger, *New Federalism: Introduction*, 16 WASH. U. J.L. & POL'Y 89, 89 (2004).

228 *Id.* (citing United States v. Lopez, 514 U.S. 549, 567–68 (1995)).

229 *See generally* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990) (holding that the Free Exercise Clause allows a state to prohibit drug use for sacramental purposes).

230 WITTE, JR. & NICHOLS, *supra* note 27, at 2.

231 Lupu, *supra* note 214, at 936.

232 *Id.* at 935–36.

233 WITTE, JR. & NICHOLS, *supra* note 27, at 240.

organizations is permitted under the Free Exercise Clause, as long as similar organizations are taxed as well. Federal courts should give states deference to determine their own antiestablishment interests if their decisions do not result in discrimination or favoritism to specific beliefs or practices.

Without federal courts' interference, states, subject to their own state constitutions, should determine whether and how to support religiously affiliated educational or social services financially. As previously discussed, most states have their own antiestablishment constitutional provisions, such as the Blaine Amendments. These constitutional provisions were democratically proposed and adopted, and were intended to protect the same interests as the Establishment Clause.[234] These provisions recognize states' significant antiestablishment concerns that are firmly rooted in American history. As James Madison opined, the Framers thought it tyrannical to "force a citizen to contribute three pence only" to support a religion of which they were not a participant.[235] This historical basis is the reason why "[m]ost States that sought to avoid an establishment of religion around the time of the founding placed in their constitutions formal prohibitions against using tax funds to support the ministry."[236] In creating the religion clauses, the Framers sought to protect religion from interference by the government and, at the same time, to protect citizens from the tyranny of a state religion and from paying taxes to support a religion in which they did not participate.

In fact, the use of public funds for construction of church property or for religious instruction have long been said to encompass a strong antiestablishment interest. As explained in *Everson v. Board of Education*, "[t]he imposition of taxes to pay ministers' salaries and to build and maintain churches and church property aroused [the Framers'] indignation. It was those feelings which found expressions in the First Amendment."[237] These historical concerns regarding the use of tax funds to support building church property or aid in religious instruction are clearly implicated in *Trinity Lutheran*, as the grant would be used to improve a church facility, would indirectly aid in religious instruction by supporting a preschool that is a "ministry of the Church," and

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[234] *See* Richard B. Katskee, *Symposium: Religious Freedom, Not Religious Discrimination*, SCOTUSBLOG (Aug. 11, 2016, 9:18 AM), http://www.scotusblog.com/2016/08/symposium-religious-freedom-not-religious-discrimination/.

[235] *Id.*

[236] Locke v. Davey, 540 U.S. 712, 723 (2004); Brief of Religious & Civil Rights Organizations, *supra* note 140, at 9 (quoting *Locke*, 540 U.S. at 723).

[237] 330 U.S. 1, 11 (1947).

promoting a program that "allow[s] a child to grow spiritually."[238] Furthermore, even if the money used for the playground is for secular use, as the Church alleges that a playground surface is, that does not change the fact that money is fungible. In other words, the less money the Church must spend on resurfacing its playground, the more money it is able to spend on sectarian uses, such as religious services. These sectarian uses of state taxpayer dollars implicate state antiestablishment concerns.

B. No Bald Favoritism or Clear Discrimination of Religion

These historical concerns make clear that states such as Missouri have a legitimate interest in furthering these antiestablishment interests when enacting and complying with their state constitutional provisions that prohibit public funding of religion. The fact that a state has stricter constitutional provisions than the Establishment Clause itself does not mean that the state is discriminating against religion. In *Trinity Lutheran*, there was no intent to discriminate or display animus towards any particular religion. Instead, there was a more cautious discrepancy in judgment in how far the government can go to support religion. This so-called "discrimination" is a necessary line drawing between religious and nonreligious institutions to be faithful to antiestablishment ideals. These strong antiestablishment interests mean that federal courts should leave the discretion for tax issues to the states unless there is clear favoritism of religion or specific religious organizations[239] or clear discrimination against religion.[240]

Bald favoritism of religion in relation to state tax exemptions and funding is a violation of the First Amendment, as demonstrated in *Texas Monthly, Inc. v. Bullock*.[241] In *Texas Monthly*, religious organizations were exempt from paying sales taxes on periodicals or publications promoting or teaching religion, yet the sales tax exemption was not given to nonreligious publications.[242] *Texas Monthly* magazine did not qualify for the religious tax exemption and sued the State, claiming that the tax exemptions violated the Establishment Clause.[243] The Court held that under the First Amendment, a state could provide a tax

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238 Brief of Religious & Civil Rights Organizations, *supra* note 140, at 11–12.

239 Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 5 (1989) (holding that a sales tax exemption for publication advancing tenants of religious faith violates the Establishment Clause).

240 Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 845 (1995) (holding that a state could not discriminate in a public forum based on a religious viewpoint).

241 *Tex. Monthly*, 489 U.S. at 5.

242 *Id.*

243 *Id.* at 6.

exemption only if the exemption had a secular legislative purpose and a primary effect that neither advanced nor inhibited religion.[244] In *Texas Monthly*, the tax exemption had no secular purpose and served to subsidize religious teachings.[245] The *Texas Monthly* Court distinguished *Walz v. Tax Commission of New York*,[246] in which New York property tax exemptions used for religious, educational, or charitable purposes were upheld.[247] In *Walz*, "the benefits derived by religious organizations flowed to a large number of nonreligious groups as well."[248] The benefits in *Walz* were given to both religious and nonreligious groups; whereas, the tax exemption in *Texas Monthly* applied only to religious groups.[249] Justice Brennan, writing for the plurality, explained:

> Insofar as that subsidy is conferred upon a wide array of nonsectarian groups as well as religious organizations . . ., the fact that religious groups benefit incidentally does not deprive the subsidy of the secular purpose and primary effect mandated by the Establishment Clause. However, when government directs a subsidy exclusively to religious organizations that is not required by the Free Exercise Clause . . ., it provide[s] unjustifiable awards of assistance to religious organizations and cannot but 'convey a message of endorsement' to slighted members of the community.[250]

Thus, the *Texas Monthly* Court determined this award to religious organizations was bald favoritism of religion.[251] *Walz* and *Texas Monthly* collectively seem to indicate that states may give tax exemptions to religious organizations only if nonreligious charitable organizations are also beneficiaries, but bald favoritism, such as a tax exemption solely for religious groups, violates the Establishment Clause.[252] The Missouri policy in *Trinity Lutheran* did not exhibit bald favoritism towards religion, as its constitutional provision prohibited direct financial assistance to religious organizations, and the policy was initially intended to benefit nonreligious organizations and groups.[253]

Bald discrimination against religion in relation to state funding is also prohibited by the First Amendment, as exemplified in *Rosenberger v. Rector &*

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244 *Id.* at 14–15, 25.
245 *Id.* at 5
246 *Id.* at 15–16; Walz v. Tax Comm'n of New York, 397 U.S. 664, 697 (1970).
247 *Walz*, 397 U.S. at 668; *see also* CHEMERINSKY, *supra* note 21, at 1298 (citing *Walz*, 397 U.S. at 664).
248 CHEMERINSKY, *supra* note 21, at 1298–99 (citing *Tex. Monthly*, 489 U.S. at 11).
249 *Tex. Monthly*, 489 U.S. at 11.
250 *Id.* at 14–15.
251 *Id.* at 15.
252 CHEMERINSKY, *supra* note 21, at 1299.
253 Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2017 (2017).

Visitors of the University of Virginia.[254] In *Rosenberger*, a student Christian publication at the University of Virginia was denied funding solely because the publication "primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality," as prohibited by the University's policy.[255] The student publication claimed that this refusal violated its First Amendment free speech rights.[256] *Rosenberger* highlights the tension between the First Amendment's prohibition against establishment of religion and its protection of free speech rights.[257] The Court held that the state could not discriminate in a public forum based on viewpoint, as the university denied funding solely because the publication presented a Christian viewpoint, which was a violation of the First Amendment.[258] *Trinity Lutheran* is not analogous to *Rosenberger*, because *Trinity Lutheran* is based solely on a free exercise claim,[259] whereas *Rosenberger* was not based on a free exercise claim. *Rosenberger* was grounded in Free Speech Clause concerns and is about viewpoint discrimination.[260] Furthermore, *Rosenberger* did not involve discretionary benefits or a house of worship as in *Trinity Lutheran*; instead, *Rosenberger* involved the denial of separate constitutional rights to a religious group.[261]

In *Trinity Lutheran*, the denial of a grant for a rubberized playground surface did not result in favoritism, and despite the Church's arguments to the contrary, it did not result in discrimination against religion. The Missouri program did not distinguish among religions or condition the receipt of a grant on a specific religious belief. Instead, the program excluded all religious organizations from eligibility.[262] In refusing to provide a grant to the Church, Missouri was merely following its long-standing state constitutional provision, which was intended to protect against state antiestablishment concerns.

C. Trinity Lutheran *Compared to* Locke v. Davey *and* Walz v. Tax Commission

Most situations related to religion and state taxation do not fall squarely into the categories of blatant discrimination or clear favoritism. State programs that do not promote blatant inequality and viewpoint discrimination of religion or

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254 Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 822, 842–46 (1995).
255 *Id.* at 822–23.
256 *Id.* at 827.
257 CHEMERINSKY, *supra* note 21, at 1250.
258 *Rosenberger*, 515 U.S. at 845.
259 Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2017 (2017).
260 *Rosenberger*, 515 U.S. at 823.
261 *See* Lupu & Tuttle, *supra* note 159.
262 *Trinity Lutheran Church*, 137 S. Ct. at 2017.

clear favoritism of religion fall within the "play in the joints," such as in *Walz v. Tax Commission of New York*[263] and *Locke v. Davey*.[264] As the Court determined in *Walz*, a New York property tax exemption for religious, educational, or charitable purposes was constitutionally permissible, because the "[t]he legislative purpose of a property tax exemption is neither the advancement nor the inhibition of religion; it is neither sponsorship nor hostility."[265] Rather, the goal of the state tax exemption was to help non-profit institutions and entities that the State valued as important to the community.[266] The *Walz* Court recognized the tension between the First Amendment religion clauses and the difficulty in finding "a neutral course between the two religion clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other."[267] Ultimately, the *Walz* Court determined the issue fell within the "play in the joints" and was deferential to the State's interest in furthering these institutions.[268] The *Walz* Court rightfully determined that states should have the freedom to regulate what they decides to tax or exempt from taxation.[269] The *Trinity Lutheran* Court should have followed *Walz*, and deferred to the state's line drawing in refusing to provide the grant to the church. As Justice Sotomayor aptly pointed out in her *Trinity Lutheran* dissent, "[the] 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."[270]

Further, as the Court determined in *Locke*, the State's denial of a scholarship for a theology degree is constitutionally permissible, and the decision of what to do with state funds is up to the State's discretion.[271] The *Trinity Lutheran* Court attempted to distinguish *Locke* by pointing out that:

> 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.[272]

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263 397 U.S. 664, 669 (1970).

264 540 U.S. 712, 718–19 (2004).

265 *Walz*, 397 U.S. at 672.

266 *Id.* at 672–73.

267 *Id.* at 668–69.

268 *Id.* at 669.

269 *Id.* at 672–73.

270 Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2038 (2017) (Sotomayor, J., dissenting).

271 Locke v. Davey, 540 U.S. 712, 724–25 (2004).

272 *Trinity Lutheran Church*, 137 S. Ct. at 2023.

This argument seems to be implying that the free exercise interests were greater in *Trinity Lutheran* than *Locke*.

However, the *Trinity Lutheran* Court failed to acknowledge a critical point: by providing a scholarship for an individual to attend a university and pursue any major of their choosing such as in *Locke*, even if the individual chose to pursue a theology or religious major, the state funding is indirect rather than direct aid. If an individual receives a state grant, even if they choose to use it to pursue a religious major, the path from the state government to financial support of religion is insulated by the individual's choice between spending the funds on religious or nonreligious uses. In the past, the Court has emphasized that the individual's choice of whether to support religion is different than the state's direct funding of religion.[273] In fact, the Court has said that indirect aid or government funding to a private individual who independently determines whether to use it for religious or nonreligious activity is less likely to raise Establishment Clause concerns than direct aid:

> *Mueller*, *Witters*, and *Zobrest* thus make clear that where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause. A program that shares these features permits government aid to reach religious institutions only by way of the deliberate choices of numerous individual recipients. The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits.[274]

In contrast, if the state provides funding directly to the religious organization, it is more likely to raise Establishment Clause concerns.[275] In a direct aid case, the state actions are not softened by an individual decision regarding the use of the funds, such as in indirect aid cases. *Trinity Lutheran* is a direct aid case because the funds from Missouri were to be given directly to the Church, without the mitigating factor of an individual's decision on how to

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[273] Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 488 (1986) ("Aid recipients' choices are made among a huge variety of possible careers, of which only a small handful are sectarian. In this case, the fact that aid goes to individuals means that the decision to support religious education is made by the individual, not by the State.").

[274] Zelman v. Simmons-Harris, 536 U.S. 639, 652 (2002).

[275] *See* Brief of Religious & Civil Rights Organizations, *supra* note 140, at 18 (citing *Witters*, 474 U.S. at 487).

use the funds.[276] The Court has established limitations in direct aid cases to sectarian organizations, specifically that if the state provides financial aid to a sectarian organization, it must be used for a secular purpose.[277] Thus, despite the Court's decision to the contrary, it appears that the state Establishment Clause concerns were, in fact, greater in *Trinity Lutheran* than in *Locke* because *Trinity Lutheran* is a direct aid case, whereas *Locke* was an indirect aid case.

D. Trinity Lutheran *as a "Heckler's Veto"*

Another federalism concern that the *Trinity Lutheran* decision raises is the idea of the "heckler's veto." A "heckler's veto" occurs when the actions of a hostile group interfere with the exercise of constitutional rights.[278] A heckler's veto can also be explained as follows:

> Heckler's veto cases typically consider the appropriate behavior of local law enforcement when a crowd or individual threatens hostile action in response to a demonstration or speaker. In these cases, the First Amendment grants a positive right to the speaker: the local government must take action to protect the speaker against a hostile crowd. The courts do not allow local law enforcement to accede to a heckler's veto.[279]

As such, common examples of a heckler's veto would be if labor organizers, religious groups, or members of an organization were forbidden to conduct a parade, religious meeting, or public speech solely because citizens threatened to disrupt or riot.[280] In situations such as these, the heckler's veto can inhibit individuals' and groups' legitimate First Amendment rights. While heckler's vetoes seem to occur most frequently in First Amendment free speech

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[276] *Trinity Lutheran Church*, 137 S. Ct. at 2017.

[277] *See* Edward Correia, Trinity Lutheran Church v. Comer*: An Unfortunate New Anti-Discrimination Principle*, 18 RUTGERS J.L. & RELIGION 280, 289 (2017).

[278] *See* Ruth McGaffey, *The Heckler's Veto: A Reexamination*, 57 MARQ. L. REV. 39, 40 (1973).

[279] Richard F. Duncan, *Just Another Brick in the Wall: The Establishment Clause as a Heckler's Veto*, 18 TEX. REV. L. & POL. 255, 264 (2014) (quoting Cheryl A. Leanza, *Heckler's Veto Case Law as a Resource for Democratic Discourse*, 35 HOFSTRA L. REV. 1305, 1306 (2007)).

[280] *See* McGaffey, *supra* note 278, at 39.

contexts,[281] they can also occur in contexts involving religious liberty, such as in *Pleasant Grove City v. Summum*,[282] and *Trinity Lutheran*.[283]

In *Pleasant Grove*, the Court noted local taxpayers may not use the Establishment Clause to second-guess a local government's decision about how it desires to use its public park land.[284] In that case, a religious group called Summum wanted to construct a monument that displayed its Seven Principles of Faith in the same government-owned park as a Ten Commandments monument.[285] When the City rejected their monument, Summum alleged that the City violated the Free Speech Clause by forbidding the display of their Principles and claimed the City also violated the Establishment Clause by displaying the Ten Commandments[286] without representing other religions.[287] The Court held that the Ten Commandments monument was a form of permissible "government speech," and that the city was not required to allow the construction of the Summum monument.[288] The *Pleasant Grove* Court emphasized that neither the Establishment Clause nor the Free Speech Clause gives private citizens a "heckler's veto" over the City's decision:

> If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed.[289]

The Court stressed that government officials were "accountable to the electorate" for their speech and actions, and if the citizens disagree with officials, they can use the political processes to vote them out.[290] Thus, rather than using

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[281] *Heckler's Veto*, DUHAIME'S LAW DICTIONARY, http://www.duhaime.org/LegalDictionary/H/HecklersVeto.aspx (last visited Mar. 26, 2019); *see* McGaffey, *supra* note 278; Zach Greenberg, *Rejecting the 'Heckler's Veto'*, FIRE (June 14, 2017), https://www.thefire.org/rejecting-the-hecklers-veto/; David L. Hudson Jr., *Controversial Speakers and the Problem of the Heckles' Veto*, FREEDOM F. INST. (Apr. 26, 2017), https://www.freedomforuminstitute.org/2017/04/26/controversial-speakers-and-the-problem-of-the-hecklers-veto/; Patrick Schmidt, *Heckler's Veto*, FIRST AMEND. ENCYCLOPEDIA, https://www.mtsu.edu/first-amendment/article/968/heckler-s-veto (last visited Mar. 26, 2019).

[282] Pleasant Grove City v. Summum, 555 U.S. 460, 464 (2009).

[283] Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2019 (2017).

[284] *Pleasant Grove City*, 555 U.S. at 467–69.

[285] *Id.* at 465.

[286] WITTE, JR. & NICHOLS, *supra* note 27, at 223.

[287] *Pleasant Grove City*, 555 U.S. at 466, 482 (Scalia, J., concurring).

[288] *Id.* at 472, 481 (majority opinion).

[289] *Id.* at 468 (quoting Keller v. State Bar of Cal., 496 U.S. 1, 12–13 (1990)); WITTE, JR. & NICHOLS, *supra* note 27, at 223.

[290] *Pleasant Grove City*, 555 U.S. at 468–69.

the Establishment Clause as a "heckler's veto," of the government's decision, citizens should voice their concerns at the ballot box.[291]

Like *Pleasant Grove*, the *Trinity Lutheran* decision is effectively a self-serving heckler's veto. In other words, the *Trinity Lutheran* Court allowed the Church to use the Free Exercise Clause as a "heckler's veto" about how to spend the state's money in accordance with its state constitutional Blaine Amendment restrictions. As the *Pleasant Grove* Court highlighted, neither the Establishment Clause nor the Free Exercise Clause should provide citizens or organizations such as Trinity Lutheran Church with a "heckler's veto" over state legislative decision-making.[292] While all points of view and religions should be accepted in society, individuals and organizations should not have the ability to compel the state to override their state constitution and provide funding simply because the "heckler" unfoundedly feels as if it violates their free exercise rights. If the circumstances, such as in *Trinity Lutheran*, do not baldly discriminate against religious organizations or exhibit favoritism of religion, the Court should hold that the state or local officials are free to act either way—they may provide or refuse to provide a grant to religious organizations without violating the First Amendment religion clauses. If the citizens disagree with the local government's decision, they can voice their concerns at the ballot box and use the political process to vote for individuals who reflect their views.

E. Other Federalism Concerns

In addition to the concept of the "heckler's veto," tax, and historical federalism concerns, there are other advantages and arguments in favor of allowing states to enforce their constitutional provisions concerning religion. For one, *Trinity Lutheran*, along with precedent such as *Locke* and *Walz*, all concern state tax funds, rather than federal funds, which strengthens the federalism argument for local autonomy.[293] One can argue that we should not necessarily trust states to uphold and defend our constitutional rights, but there are significant checks and balances on the state government. Since *Trinity Lutheran* concerns only state tax funds, the choice of how to use the funds should not be subject to control by the federal government because there are already meaningful checks and balances over the way the funds are used. For instance, the local legislatures are elected by the individuals within the locality, so if they

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[291] *See id.*

[292] *See id.* at 468; WITTE, JR. & NICHOLS, *supra* note 27, at 223.

[293] *See* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017); Locke v. Davey, 540 U.S. 712 (2004); Walz v. Tax Comm'n of New York, 397 U.S. 664 (1970).

make decisions that improperly use funds or negatively affect the community, they will not be reelected. Even more importantly, the decisions of the local legislatures are also subject to state judicial review, which also keeps them in check. The local legislatures are also kept in check by the Establishment Clause itself.

Furthermore, the federal government can only make one-size-fits-all decisions on behalf of the entire country. State and local governments may be better able to conduct fact-finding and make other tailored policies that federal courts interpreting the religion clauses cannot. State and local public officials are capable of determining what is best for their respective communities and are most aware of which local organizations should receive grants and tax exemptions, and which should not. Circumstances differ between states, school districts, hospitals, cities, and so on. State and local enforcement of religious liberty allow tailoring to fit the conditions of the locality and greater flexibility in addressing local concerns. In this way, federalism is essential because it also allows states to act as laboratories to formulate the most effective solutions to critical problems.[294] For example, if a state needs more vigorous religious freedom protections due to local conditions such as religious bigotry, the legislatures can enact laws to strengthen the religious liberty of the constituents therein. Furthermore, federalism allows individuals to choose to live in a state that closely aligns with their ideals, and addresses problems in a way they find desirable.[295] Thus, if the federal government refuses to defer to state sovereignty on important issues, it eliminates the variety of state solutions to local problems, and it diminishes individual freedom in this regard.[296] If the states comply with the minimum standards set by the federal religion clauses, they should be able to enforce their own provisions that provide more expansive protection of individual rights and serve to further their own antiestablishment issues.

It is important to address that in the past, in precedent such as *Hobbie v. Unemployment Appeals Commission*, *Widmar v. Vincent*, *Thomas v. Review Board of Indian Employment Security Division*, and *Sherbert v. Verner*, the Supreme Court overrode state constitutional establishment concerns about spending money on religion and found them not compelling enough under the First Amendment free exercise and speech clauses.[297] However, these cases all

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294 Cooper, *supra* note 9.

295 *Id.*

296 *Id.*

297 *See generally* Hobbie v. Unemp't Appeals Comm'n of Fla., 480 U.S. 136 (1987) (finding that state denial of receipt of a benefit because of conduct mandated by religious belief must be subjected to strict scrutiny and can be justified only by proof of a compelling state interest); 'Widmar v. Vincent, 454 U.S. 263 (1981)

took place during an era in which the Court held that the strict scrutiny should be used in evaluating laws burdening the free exercise of religion.[298] In 1990, in *Employment Division v. Smith*, the Court changed the standard in free exercise causes from strict scrutiny to a standard of neutrality, holding that the Free Exercise Clause could not be used to challenge a neutral law of general applicability.[299] The *Smith* Court specifically noted that those seeking religious exemptions from laws should look to political processes rather than the courts.[300] During the *Smith* neutrality era, the *Locke* Court held that states have the discretion on how they want to spend tax money and the extent to which they wish to support religion financially.[301] Therefore, these pre-1990 cases, where the Court overrode state constitutional establishment concerns, are eclipsed by precedent such as *Locke v. Davey* in the post-*Smith* era.[302]

Determining whether a government program or rule violates the Establishment Clause can be challenging for states, so many prefer to create bright-line rules and take a stricter approach to antiestablishment than the Establishment Clause itself.[303] However, after *Trinity Lutheran*, states have less "play in the joints," or less freedom to adopt their own antiestablishment policies that are more robust than the Constitution.[304] The decision creates a dilemma for states in that it suggests that if a state provides too much assistance to a religious organization, it violates the Establishment Clause, but if the benefit is allowed by the Establishment Clause, it is also required by the Free Exercise Clause to be offered to religious organizations. This predicament takes away the ability of states to navigate the "play in the joints" and follow a more cautious approach to the Establishment Clause line than the federal Establishment Clause itself.

This proverbial tightrope that states are forced to walk in the shrunken space between the Establishment Clause and Free Exercise Clause creates many

(holding that the state''s interest in achieving greater separation of church and state than is already ensured under the Establishment Clause is not sufficiently "compelling" to justify content-based discrimination against religious speech of the student group in question); Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707 (1981) (reasoning that justifications provided for Indiana's inroading on religious liberty were not sufficiently compelling); ''Sherbert v. Verner, 374 U.S. 398 (1963) (finding that there is no compelling state interest enforced in the eligibility provisions of the South Carolina statute that justifies the substantial infringement of appellant's right to religious freedom under the First Amendment).

298 *Sherbert*, 374 U.S. at 398; *see also* CHEMERINSKY, *supra* note 21, at 1316; WITTE, JR. & NICHOLS, *supra* note 27, at 128.

299 494 U.S. 872, 879 (1990); *see also* CHEMERINSKY, *supra* note 21, at 1317.

300 *Smith*, 494 U.S. at 890; *see also* CHEMERINSKY, *supra* note 21, at 1327.

301 Locke v. Davey, 540 U.S. 712, 721 (2004); *see also* CHEMERINSKY, *supra* note 21.

302 *Locke*, 540 U.S. at 712.

303 Correia, *supra* note 277.

304 Russo & Thro, *supra* note 184, at 257.

problems. It is likely that states will be less likely to provide public benefits, considering that they will have to consider religious organization applicants as well as nonreligious organization applicants.[305] Thus, they will have to dedicate time and resources to ensure the funds are not used for sectarian uses, and that the program is not violating the Establishment Clause.[306] The obligation of monitoring state programs and the use of the government funds awarded to religious organizations would be a significant administrative and financial burden on the states.[307] Furthermore, if the state provides a grant to a religious organization and monitors what the funds are used for too infrequently, the funds could be used for impermissible purposes. In contrast, if the state monitors too frequently, they risk interfering with the internal affairs of a church.[308] States will also have the plight of reviewing applications from various competing religious sects and also determine which denominations even qualify as a "religion" in the first place.[309] This situation is problematic as it raises both Establishment Clause concerns that the state could favor or provide grants to one religion over others, but also Free Exercise Clause concerns because the state could disfavor particular religions in its provision of grants. Even secular criteria for grants, such as the number of students served or size of the property, could lead to favoritism of larger religious groups at the expense of smaller religious groups. Because of the problems that this decision may bring, it is clear *Locke v. Davey* is the better approach, and state tax and funding issues are best left sub-constitutional.

CONCLUSION

This Comment argues that federal courts should follow *Locke v. Davey*'s example rather than *Trinity Lutheran Church v. Comer*, and leave control of state funding of religion to the political processes and not the courts. While the full extent of *Trinity Lutheran*'s consequences for federalism and state sovereignty remains to be seen, it is clear that the decision undercuts the long-standing federalism at work in *Locke v. Davey* and restricts states' freedom to adopt their own individual antiestablishment policies that are more robust than the Constitution itself.

The issue of state funding and taxation of religion presented in *Trinity Lutheran* falls within the "play in the joints," meaning that providing a state-

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305 *See* Correia, *supra* note 277, at 295.

306 *Id.*

307 *See* Brief of Religious & Civil Rights Organizations, *supra* note 140, at 19–20.

308 *Id.* at 21.

309 Correia, *supra* note 277, at 295–96.

funded grant for a religious organization's playground would not violate the Establishment Clause, but the denial of a grant to a religious organization would not violate the Free Exercise Clause either. The decision of how to use state taxpayer money should be left to states' discretion unless there is bald favoritism of religion or bald discrimination against religion. The State of Missouri's refusal to provide a grant to a church for a rubberized playground surface based on its state constitutional policy of denying grants to religiously affiliated organizations was neither bald discrimination against religion nor favoritism. It was simply upholding a long-standing state policy to enforce the State's antiestablishment interests. Accordingly, the *Trinity Lutheran* Court should have followed the decision in *Locke v. Davey*, leaving state tax issues sub-constitutional.

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