

## DOWN BUT NOT OUT: *TRINITY LUTHERAN'S* IMPLICATIONS FOR STATE NO-AID PROVISIONS

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### INTRODUCTION

“[T]he exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution . . . and cannot stand.”<sup>1</sup> The Court’s sweeping language in its recent *Trinity Lutheran* decision has been called a “new constitutional rule”<sup>2</sup> and lauded as a “landmark victory” by proponents of religious liberty.<sup>3</sup> On the other side of the discussion, constitutional law scholar Erwin Chemerinsky described the decision as troubling: “a dramatic change in the law that likely is going to require governments to provide much greater support for religious institutions than ever before.”<sup>4</sup> The decision could also substantially limit state sovereignty in religious establishment. As Justice Sotomayor briefly alluded to in her dissent,<sup>5</sup> *Trinity Lutheran* could be the death knell for antiestablishment clauses on the books in nearly forty states: “no-aid provisions” that expressly restrict government funding to religious entities.

In contrast, this paper proposes that state no-aid provisions can in fact be reconciled with the distinctions in *Trinity Lutheran*. Lower courts and legislatures alike should recognize the nuances in these distinctions before radically extending taxpayer-funded benefits to religious institutions.

This paper proceeds in three parts. First, Part I gives background on the federal Religion Clauses and no-aid provisions in state constitutions. Next, Part II details the *Trinity Lutheran* decision. Finally, Part III first provides a legal and normative analysis of the Court’s decision, and then discusses the implications for state no-aid provisions.

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<sup>1</sup> *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2025 (2017).

<sup>2</sup> William E. Thro & Charles J. Russo, *Odious to the Constitution: The Educational Implications of Trinity Lutheran Church v. Comer*, 346 EDUC. L. REP. (West) 1, 1 (2017).

<sup>3</sup> Press Release, U.S. Senator for Texas Ted Cruz, Sen Cruz: Trinity Lutheran Decision Is “Landmark Victory for Religious Freedom” (June 26, 2017), [https://www.cruz.senate.gov/?p=press\\_release&id=3204](https://www.cruz.senate.gov/?p=press_release&id=3204).

<sup>4</sup> Erwin Chemerinsky, *Waiting for Gorsuch: October Term 2016*, 20 GREEN BAG 2D 351, 358 (2017).

<sup>5</sup> *Trinity Lutheran*, 137 S. Ct. at 2037–38 (Sotomayor, J., dissenting).

## I. BACKGROUND

### A. *The Federal Religion Clauses*

The First Amendment provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”<sup>6</sup> The Establishment Clause and Free Exercise Clause subsumed in this statement collectively comprise the Constitution’s Religion Clauses. The two Clauses have long been described as being “frequently in tension.”<sup>7</sup> For example, in *Everson v. Board of Education*, the seminal case incorporating the Establishment Clause as to the states, the Court stated that, on the one hand, “[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.”<sup>8</sup>

However, the Court went on to conclude that, “[o]n the other hand, other language of the [First A]mendment commands that [a state] cannot hamper its citizens in the free exercise of their own religion” and thus “cannot exclude . . . members of any . . . faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation.”<sup>9</sup> Based on these principles, the *Everson* Court held that a state program providing bus transportation to parochial-school and public-school students alike did not violate the Establishment Clause. While the Court has tried to ease this “tension” in later decisions,<sup>10</sup> such neutrality towards religion and non-religion has been one of the consistent principles underpinning the doctrinal development of the Religion Clauses.<sup>11</sup>

#### 1. *Establishment Clause*

Establishment Clause doctrine—particularly in the government benefit context relevant to *Trinity Lutheran’s* facts—has undergone substantial

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<sup>6</sup> U.S. CONST. amend. I.

<sup>7</sup> *Locke v. Davey*, 540 U.S. 712, 718 (2004) (citing *Norwood v. Harrison*, 413 U.S. 455, 469 (1973)).

<sup>8</sup> *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947).

<sup>9</sup> *Id.* (emphasis in original); see also Douglas Laycock, *Churches, Playgrounds, Government Dollars—and Schools?*, 131 HARV. L. REV. 133, 138 (2017) (discussing how the two principles are disjointed, but exclusion is not an option).

<sup>10</sup> *Id.* at 138.

<sup>11</sup> *Walz v. Tax Comm’n*, 397 U.S. 664, 669 (1970) (“The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.”).

evolution since the Court's seemingly contradictory language in *Everson*.<sup>12</sup> In invalidating two separate state programs providing salary and materials reimbursements to sectarian school teachers, the Court in *Lemon v. Kurtzman* articulated a three-part test to determine whether a statute violates the Establishment Clause: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"<sup>13</sup>

Under the *Lemon* test, government funding generally must be restricted to secular uses to avoid impermissibly advancing religion. For example, in *Tilton v. Richardson*, a companion case to *Lemon*, the Court held that a federal program providing construction grants directly to colleges and universities, but expressly limiting the use of funds to facilities that were not used "for sectarian instruction or religious worship," was permissible under the Establishment Clause.<sup>14</sup> But the Court severed a provision in the program that allowed the government's property interest in the facility to expire after twenty years because it could have "the effect of advancing religion" "[i]f, at the end of 20 years, the building is, for example, converted into a chapel or otherwise used to promote religious interests."<sup>15</sup>

Subsequent decisions also considered the religious character of the recipient, prohibiting "state aid . . . to institutions that are so 'pervasively sectarian' that secular activities cannot be separated from sectarian ones."<sup>16</sup> Notably, in *Aguilar v. Felton* and its companion case, *School District of Grand Rapids v. Ball*, the Court invalidated state programs that sent publicly funded teachers into parochial schools to teach classes.<sup>17</sup> Among other things, the Court reasoned that the pervasively sectarian nature of the schools could have influenced the publicly funded teachers to religiously indoctrinate students. Further, the teachers effectively subsidized the religious functions of the school by reducing its responsibility for teaching secular subjects.<sup>18</sup>

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<sup>12</sup> See Laycock, *supra* note 9, at 137-38.

<sup>13</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (citations omitted) (quoting *Walz*, 397 U.S. at 674).

<sup>14</sup> *Tilton v. Richardson*, 403 U.S. 672, 683-84 (1971).

<sup>15</sup> *Id.* at 683; see also *Hunt v. McNair*, 413 U.S. 734, 744 (1973) (upholding state revenue bond program that financed facilities at religious colleges and universities because, inter alia, the program excluded worship and religious instruction facilities).

<sup>16</sup> *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 755, 759 (1976) (finding that universities at issue were not "pervasively sectarian" and upholding state statute granting annual subsidy to religiously affiliated private colleges and universities, provided that colleges did not provide only religious degrees and complied with "statutory prohibition against sectarian use, and . . . administrative enforcement").

<sup>17</sup> *Aguilar v. Felton*, 473 U.S. 402, 408-12, (1985), *overruled by* *Agostini v. Felton*, 521 U.S. 203, 235 (1997); *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 397 (1985), *overruled by* *Agostini*, 521 U.S. at 235.

<sup>18</sup> *Ball*, 473 U.S. at 397; see also *Aguilar*, 473 U.S. at 412 ("First . . . the aid is provided in a

However, the Court has increasingly liberalized its approach to government funding of religious institutions. First, it has recognized a distinction between benefits provided *directly* to religious entities and benefits provided *indirectly*, or “only as a result of the genuinely independent and private choices of aid recipients.”<sup>19</sup> For example, the Establishment Clause did not bar a student from using a state-provided education grant at a religious college in *Witters v. Washington Department of Services for the Blind*.<sup>20</sup> The fact that the funding was provided directly to the student, who then independently chose to use the aid to attend a religious school, “ma[de] the link between the State and the school petitioner wishe[d] to attend a highly attenuated one.”<sup>21</sup> Put another way, there is no “proximate cause” for an Establishment Clause violation with indirect aid: the recipient’s independent choice to use such funding at a religious institution is akin to a superseding act that “breaks the chain of causation”—here, the connection with state action.<sup>22</sup> However, since the state’s constitution included a provision precluding *any* aid to religious entities, the Court remanded the case back to the state court, noting that “[o]n remand, the state court is of course free to consider the applicability of the ‘far stricter’ dictates of the . . . State Constitution.”<sup>23</sup>

Second, the neutrality of a funding program has become more relevant in permitting direct aid to flow to religious institutions. Overruling *Aguilar* and *Ball*, the Court in *Agostini v. Felton* held that state programs sending public school teachers into religious schools did not violate the Establishment Clause.<sup>24</sup> Noting a “change[ ]” in their “understanding of the criteria used to assess whether aid to religion has an impermissible effect,”<sup>25</sup> the Court concluded that the programs there would not impermissibly advance

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pervasively sectarian environment. Second, because assistance is provided in the form of teachers, ongoing inspection is required to ensure the absence of a religious message.”)

<sup>19</sup> *Witters v. Wash. Dep’t of Servs. for the Blind*, 474 U.S. 481, 486–87 (1986).

<sup>20</sup> *Id.* at 489.

<sup>21</sup> *Id.* at 488; see also *Zelman v. Simmons-Harris*, 536 U.S. 639, 653–56, 662–63 (2002) (holding that a state school voucher program that allowed recipients to use educational grants at private religious schools did not violate the Establishment Clause because the program was religiously neutral and one of “true private choice,” where the state provided funds directly to parents who, in turn, endorsed checks over to schools); *Mueller v. Allen*, 463 U.S. 388, 398–401 (1983) (holding that a state statute allowing taxpayers to deduct education expenses incurred in sending their children to religious schools did not violate the Establishment Clause, as deduction was available to all taxpayers generally and any aid to religious schools was the result of parents’ independent choices).

<sup>22</sup> See Stuart M. SPEISER ET AL., 3 AMERICAN LAW OF TORTS § 11:9 (Westlaw rev. ed. 2018) (“A ‘superseding cause’ breaks the chain of causation that the defendant began with his or her conduct. It is a separate act that operates as an independent force to produce the victim’s injury.” (citing *State v. Smith*, 819 N.W.2d 724 (Minn. Ct. App. 2012), *aff’d*, 835 N.W.2d 1 (Minn. 2013)). I am indebted to Professor Sheldon Nahmod for this proximate cause analogy.

<sup>23</sup> *Witters*, 474 U.S. at 489 (quoting *Witters v. Comm’n for the Blind*, 689 P.2d 53, 55 (Wash. 1984)).

<sup>24</sup> *Agostini v. Felton*, 521 U.S. 203, 234–35 (1997).

<sup>25</sup> *Id.* at 223.

religion, nor would pervasive monitoring to ensure secular instruction be required. Namely, it could not be presumed that the publicly funded teachers would depart from their secular duties and teach religious doctrine.<sup>26</sup> And, importantly, the aid was allocated according to neutral, secular criteria based on student need regardless of where they attended school, which reduced the likelihood of the state funding religious indoctrination or a perceived government endorsement of religion.<sup>27</sup>

*Mitchell v. Helms* reaffirmed the Court's doctrinal shift and cast further doubt on its prior prohibitions on aid to "pervasively sectarian" institutions, this time rejecting an as-applied Establishment Clause challenge to an aid program.<sup>28</sup> Here, state and local agencies had received federal funds to purchase secular educational materials and had in turn loaned those materials to "pervasively sectarian" Catholic schools in the state.<sup>29</sup> Justice Thomas, writing for the plurality, reasoned that the aid itself was secular and provided for education, not indoctrination; thus, "the religious nature of a recipient should not matter to the constitutional analysis, so long as the recipient adequately furthers the government's secular purpose."<sup>30</sup> Further, Thomas extended the "independent and private choices" analysis from *Witters* and *Agostini*. Since the materials were distributed to schools on a neutral, per-capita enrollment basis, he concluded that this "direct" aid to religious schools was the result of the private choices of the attending students.<sup>31</sup> Due to these private choices, "any use of that aid to indoctrinate [could not] be attributed to the government and [was] thus not of constitutional concern."<sup>32</sup>

In her concurrence, Justice O'Connor, joined by Justice Breyer, agreed that the program's neutral, secular criteria would not impermissibly advance religion. However, she rejected the plurality's analysis that such neutrality made the program presumptively constitutional, calling it a rule of "unprecedented breadth."<sup>33</sup> Moreover, she refused to view direct aid made on a per capita basis the same as indirect aid made as the result of private choice, reasoning that direct aid to religious institutions increases the perception of government endorsement of religion. As such, actual diversion of direct aid to religious uses is still impermissible under the

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<sup>26</sup> *Id.* at 226-27, 233-34.

<sup>27</sup> *Id.* at 231-32.

<sup>28</sup> *See Mitchell v. Helms*, 530 U.S. 793, 807-08 (2000) (plurality opinion) (recognizing that *Agostini* "recast *Lemon's* entanglement inquiry as simply one criterion relevant to determining a statute's effect").

<sup>29</sup> *Id.* at 801-03.

<sup>30</sup> *Id.* at 827, 829.

<sup>31</sup> *Id.* at 829-31.

<sup>32</sup> *Id.* at 820.

<sup>33</sup> *Id.* at 837 (O'Connor, J., concurring in judgment).

Establishment Clause.<sup>34</sup>

## 2. Free Exercise Clause

The “tension” between avoiding establishment and protecting the right to religious conscience also runs through the development of free exercise doctrine.<sup>35</sup> Historically, the Court had strictly scrutinized and almost invariably invalidated government actions that substantially burdened religious practice or belief.<sup>36</sup> For example, in *Sherbert v. Verner*, the Court held that the state’s employment commission violated the petitioner’s free exercise rights when it disqualified her for unemployment benefits after she was terminated for refusing to work on her religion’s Sabbath.<sup>37</sup> First, here the petitioner’s religious practice was substantially burdened, as the commission’s “ruling force[d] her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand.”<sup>38</sup> The Court then applied strict scrutiny.<sup>39</sup> Concluding that the state would need to show a compelling interest to justify such a burden, the Court found the state’s interest in reducing fraudulent unemployment claims and unencumbering employers’ scheduling abilities constitutionally insufficient.<sup>40</sup>

<sup>34</sup> *Id.* at 840–44.

<sup>35</sup> *See Wisconsin v. Yoder*, 406 U.S. 205, 220–21 (1972) (“The Court must not ignore the danger that an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause, but that danger cannot be allowed to prevent any exception no matter how vital it may be to the protection of values promoted by the right of free exercise. By preserving doctrinal flexibility and recognizing the need for a sensible and realistic application of the Religion Clauses ‘we have been able to chart a course that preserved the autonomy and freedom of religious bodies while avoiding any semblance of established religion. This is a ‘tight rope’ and one we have successfully traversed.” (citation omitted) (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 672 (1970))).

<sup>36</sup> *Emp’t Div. v. Smith*, 494 U.S. 872, 907 (1990) (Blackmun, J., dissenting) (“This Court over the years painstakingly has developed a consistent and exacting standard to test the constitutionality of a state statute that burdens the free exercise of religion. Such a statute may stand only if the law in general, and the State’s refusal to allow a religious exemption in particular, are justified by a compelling interest that cannot be served by less restrictive means.”).

<sup>37</sup> 374 U.S. 398, 409–10 (1963).

<sup>38</sup> *Id.* at 404.

<sup>39</sup> *Id.* at 406 (“We must next consider whether some compelling state interest enforced in the eligibility provisions of the South Carolina statute justifies the substantial infringement of appellant’s First Amendment right.”); *see also Yoder*, 406 U.S. at 218 (holding that the application of Wisconsin’s compulsory school attendance law to Amish families who did not send their children to school after the eighth grade violated their free exercise rights); *id.* at 215 (“The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.”).

<sup>40</sup> *Sherbert*, 374 U.S. at 407; *see also Hobbie v. Unemp’t Appeals Comm’n*, 480 U.S. 136, 139–40 (1987) (holding that state employment commission violated petitioner’s free exercise rights in denying unemployment benefits where petitioner was terminated for refusing to work on Sabbath); *Thomas v. Review Bd.*, 450 U.S. 707, 717–18 (1981) (holding that the state unemployment board violated claimant’s free exercise rights for refusing unemployment benefits where claimant quit job

Similarly, significant disqualifications or penalties based on religious status may constitute substantial burdens. In *McDaniel v. Paty*, the Court invalidated a state constitutional provision disqualifying ministers or other clergy members from serving as delegates to the state constitutional convention.<sup>41</sup> Despite the historical antiestablishment rationales for clergy-disqualification in government positions, the Court held that the state provision violated the petitioner's free exercise: he could not simultaneously enjoy his rights to religious practice and to seek and hold office "because the State has conditioned the exercise of one on the surrender of the other."<sup>42</sup>

However, the Court reevaluated its free exercise standards in *Employment Division v. Smith*, and held that the government is not required to provide exemptions for incidental burdens on religious practice due to compliance with neutral, generally applicable laws.<sup>43</sup> Declining to apply *Sherbert's* strict-scrutiny balancing test, the *Smith* Court concluded that the state unemployment commission's denial of unemployment benefits to claimants who were fired for illegal drug use after taking peyote for religious reasons did not violate the Free Exercise Clause.<sup>44</sup> The Court reasoned that the law was neutral and generally applicable as it did not attempt to regulate religious belief and was an "across-the-board criminal prohibition";<sup>45</sup> religious exemptions from such laws would cause each person "to become a law unto himself."<sup>46</sup> Accordingly, neutral, generally applicable laws are now typically only subject to rational basis review.<sup>47</sup>

In contrast, laws that work to target religious practice or demonstrate animus or hostility towards religion are subject to strict scrutiny.<sup>48</sup> In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Court found that, while a series of municipal ordinances prohibiting animal sacrifice appeared facially neutral, the ordinances explicitly targeted the Santería religion's practices through references to ritual sacrifice, and the actual effect of the laws was to purposefully discriminate against the church's religion.<sup>49</sup> Taken together, "almost the only conduct subject to [the ordinances] . . . [was] the religious exercise of [the] church members."<sup>50</sup>

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after being transferred to the weapons production department because their religious beliefs forbade production of armaments).

<sup>41</sup> 435 U.S. 618, 629 (1978).

<sup>42</sup> *Id.* at 626.

<sup>43</sup> 494 U.S. 872, 878 (1990).

<sup>44</sup> *Id.* at 882.

<sup>45</sup> *Id.* at 882, 884.

<sup>46</sup> *Id.* at 885 (quoting *Reynolds v. United States*, 98 U.S. 145, 167 (1878)).

<sup>47</sup> *See id.* at 878-79 ("We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.").

<sup>48</sup> *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993).

<sup>49</sup> *Id.* at 535.

<sup>50</sup> *Id.*

Recently, the Court has further clarified that state animus or hostility towards religion demonstrates a lack of neutrality.<sup>51</sup> A Colorado baker sanctioned for violating the state's public accommodation law for refusing to provide a wedding cake for a gay couple due to his religious beliefs recently prevailed on his free exercise claim in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*.<sup>52</sup> There, the Court found that comments made by members of the state civil rights commission while adjudicating the baker's claim, including describing his refusal as "one of the most despicable pieces of rhetoric that people can use," evidenced "clear and impermissible hostility toward the sincere religious beliefs that motivated his objection."<sup>53</sup> Further, the commission's disparate treatment of similar claims also signaled "disapproval" of the baker's religious beliefs: the commission had found lawful other bakers' refusals to create cakes that disparaged gay marriage.<sup>54</sup> In sum, such "hostility was inconsistent with the First Amendment's guarantee that our laws be applied in a manner that is neutral toward religion."<sup>55</sup>

But in the government funding context, "there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause."<sup>56</sup> Accordingly, there is no free exercise violation where the government does not make funding recipients "choose between their religious beliefs and receiving a government benefit."<sup>57</sup> In *Locke v. Davey*, the Court held that a state scholarship program that prohibited recipients from pursuing a devotional theology degree did not violate the Free Exercise Clause.<sup>58</sup> First, the Court noted that "the State could, consistent with the Federal Constitution, permit [scholarship recipients] to pursue a degree in devotional theology," but the issue was whether the state's denial of funds for that purpose, pursuant to its more restrictive antiestablishment constitutional provisions, violated the Free Exercise Clause.<sup>59</sup>

The Court then concluded that, while the program was not facially neutral towards religion, it did not "suggest[ ] animus towards religion," as it allowed students to attend "pervasively religious" institutions as well as enroll in theology courses.<sup>60</sup> Further, qualifying scholarship recipients did not have to forego the funds, as they remained free to "use their scholarship to pursue a secular degree at a different institution from where they are studying

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<sup>51</sup> 138 S. Ct. 1719, 1724 (2018).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 1729.

<sup>54</sup> *Id.* at 1731.

<sup>55</sup> *Id.* at 1732.

<sup>56</sup> *Locke v. Davey*, 540 U.S. 712, 719 (2004).

<sup>57</sup> *Id.* at 720-21.

<sup>58</sup> *Id.* at 715.

<sup>59</sup> *Id.* at 719.

<sup>60</sup> *Id.* at 720, 724-25.



devotional theology.”<sup>61</sup> In short, “[t]he State ha[d] merely chosen not to fund a distinct category of instruction.”<sup>62</sup>

### B. State “No-Aid Provisions”

As seen above in *Witters* and *Locke*, state constitutions often contain establishment clause provisions that are more restrictive than the federal counterpart. In fact, only about ten states have establishment clause provisions with language that parallels the federal Establishment Clause.<sup>63</sup> The remainder typically have language that restricts state aid to religious entities to varying degrees. For the purposes of this paper, such provisions will collectively be referred to as “no-aid provisions.” The two most relevant provisions are state “Blaine Amendments” and “compelled support provisions.”<sup>64</sup>

#### 1. Blaine Amendments

State Blaine Amendments are “named” after the failed federal amendment proposed by House Representative James G. Blaine in 1876.<sup>65</sup> Various commentators have noted that the federal Blaine Amendment arose out of distinct anti-Catholic animus, after Catholic immigrants had increasingly obtained government support and funding for sectarian schools in the mid-nineteenth century.<sup>66</sup> Accordingly, Blaine’s proposed amendment specifically sought to curtail sectarian influence in education funding, stating:

[N]o money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect; nor shall any money so raised or lands so devoted be divided between religious sects or

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<sup>61</sup> *Locke v. Davey*, 540 U.S. 712, 721 n.4 (2004).

<sup>62</sup> *Id.* at 721.

<sup>63</sup> James N.G. Cauthen, *Referenda, Initiatives, and State Constitutional No-Aid Clauses*, 76 ALB. L. REV. 2141, 2145 & n.21 (2013).

<sup>64</sup> Jill Goldenziel, *Blaine’s Name in Vain?: State Constitutions, School Choice, and Charitable Choice*, 83 DENV. U. L. REV. 57, 63 (2005); see also Luke A. Lantta, *The Post-Zelman Voucher Battleground: Where to Turn After Federal Challenges to Blaine Amendments Fail*, 67 LAW & CONTEMP. PROBS. 213, 214, 229 (2004).

<sup>65</sup> Goldenziel, *supra* note 64, at 63.

<sup>66</sup> *Id.*; see also *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion) (“Opposition to aid to ‘sectarian’ schools acquired prominence in the 1870’s with Congress’ consideration (and near passage) of the Blaine Amendment, which would have amended the Constitution to bar any aid to sectarian institutions. Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that ‘sectarian’ was code for ‘Catholic.’”); Cauthen, *supra* note 63, at 2147; Kyle Duncan, *Secularism’s Laws: State Blaine Amendments and Religious Persecution*, 72 FORDHAM L. REV. 493, 495 (2003); Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J.L. & PUB. POL’Y 551, 558–65 (2003); Lantta, *supra* note 64, at 215–18.

denominations.<sup>67</sup>

However, despite the anti-Catholic narrative associated with the Blaine Amendment, some scholars dispute the degree to which such animus existed, as well as the influence of the federal amendment on similar state provisions. At least fifteen states had enacted restrictions on funding to parochial schools prior to the debates surrounding the Blaine Amendment.<sup>68</sup> Further, several of these states were largely devoid of “significant conflicts over parochial school funding at the time.”<sup>69</sup> However, over twenty states enacted Blaine Amendments in the period following the federal constitutional debate and in the early twentieth century.<sup>70</sup>

Contemporary definitions of state Blaine Amendments vary.<sup>71</sup> Some commentators use the term to describe constitutional provisions that, like the original Blaine Amendment, only expressly prohibit government funding to religious schools.<sup>72</sup> Others include provisions that preclude funding to religious entities generally.<sup>73</sup> Regardless of the particulars, at least thirty-eight states have constitutional provisions that restrict government aid to religious entities at least to some degree.<sup>74</sup>

State Blaine Amendments also vary considerably in their application, ranging from restrictive to permissive. Restrictive amendments, like Michigan’s express prohibition on school vouchers,<sup>75</sup> often prohibit indirect (e.g., “independent choice” aid) in addition to direct government aid, while permissive provisions are generally limited to direct aid and are also

<sup>67</sup> Goldenziel, *supra* note 64, at 64.

<sup>68</sup> Cauthen, *supra* note 63, at 2147.

<sup>69</sup> Steven K. Green, *The Insignificance of the Blaine Amendment*, 2008 BYU L. REV. 295, 313 (“The Michigan Constitution served as an example for similar no-funding constitutional provisions in Wisconsin (1848), Indiana (1851), Ohio (1851), and Minnesota (1857).”). *But see* Laycock, *supra* note 9, at 166–67 (“If a state’s Blaine provision results in facial discrimination between religious and secular private education, then motive should not matter after *Trinity Lutheran*. Such ‘express discrimination’ is unconstitutional without regard to motive. This may reduce the stakes of the debate over motive.”).

<sup>70</sup> Green, *supra* note 69, at 327 (“[T]wenty-one states adopted their provisions between 1876—the year of the debate over the Blaine Amendment—and 1911—the year marking the admission of New Mexico, the last state admitted before a fifty-year hiatus broken by Alaska and Hawaii.”).

<sup>71</sup> Goldenziel, *supra* note 64, at 68 (“Scholars disagree over the definition of a Blaine Amendment.”).

<sup>72</sup> Lantta, *supra* note 64, at 226–27.

<sup>73</sup> Duncan, *supra* note 66, at 515 (“For my purposes, a State Blaine means a state constitutional provision that bars persons’ and organizations’ access to public benefits explicitly because they are religious persons or organizations. This is a broad definition . . . For instance, some bar equal participation in public aid only to religious schools; others bar religious organizations or institutions; yet others bar non-public institutions generally, while explicitly including religious institutions in that category.”).

<sup>74</sup> *See* *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2037 & n.10 (2017) (Sotomayor, J., dissenting) (noting that “[t]oday, thirty-eight States have a counterpart to Missouri’s [no-aid provision]” and listing no-aid provisions); Green, *supra* note 69, at 327.

<sup>75</sup> MICH. CONST. art. VIII, § 2; *see also* Goldenziel, *supra* note 64, at 82.

supported by lenient judicial interpretations.<sup>76</sup> For example, New York’s no-aid provision is actually titled the “Blaine Amendment.” But despite this ominous moniker, New York courts have interpreted the provision’s facially restrictive prohibition on “indirect” aid to mean indirectly establishing or advancing religion.<sup>77</sup> However, roughly seventeen states’ no-aid provisions fall into the restrictive or strict category.<sup>78</sup>

## 2. *Compelled Support Clauses*

Compelled support clauses have similarly been construed to restrict government aid to religious entities. Such provisions are found in twenty-nine state constitutions and generally preclude taxpayers from being forced to financially support religious institutions.<sup>79</sup> “[S]tate courts generally have not interpreted compelled support clauses to place any greater restrictions on government than those imposed under the First Amendment,”<sup>80</sup> but Vermont in particular has used a compelled support provision to prohibit a school choice program.<sup>81</sup> Further, no-funding provisions are also found within or following compelled support clauses and have been interpreted together with them.<sup>82</sup>

## II. *TRINITY LUTHERAN*

Trinity Lutheran Church operates a Child Learning Center, which provides daycare and preschool services on a nondiscriminatory basis to the Boone County, Missouri community at large.<sup>83</sup> The Church expressly includes the Learning Center as one of its religious ministries, and includes “developmentally appropriate” religious instruction in its programs.<sup>84</sup> The Learning Center also has a well-equipped playground, albeit with an “unforgiving” pea gravel surface, used by both Center students and other

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<sup>76</sup> Lantta, *supra* note 64, at 226–27; *see also* Frank R. Kemerer, *The Constitutional Dimension of School Vouchers*, 3 TEX. F. ON C.L. & C.R. 137, 172 (1998).

<sup>77</sup> Lantta, *supra* note 64, at 240.

<sup>78</sup> *Id.* at 227.

<sup>79</sup> Cauthen, *supra* note 63, at 2145; Goldenziel, *supra* note 64, at 64–65.

<sup>80</sup> Cauthen, *supra* note 63, at 2145.

<sup>81</sup> *Chittenden Town Sch. Dist. v. Dep’t of Educ.*, 738 A.2d 539, 562–63 (Vt. 1999); *see also* Goldenziel, *supra* note 64, at 65.

<sup>82</sup> *See* MICH. CONST. art. I, § 4 (“No person shall be compelled to attend, or, against his consent, to contribute to the erection or support of any place of religious worship, or to pay tithes, taxes or other rates for the support of any minister of the gospel or teacher of religion. No money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society, theological or religious seminary; nor shall property belonging to the state be appropriated for any such purpose.”); *Am. Atheists, Inc. v. City of Detroit Downtown Dev. Auth.*, 567 F.3d 278, 301 (6th Cir. 2009).

<sup>83</sup> *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2017 (2017).

<sup>84</sup> *Id.* at 2027–28 (Sotomayor, J., dissenting).

children in the local community.<sup>85</sup>

The Missouri Department of Natural Resources ran a Scrap Tire Program providing reimbursement grants on a competitive basis to qualifying organizations that installed rubber surfaces made from recycled tires.<sup>86</sup> The Learning Center applied for a grant under the program in 2012, seeking to resurface its playground and ameliorate the safety hazards posed by the existing pea gravel.<sup>87</sup> Despite being one of the most competitive candidates,<sup>88</sup> the Department denied the Center's application under its policy that categorically excluded "any applicant owned or controlled by a church, sect, or other religious entity,"<sup>89</sup> adopted pursuant to the Missouri constitution's no-aid provision.<sup>90</sup>

The Church subsequently sued the Department in federal court, asserting that the Department's denial of its grant application violated the First Amendment's Free Exercise, Establishment, and Free Speech Clauses, the Fourteenth Amendment's Equal Protection Clause, and the state constitution's no-aid provision.<sup>91</sup>

Recognizing the more stringent separation of church and state under the Missouri Constitution and distinguishing cases where aid was provided to institutions that were religiously affiliated but ultimately not controlled by religious entities, the district court first determined that awarding a grant to the Church would violate the state constitution's no-aid provision.<sup>92</sup>

The court then held that the Department's denial did not violate the Free Exercise Clause. Primarily relying on *Locke*, the court found that the Department had merely excluded the Church from receiving an affirmative benefit and as such did not target religious practice. Further, the government's significant antiestablishment interest outweighed the relatively minor burden on the Church.<sup>93</sup> Moreover, the court concluded that since the Department, consistent with the Establishment Clause, *could* provide grants to the Church, a possible Establishment Clause violation was "not at

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<sup>85</sup> *Id.* at 2017-18 (majority opinion).

<sup>86</sup> *Id.* at 2017.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 2018 ("The Center ranked fifth among the 44 applicants in the 2012 Scrap Tire Program.").

<sup>89</sup> *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2017 (2017).

<sup>90</sup> *See* MO. CONST. art. I, § 7 ("[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.").

<sup>91</sup> *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 976 F. Supp. 2d 1137, 1140 (W.D. Mo. 2013), *aff'd*, 788 F.3d 779 (8th Cir. 2015), *rev'd and remanded sub nom. Trinity Lutheran*, 137 S. Ct. 2012. As the Supreme Court did not reach the merits of the Church's Equal Protection or Free Speech claims, the lower court's reasoning as to those claims is omitted from this background discussion.

<sup>92</sup> *Id.* at 1141-45.

<sup>93</sup> *Id.* at 1146-51.

issue in this case.”<sup>94</sup>

On appeal, the Eighth Circuit similarly rejected the Church’s federal and state constitutional claims and affirmed the judgment.<sup>95</sup> The court again recognized that “Missouri could include the Learning Center’s playground in a non-discriminatory Scrap Tire grant program without violating the Establishment Clause,” but that the issue was “whether the Free Exercise Clause [or] the Establishment Clause . . . *compel* Missouri to provide public grant money directly to a church, contravening a long-standing state constitutional provision that is not unique to Missouri.”<sup>96</sup> Finding that “[n]o Supreme Court case . . . has granted such relief,” the court noted that “only the Supreme Court [could] make that leap,” again relying on *Locke* to hold that the state no-aid provision did not conflict with the federal Religion Clauses.<sup>97</sup>

The Supreme Court, in a 7-2 decision, reversed. Consistent with the lower court decisions, the Court first conceded that “[t]he parties agree that the Establishment Clause of th[e] First Amendment does not prevent Missouri from including Trinity Lutheran in the Scrap Tire Program.”<sup>98</sup> Proceeding to the Church’s free exercise claim, Chief Justice Roberts, writing for the majority, noted that “[t]he Free Exercise Clause ‘protect[s] religious observers against unequal treatment’ and subjects to the strictest scrutiny laws that target the religious for ‘special disabilities’ based on their ‘religious status.’”<sup>99</sup>

Analogizing to *McDaniel* and *Sherbert*, the majority found that the Department’s categorical exclusion of the Center from the grant program effectively imposed a penalty on the Church and other religious entities “solely because of their religious character.”<sup>100</sup> Roberts then distinguished *Locke* by indicating that Washington state had “merely chosen not to fund a distinct category of instruction” and that the claimant there “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.”<sup>101</sup> In contrast, here, the Church “was denied a grant simply because of what it is—a church.”<sup>102</sup>

Further, the Department’s antiestablishment interest was not analogous to the state of Washington’s in *Locke* since clergy training was an “essentially

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<sup>94</sup> *Id.* at 1151.

<sup>95</sup> *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 788 F.3d 779, 790 (8th Cir. 2015).

<sup>96</sup> *Id.* at 784.

<sup>97</sup> *Id.* at 784–85.

<sup>98</sup> *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017).

<sup>99</sup> *Id.* at 2019 (quoting *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533, 542 (1993) (internal quotation marks omitted)).

<sup>100</sup> *Id.* at 2021–22.

<sup>101</sup> *Id.* at 2023 (internal citations omitted).

<sup>102</sup> *Id.*

religious endeavor” and clearly distinct from playground resurfacing in this case.<sup>103</sup> In addition, the *Locke* Court only reached the state’s antiestablishment interest after determining that the state program there “did not require students to choose between their religious beliefs and receiving a government benefit.”<sup>104</sup> Here, the majority found that the Church essentially had to choose between the two.<sup>105</sup> Since the Department’s antiestablishment interest was not “compelling,” the Court found that its policy violated the Church’s free exercise rights, emphatically stating that “the exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution all the same, and cannot stand.”<sup>106</sup> However, Roberts, joined by a plurality of Justices, attempted to limit the reach of the decision in footnote three to the majority opinion: “This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination.”<sup>107</sup>

Justices Gorsuch and Thomas each concurred in part but declined to join footnote three. Thomas expressed concern with “[t]his Court’s endorsement in *Locke* of even a ‘mil[d] kind’ of discrimination against religion,” but agreed with the majority’s narrow interpretation of the case.<sup>108</sup> Gorsuch questioned the majority’s distinction from *Locke* between “discriminat[ion] on the basis of religious *status* and religious *use*,” specifically noting that, it shouldn’t “matter whether we describe [a] benefit, say, as closed to Lutherans (status) or closed to people who do Lutheran things (use). It is free exercise either way.”<sup>109</sup> Accordingly, free exercise principles “do not permit discrimination against religious exercise—whether on the playground or anywhere else.”<sup>110</sup>

Justice Breyer concurred in the judgment, specifically reasoning that the Scrap Tire Program—due to its focus on child health and safety—was more properly characterized not as a mere public benefit, but more akin to public welfare.<sup>111</sup> In that sense, precluding the Church from the program would be analogous to cutting it off from such “general government services as

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<sup>103</sup> *Id.*

<sup>104</sup> *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2023 (2017) (internal quotations omitted).

<sup>105</sup> *Id.* at 2024 (“In this case, there is no dispute that Trinity Lutheran *is* put to the choice between being a church and receiving a government benefit.”).

<sup>106</sup> *Id.* at 2025.

<sup>107</sup> *Id.* at 2024 n.3 (plurality). Chief Justice Roberts’s opinion was joined in full by Justices Kennedy, Alito, and Kagan. Justices Thomas and Gorsuch joined except as to footnote three, and Justice Breyer concurred in the judgment only. Justices Sotomayor and Ginsburg dissented. *Id.* at 2016 (majority opinion).

<sup>108</sup> *Id.* at 2025 (Thomas, J., concurring) (second alteration in original) (internal citations omitted).

<sup>109</sup> *Id.* at 2025–26 (Gorsuch, J., concurring) (emphasis in original).

<sup>110</sup> *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2026 (2017).

<sup>111</sup> *Id.* at 2026–27 (Breyer, J., concurring in judgment).

ordinary police and fire protection” that the *Everson* Court stated churches and religious institutions were clearly entitled to receive.<sup>112</sup>

In an impassioned dissent, Justice Sotomayor, joined by Justice Ginsberg, first argued that, contrary to the assertions of the parties, providing direct funding to the Church would violate the Establishment Clause.<sup>113</sup> Noting the inherently religious mission of the Learning Center, Sotomayor found that direct program grants would impermissibly advance religion, as “[t]he playground surface cannot be confined to secular use any more than lumber used to frame the Church’s walls, glass stained and used to form its windows, or nails used to build its altar.”<sup>114</sup>

Even absent an Establishment Clause violation, Justice Sotomayor concluded that the interplay between the Religion Clauses often *requires* the government to “draw lines based on an entity’s religious ‘status.’”<sup>115</sup> After providing a substantive historical discussion of state opposition to public funding of religious entities, she argued that the *Locke* decision recognized this historic state interest.<sup>116</sup>

Further, Justice Sotomayor contended that since the Establishment Clause prohibits government from funding religious activities, “[a] state can reasonably use status as a ‘house of worship’ as a stand-in for ‘religious activities.’”<sup>117</sup> Also noting that “thirty-eight states have a counterpart to Missouri’s [no-aid provision],”<sup>118</sup> she concluded by expressing concern that the majority’s decision “holds not just that a government may support houses of worship with taxpayer funds, but that—at least in this case and perhaps in others—it must do so whenever it decides to create a funding program.”<sup>119</sup>

### III. DISCUSSION

#### A. *Legal Perspectives on Trinity Lutheran*

At first, what may be most striking about the decision is the complete absence of analysis on the Establishment Clause issue. Chief Justice Roberts’ omission is no doubt a flaw in the majority opinion. However, it is ultimately a minor one. Despite Justice Sotomayor’s vigorous argument, including Trinity Lutheran in the Scrap Tire Program likely does not violate

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<sup>112</sup> *Id.* at 2027 (quoting *Everson v. Bd. of Educ.*, 330 U.S. 1, 17–18 (1947)).

<sup>113</sup> *Id.* at 2028–29 (2017) (Sotomayor, J., dissenting) (“The government may not directly fund religious exercise. . . . Nowhere is this rule more clearly implicated than when funds flow directly from the public treasury to a house of worship.”).

<sup>114</sup> *Id.* at 2030.

<sup>115</sup> *Id.* at 2031.

<sup>116</sup> *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2036 (2017).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 2037.

<sup>119</sup> *Id.* at 2041 (internal citation omitted).

the Establishment Clause. Sotomayor is entirely correct in recognizing that “[c]onstitutional questions are decided by this Court, not the parties’ concessions.”<sup>120</sup> But, her Establishment Clause analysis effectively ignores the Court’s recent shift away from categorical prohibitions on aid to “pervasively sectarian” institutions.<sup>121</sup> Resurfacing a gravel playground at a church daycare cannot reasonably be interpreted as advancing or endorsing religious indoctrination any more than placing public school teachers in pervasively sectarian schools could in the program upheld in *Agostini*.<sup>122</sup> In prior cases, the Court has noted “‘special Establishment Clause dangers,’ when *money* is given to religious schools or entities directly,”<sup>123</sup> and Justice Sotomayor emphasized that Trinity Lutheran had provided no “assurances that public funds would not be used for religious activity.”<sup>124</sup> However, since the Scrap Tire Program only provides one-time reimbursement grants for playground resurfacing costs, the state can easily verify and ensure secular use of the funds.<sup>125</sup>

The majority opinion’s free exercise analysis, in contrast, fails in several respects. Despite Chief Justice Roberts’ attempt to limit the reach of the decision, footnote three is unlikely to have that practical effect. The footnote only garnered a plurality of Justices, leaving courts and future litigants to likely rely on the opinion’s sweeping pronouncements.<sup>126</sup>

More importantly, Roberts’ interpretation of free exercise precedent does not support his opinion’s far-reaching “nondiscrimination” principle.<sup>127</sup> He and the majority ultimately rejected the government’s antiestablishment interest as not compelling enough in concluding that the Department’s exclusion of religious entities from the Scrap Tire Program constituted

<sup>120</sup> *Id.* at 2028.

<sup>121</sup> *Mitchell v. Helms*, 530 U.S. 793, 826–28 (2000) (plurality opinion).

<sup>122</sup> *Agostini v. Felton*, 521 U.S. 203, 228, 234–35 (1997).

<sup>123</sup> *Mitchell*, 530 U.S. at 818–19 (internal citation omitted) (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 842 (1995)).

<sup>124</sup> *Trinity Lutheran*, 137 S. Ct. at 2029.

<sup>125</sup> *Tilton v. Richardson*, 403 U.S. 672, 688 (1971) (noting that the construction grants for secular facilities at religious colleges at issue were a one-time payment and thus “no government analysis of an institution’s expenditures on secular as distinguished from religious activities” would be required).

<sup>126</sup> Aside from only commanding a plurality, the footnote may have been a mere compromise to secure the majority’s result, and, in particular, Justice Breyer’s vote. Gillian E. Metzger, Foreword, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 29 (2017). However, despite their separate opinions, it is not unreasonable to speculate that Justices Breyer, Sotomayor, and Ginsburg would likely agree with footnote 3’s limiting principle, which may lend more support for its future importance. Frank Ravitch, *Symposium: Trinity Lutheran and Zelman—Saved by Footnote 3 or a Dream Come True for Voucher Advocates?*, SCOTUSBLOG (June 26, 2017, 10:59 PM), <http://www.scotusblog.com/2017/06/symposium-trinity-lutheran-church-v-comer-zelman-v-simmons-harris-saved-footnote-3-dream-come-true-voucher-advocates/>.

<sup>127</sup> Edward Correia, *Trinity Lutheran Church v. Comer: An Unfortunate New Anti-Discrimination Principle*, 18 RUTGERS J.L. & RELIGION 280, 290–92 (2017).



“discrimination” on the basis of religious status. However, the compelling government interest requirement under *Sherbert* and *McDaniel*—the free exercise government aid cases most analogous to the facts in *Trinity Lutheran*—was effectively abrogated by *Smith* as to neutral and generally applicable government action.<sup>128</sup>

The majority opinion did note that the program was generally applicable, but maintained it was not neutral as it expressly referenced religion.<sup>129</sup> But, under *Locke*, which Roberts fervently distinguished but ultimately upheld, a policy’s lack of facial neutrality as to religion does not automatically trigger strict scrutiny review.<sup>130</sup> Instead, *Locke* clarifies *Lukumi*’s neutrality requirement in the context of government aid to religious organizations: a program is not neutral if it demonstrates “animus” or “hostility” towards religion.<sup>131</sup> The animus in *Lukumi* was clear: the city government specifically targeted the Santería religion because it disapproved of its religious practices. Likewise, the state commission in *Masterpiece Cakeshop* was similarly hostile and disapproving of the baker’s religious views on gay marriage in his decision to refuse service at his business.<sup>132</sup> Missouri’s desire to avoid violating the Constitution is not nearly of the same ilk.

Accordingly, “discrimination” on the basis of religious status that triggers strict scrutiny review should be accompanied by demonstrable animus or hostility towards religion. Although the case was decided after *Trinity Lutheran*, the *Masterpiece Cakeshop* decision supports the principle that such hostility should reflect palpable state disapproval of religious belief.<sup>133</sup> Unfortunately, the Court has increasingly considered a mere lack of neutrality between secular and religious institutions in the provision of

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<sup>128</sup> See *City of Boerne v. Flores*, 521 U.S. 507, 513 (1997) (“In evaluating the claim [in *Smith*], we declined to apply the balancing test set forth in *Sherbert v. Verner*, under which we would have asked whether Oregon’s prohibition substantially burdened a religious practice and, if it did, whether the burden was justified by a compelling government interest.” (internal citation omitted)); *Ruiz-Diaz v. United States*, 703 F.3d 483, 486 (9th Cir. 2012) (“The Supreme Court in *Employment Division v. Smith* overruled *Sherbert* and [*Wisconsin v. Yoder*.” (internal citations omitted)); see *Correia*, *supra* note 127, at 292 (arguing that *McDaniel* is the case “closest to the broad proposition the Court claims,” but “the Court’s authority for the ‘highest order’ test [in *McDaniel*] comes from a case that has been clearly rejected if not overruled outright”).

<sup>129</sup> *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2024 (2017).

<sup>130</sup> *Locke v. Davey*, 540 U.S. 712, 720 (2004) (“[Petitioner] contends that under the rule we enunciated in *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, the program is presumptively unconstitutional because it is not facially neutral with respect to religion. We reject his claim of presumptive unconstitutionality, however; to do otherwise would extend the *Lukumi* line of cases well beyond not only their facts but their reasoning.” (internal citation and footnote omitted)).

<sup>131</sup> See *id.* at 725 (“[W]e find neither in the history or text of [the state no-aid provision], nor in the operation of the Promise Scholarship Program, anything that suggests animus toward religion.”); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) (“[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral.”).

<sup>132</sup> *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1729–30, 1732 (2018).

<sup>133</sup> *Id.*

government benefits as demonstrating “hostility” towards religion,<sup>134</sup> despite rational justifications for the exclusion of religious entities from government aid programs. This understanding of discrimination oversimplifies *Lukumi*’s formulation, where for discrimination to be constitutionally suspect, it must be rooted in the “targeting,” “suppression,”<sup>135</sup> or “disfavor of religion.”<sup>136</sup> The Court has repeatedly recognized that government distinctions based on religious status are often necessary because of the interactions between the Religion Clauses.<sup>137</sup>

### B. Normative Perspectives on Trinity Lutheran

From a normative perspective, the result in *Trinity Lutheran* is probably the “right” one. After all, this is also a case about “scraped knees” on neighborhood playgrounds.<sup>138</sup> The Learning Center was likely the most deserving grant recipient in Boone County, Missouri. It ranked fifth out of all applicants. Its playground was public and not only served its approximately ninety students, but also children from the entire community.<sup>139</sup> The program’s goals of increasing child safety on playgrounds while reducing scrap tire waste in landfills would not be as adequately fulfilled if the Missouri Department of Resources *didn’t* replace the Learning Center’s “unforgiving” pea gravel playground surface.<sup>140</sup>

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<sup>134</sup> See *Trinity Lutheran*, 137 S. Ct. at 2025 (“[T]he exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is *odious* to our Constitution all the same, and cannot stand.” (emphasis added)); *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion) (“[H]ostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow.”); Frank S. Ravitch, *The Supreme Court’s Rhetorical Hostility: What Is ‘Hostile’ to Religion Under the Establishment Clause?*, 2004 BYU L. REV. 1031, 1034 (“[T]he Court (or a plurality of Justices) has in essence said that failure to treat religious entities and individuals like all other entities and individuals is hostile toward religion. Thus, the Court seems poised to treat hostility and lack of formal neutrality as two sides of the same coin.” (footnote omitted)).

<sup>135</sup> *Lukumi*, 508 U.S. at 533.

<sup>136</sup> *Locke v. Davey*, 540 U.S. 712, 720 (2004) (“In the present case, the State’s disfavor of religion (if it can be called that) is of a far milder kind. It imposes neither criminal nor civil sanctions on any type of religious service or rite. It does not deny to ministers the right to participate in the political affairs of the community.”).

<sup>137</sup> See *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2040 (2017) (Sotomayor, J., dissenting) (“A State’s decision not to fund houses of worship does not disfavor religion; rather, it represents a valid choice to remain secular in the face of serious establishment and free exercise concerns. That does not make the State ‘atheistic or antireligious.’” (quoting *County of Allegheny v. ACLU*, 492 U.S. 573, 610 (1989)); Correia, *supra* note 127, at 294 (“There will always be an element of ‘discrimination’ in the treatment of religious and non-religious activities and organizations as long as the Establishment Clause has any meaning.”).

<sup>138</sup> *Trinity Lutheran*, 137 S. Ct. at 2025 (majority opinion).

<sup>139</sup> Steven D. Schwinn, *Can a State Exclude a Church from an Otherwise Neutral and Secular Grant Program Just Because It Is a Church?: Trinity Lutheran Church of Columbia v. Comer (Docket No. 15-577)*, 44 PREVIEW U.S. SUP. CT. CAS. 214, 214 (2017).

<sup>140</sup> *Trinity Lutheran*, 137 S. Ct. at 2017.

But the boundless principles on religious “discrimination” the majority opinion invokes to resolve the issue are deeply troubling. The majority’s adherence to an austere, formalistic conception of neutrality and nondiscrimination in government funding fails to account for the unique status that houses of worship occupy in our legal and social framework. The Free Exercise Clause requires a certain degree of government noninterference in church affairs: a “special solitude” that is distinct and exceeds similar “secular” constitutional protections, such as the freedom of association.<sup>141</sup> As such, the government cannot, among other things, judicially resolve certain church property disputes or require houses of worship to comply with employment discrimination statutes in the selection of clergy.<sup>142</sup>

Until *Trinity Lutheran* of course, accommodations affirmatively required by the Free Exercise Clause were few. Instead, where there is no Establishment Clause violation, federal and state governments have extended substantial accommodations to religious entities as a matter of legislative grace rooted in the noninterference principle.<sup>143</sup> Such discretionary accommodations can properly be considered “benefits.”<sup>144</sup> Many of these accommodations are not granted to similar, secular organizations. For instance, houses of worship may discriminate on the basis of religion in all employment decisions<sup>145</sup> and enjoy additional federal tax exemptions over secular nonprofits.<sup>146</sup> And here, these discretionary benefits only need to be

<sup>141</sup> *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 189 (2012).

<sup>142</sup> *Id.* at 188–90; *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 449 (1969) (“[T]he First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes.”).

<sup>143</sup> *Real Alternatives, Inc. v. Sec’y Dep’t of Health & Human Servs.*, 867 F.3d 338, 352 (3d Cir. 2017) (citing *Cutter v. Wilkinson*, 544 U.S. 709, 720–22 (2005)).

<sup>144</sup> Kevin L. Brady, Comment, *Religious Sincerity and Imperfection: Can Lapsing Prisoners Recover Under RFRA and RLUIPA?*, 78 U. CHI. L. REV. 1431, 1455 (2011) (“Religious accommodations often provide benefits solely to sincere adherents.”).

<sup>145</sup> 42 U.S.C. § 2000e-1 (2012); *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 338 (1987) (“Where . . . government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption come packaged with benefits to secular entities.”).

<sup>146</sup> Religious entities and secular nonprofits are both eligible for federal tax exemption. See 26 U.S.C. § 501(c)(3) (2012) (authorizing non-profit exemption from federal taxes). However, houses of worship (and in some cases their auxiliary organizations) do not have to apply for recognition of the exemption or file an annual information return (returns are open to public inspection). See *id.* § 508(c)(1) (showing that houses of worship are exempt from the need to file a 501(c)(3)); *id.* § 6033(a)–(b) (exempting religious organizations from annual information returns). Nor are they presumed to be private foundations, exempting them from additional regulations and special taxes. See *id.* § 508(b), (c)(1)(A) (outlining the special existence of religious entities as exempt from private foundation taxes). They are generally not subject to audit, and do not have to pay employment taxes or comply with certain retirement plan requirements for their ministers. See *id.* § 7611(a)(1), (2) (exempting religious entities from audit); *id.* § 3309(b)(1)–(2), 414(e) (showing that religious entities as employers are exempt from employment taxes and retirement plan requirements); see also W. COLE DURHAM AND ROBERT SMITH, 4 RELIGIOUS ORGANIZATIONS AND THE LAW § 32:6 (Westlaw rev. ed. 2017) (summarizing the tax exemptions that religious

distributed neutrally among religions to comport with the Establishment and Equal Protection Clauses, despite the lack of neutrality between religious and secular entities.<sup>147</sup>

Accordingly, the *Trinity Lutheran* decision essentially allows houses of worship and religious organizations to “double-dip” in benefits and accommodations.<sup>148</sup> It allows state governments to extend discretionary benefits solely to religious entities under a less stringent concept of neutrality while simultaneously requiring state governments to include them in discretionary funding programs extended to secular entities under a higher neutrality standard. This inconsistency undermines neutrality overall by prioritizing religious “status,” cripples the “play in the joints” in the Religion Clauses where the legislature may allocate assistance according to political preferences, and appears fundamentally at odds with common-sense notions of fairness.

Moreover, the majority’s conclusion that arguably benign exclusions of religious entities from government funding programs constitute “odious” status discrimination may raise equal protection concerns where the government seeks to accommodate religion. For example, state action based on racial status is subject to strict scrutiny review regardless of whether it burdens or benefits individuals in the class.<sup>149</sup> In contrast, religious accommodations are typically only subject to a far less rigorous Establishment Clause analysis.<sup>150</sup> If, according to the *Trinity Lutheran* majority, strict scrutiny applies whenever government restricts religious participation in government funding programs, strict scrutiny should likewise apply when the government extends discretionary benefits exclusively to religious entities. A heightened standard of review may threaten a host of

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entities enjoy). Additionally, ministers themselves receive various exemptions under the tax code. *See id.* § 107 (outlining the ministerial exemptions in the tax code).

<sup>147</sup> *Amos*, 483 U.S. at 338–39 (“Appellees argue that [the religious discrimination exemption under Title VII] offends equal protection principles by giving less protection to the employees of religious employers than to the employees of secular employers. . . . But . . . laws discriminating among religions are subject to strict scrutiny, and . . . laws ‘affording a uniform benefit to all religions’ should be analyzed under *Lemon*.” (internal citations omitted)).

<sup>148</sup> *See* Ira C. Lupu, *Government Messages and Government Money: Santa Fe, Mitchell v. Helms, and the Arc of the Establishment Clause*, 42 WM. & MARY L. REV. 771, 820 (2001) (“[T]he absence of a religious nondiscrimination requirement in hiring might be seen as double-dipping by religious institutions, which rely on their sectarian character in their quest for autonomy in selecting employees while simultaneously seeking a place as a religion-neutral dispenser of government benefits.”); Laura B. Mutterperl, Note, *Employment at (God’s) Will: The Constitutionality of Antidiscrimination Exemptions in Charitable Choice Legislation*, 37 HARV. C.R.-C.L. L. REV. 389, 432–33 (2002).

<sup>149</sup> *See* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 223–24 (1995) (under “consistency” principle, holding that all race-based classifications are subject to strict scrutiny regardless of “the race of those burdened or benefited by a particular classification” (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989))).

<sup>150</sup> *Amos*, 483 U.S. at 338–39.

permissible religious accommodations. For instance, historical noninterference in church affairs may be a compelling government interest in upholding exemptions from federal tax audits and reporting requirements for houses of worship,<sup>151</sup> but the breadth of the exemption is likely not narrowly tailored. There are likely less restrictive means to avoid substantial interference in religious affairs while still subjecting churches to similar tax requirements as secular nonprofits. For one, church financial records could be reviewed as a matter of course “to the extent necessary to determine the liability for, and the amount of, any tax”—the Internal Revenue Service is already authorized to do when it reasonably believes a church claiming an exemption is not a bona fide church.<sup>152</sup>

In either event, the *Trinity Lutheran* decision may be a double-edged sword. On the one hand, religious entities may now be able to participate in a wide swath of government funding programs previously foreclosed to them. On the other hand, government funding is a finite resource, and increased program participation likewise increases the strain on those resources. Constitutionally mandated inclusion of religious entities may thus have a chilling effect on social welfare programs. Legislatures may reduce the amount of benefits under existing funding programs and decline to offer new ones due to budget constraints. The force of Chief Justice Roberts’ footnote three is likely insufficient to tackle these externalities and social costs.<sup>153</sup>

Further, government funding routinely comes with strings attached. The government constitutionally cannot “giv[e] significant aid to institutions that practice racial or other invidious discrimination,”<sup>154</sup> and funding programs often require nondiscrimination in hiring and provision of services for eligibility. In contrast, houses of worship are expressly permitted to discriminate on religious grounds under federal law and various state public accommodations statutes.<sup>155</sup> Such neutral and generally applicable nondiscrimination conditions to funding as applied to religious entities likely do not violate the Free Exercise Clause<sup>156</sup> or the unconstitutional conditions

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<sup>151</sup> See John W. Whitehead, *Tax Exemption and Churches: A Historical and Constitutional Analysis*, 22 CUMB. L. REV. 521, 545–55 (1992) (detailing the history of tax exemptions for churches).

<sup>152</sup> 26 U.S.C. § 7611(a)(2), (b)(1)(A) (2012).

<sup>153</sup> See Ira C. Lupu, *Uncovering the Village of Kiryas Joel*, 96 COLUM. L. REV. 104, 115 (1996) (“Religious accommodations usually create externalities, in the sense that such accommodations permit behavior which the polity would otherwise forbid; because the underlying prohibition usually has social benefits, accommodations generate corresponding social costs.”).

<sup>154</sup> *Norwood v. Harrison*, 413 U.S. 455, 467 (1973).

<sup>155</sup> See, e.g., 42 U.S.C. § 2000e-1 (2012); Kelly Catherine Chapman, *Gay Rights, the Bible, and Public Accommodations: An Empirical Approach to Religious Exemptions for Holdout States*, 100 GEO. L.J. 1783, 1789 (2012) (noting at least twenty-two jurisdictions with public accommodations statutes that prohibit sexual orientation discrimination, with most including at least “minimal” exemptions for houses of worship).

<sup>156</sup> See *Emp’t Div. v. Smith*, 494 U.S. 872, 877 (1990) (describing the Free Exercise Clause and noting that the government “may not compel affirmation of religious belief”).

doctrine,<sup>157</sup> but nonetheless clash with principles of noninterference. Of course, these entities always have recourse to simply decline the funds.<sup>158</sup> But the resulting conflict is clear where religious entities seek to exercise their “right” to funding under *Trinity Lutheran*.<sup>159</sup>

### C. Implications for State No-Aid Provisions

The *Trinity Lutheran* decision has sparked ample attention as to its implications for government funding programs going forward. Some commentators have expressed concern that the decision effectively creates a new free exercise principle: “that the government is constitutionally required to provide assistance to religious institutions.”<sup>160</sup> Others have contrarily argued that the decision is “long overdue,” and correctly extends the Free Exercise Clause principle against discrimination based on religious status to government benefits.<sup>161</sup> Arguably most significantly, commentators on both sides have noted that the decision calls into doubt the viability of state no-aid provisions found in the majority of state constitutions.<sup>162</sup>

However, *Trinity Lutheran*’s implications for state Blaine Amendments and similar constitutional provisions that prohibit government funding to religious entities are likely not as far reaching as commentators have claimed and, more importantly, should not be interpreted as such. State no-aid provisions likely do not categorically violate the Free Exercise Clause for three notable reasons.

First, state Blaines are largely consistent with the religious status versus

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<sup>157</sup> See, e.g., *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 544–46, 549, 551 (1983) (holding that tax exemption condition prohibiting lobbying by certain nonprofits was not unconstitutional condition because government is “not required . . . to subsidize lobbying”).

<sup>158</sup> See *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 570 U.S. 205, 214 (2013) (“As a general matter, if a party objects to a condition on the receipt of federal funding, its recourse is to decline the funds. This remains true when the objection is that a condition may affect the recipient’s exercise of its First Amendment rights.”); Ibbey Caputo & Jon Marcus, *The Controversial Reason Some Religious Colleges Forgo Federal Funding*, ATLANTIC (July 7, 2016), <https://www.theatlantic.com/education/archive/2016/07/the-controversial-reason-some-religious-colleges-forgo-federal-funding/490253/> (noting that religious colleges are refusing Title IV and IX funding due to conditions prohibiting sexual orientation discrimination).

<sup>159</sup> See Brief of Amicus Curiae Lambda Legal Defense & Education Fund, Inc. in Support of Respondent at 18, *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017) (No. 15–577), 2016 WL 3667051, at \*18 (“[N]umerous courts have held that publicly funded social service providers are not entitled to religious accommodations that would permit them to deliver services in a sectarian or discriminatory manner, which would violate the Establishment Clause.”); Richard W. Garnett & Jackson C. Blais, *Religious Freedom and Recycled Tires: The Meaning and Implications of Trinity Lutheran*, 2017 CATO SUP. CT. REV. 105, 127–28.

<sup>160</sup> Chemerinsky, *supra* note 4, at 358.

<sup>161</sup> Garnett & Blais, *supra* note 159, at 121.

<sup>162</sup> See, e.g., Erica Smith, *Blaine Amendments and the Unconstitutionality of Excluding Religious Options from School Choice Programs*, 18 FEDERALIST SOC’Y REV. 48, 48, 58 (2017).

religious use distinction proposed in *Trinity Lutheran*.<sup>163</sup> Read to its broadest conclusion, the *Trinity Lutheran* decision advances the proposition that *any* government discrimination in generally available funding programs based on religious status is the lynchpin of a free exercise violation.<sup>164</sup> However, the majority in *Trinity Lutheran* explicitly recognized the continuing validity of their decision in *Locke*, which implicitly upheld Washington’s constitutional prohibition on the use of public funds for religious instruction as applied to its state scholarship program.<sup>165</sup> Specifically, the *Trinity Lutheran* majority noted that the *Locke* petitioner “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.”<sup>166</sup>

State Blaine Amendments can similarly be construed as prohibiting the religious *use* of taxpayer funds rather than excluding churches and religious institutions from government funding programs “*solely* because of their religious character.”<sup>167</sup> The education funding context is particularly illustrative. As noted in Section I.B.1 above, the failed national Blaine Amendment was exclusively concerned with education funding.<sup>168</sup> Today, nearly forty states have Blaine Amendments in their constitutions, with the vast majority of such amendments dealing primarily with education funding to sectarian schools.<sup>169</sup> Even absent a federal Establishment Clause violation, prohibiting the use of public funds to pay for religious instruction at sectarian schools is a legitimate government interest.<sup>170</sup> The Supreme Court has repeatedly recognized the fundamental establishment concerns with religious indoctrination in the education funding context.<sup>171</sup> While religious

<sup>163</sup> *Trinity Lutheran*, 137 S. Ct. at 2023.

<sup>164</sup> *Id.* at 2025 (“[T]he exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution all the same, and cannot stand.”).

<sup>165</sup> *See id.* at 2022–23; *Locke v. Davey*, 540 U.S. 712, 720–25 (2004) (holding that state scholarship program’s prohibition on use of funds for theology degrees did not violate Free Exercise Clause).

<sup>166</sup> *Trinity Lutheran*, 137 S. Ct. at 2023 (emphasis in original).

<sup>167</sup> *See id.* at 2021 (emphasis added).

<sup>168</sup> *See* 4 CONG. REC. 205 (1875); *see also* DeForrest, *supra* note 66, at 557 (“The second effect of Blaine’s amendment would have been to prohibit state governments from supporting private religious schools with funds from the public treasury.”).

<sup>169</sup> *See* Green, *supra* note 69, at 327 (“Counts may vary, but thirty-eight states have express provisions limiting or prohibiting public funding to religious schools (by whatever name) and/or prohibiting control of the education fund by a religious entity.”); Goldenziel, *supra* note 64, at 69 (“While the Federal Blaine Amendment was confined to restrictions of public funding of schools, twenty-one of the thirty-nine no-funding provisions restrict funding to all religious institutions or societies, or any funding that will be used for a religious purpose.”); *see also* Meir Katz, *The State of Blaine: A Closer Look at the Blaine Amendments and Their Modern Application*, 12 ENGAGE 111, 111 & n.1 (2011) (listing amendments).

<sup>170</sup> *See Locke*, 540 U.S. at 722–25 (holding the state had a “substantial” interest in not funding theological instruction, even though such funding would be permissible under federal Establishment Clause).

<sup>171</sup> *See Tilton v. Richardson*, 403 U.S. 672, 687 (1971) (upholding direct grants to religiously affiliated

instruction at sectarian schools may not be an “essentially religious endeavor” to the same degree as the ministerial training sought by the petitioner in *Locke*,<sup>172</sup> the implications for funding religious indoctrination are undoubtedly related.<sup>173</sup>

The status versus use distinction is relevant for this very reason. In the context of a government benefit funded by taxpayer dollars, it *does* matter “whether we describe that benefit, say, as closed to Lutherans (status) or closed to people who do Lutheran things (use).”<sup>174</sup> Providing funding to a Lutheran to educate schoolchildren in religious doctrine, for example, is a far cry from providing unemployment benefits to a Lutheran terminated for refusing to work on the Sabbath.<sup>175</sup> The relevant inquiry should include a determination of whether funds from the public fisc will invariably be used for inherently religious purposes, like instruction and indoctrination. The *Trinity Lutheran* plurality implicitly recognized this distinction in their controversial footnote 3; the free exercise violation largely existed because playground resurfacing is not a religious activity.<sup>176</sup>

Accordingly, state agencies may need to more closely evaluate the nature of the aid provided under government programs before—pursuant to more restrictive state constitutional provisions—adopting policies that categorically exclude religious institutions. Funding programs that deny qualified religious institutions clearly secular aid for clearly secular uses are prime for attack on free exercise grounds post-*Trinity Lutheran*.

However, in practice, states by and large do not adopt such bright-line rules concerning government funding to religious institutions under Blaine

colleges because, inter alia, “religious indoctrination is not a substantial purpose or activity of these church-related colleges and universities,” thus “there is less likelihood than in primary and secondary schools that religion will permeate the area of secular education. This reduces the risk that government aid will in fact serve to support religious activities.”); see also *Mitchell v. Helms*, 530 U.S. 793, 837–38 (2000) (O’Connor, J., concurring) (noting that “actual diversion of government aid to religious indoctrination is in tension with our precedents” in cases of direct aid to religious institutions); *Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 245, 248 (1968) (noting that “this Court has long recognized that religious schools pursue two goals, *religious instruction* and secular education,” but that secular textbooks and materials state provided to religious schools were not “instrumental in the teaching of religion” (emphasis added)).

<sup>172</sup> *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2023 (2017) (quoting *Locke v. Davey*, 540 U.S. 712, 721–22 (2004)).

<sup>173</sup> *Tilton*, 403 U.S. at 685–86 (“The ‘affirmative if not dominant policy’ of the instruction in pre-college church schools is ‘to assure future adherents to a particular faith by having control of their total education at an early age.’” (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 671 (1970))).

<sup>174</sup> *Trinity Lutheran*, 137 S. Ct. at 2026 (Gorsuch, J., concurring).

<sup>175</sup> See *Hobbie v. Unemp’t Appeals Comm’n*, 480 U.S. 136, 139–40 (1987); *Sherbert v. Verner*, 374 U.S. 398, 409–10 (1963).

<sup>176</sup> *Trinity Lutheran*, 137 S. Ct. at 2023 (majority opinion) (“The claimant in *Locke* sought funding for an ‘essentially religious endeavor . . . akin to a religious calling as well as an academic pursuit,’ and opposition to such funding ‘to support church leaders’ lay at the historic core of the Religion Clauses. *Here nothing of the sort can be said about a program to use recycled tires to resurface playgrounds.*” (emphasis added) (internal citations omitted) (quoting *Locke*, 540 U.S. at 721–22)).



Amendments or compelled support provisions, and often provide grants to religious organizations for their secular activities.<sup>177</sup> State interpretations of their respective Blaine Amendments vary considerably<sup>178</sup> and compelled support provisions in particular generally do not bar religious organizations from receiving neutral, generally applicable government benefits for secular purposes.<sup>179</sup> For instance, the Sixth Circuit found that a Michigan program providing direct reimbursements to downtown Detroit property owners for building façade refurbishment costs did not violate the state’s no-aid provision even though it included churches in the program.<sup>180</sup> Finding that the program did not violate the federal Establishment Clause, the court applied Michigan courts’ interpretation of the no-aid provision as being consistent with its federal counterpart.<sup>181</sup>

Moreover, even where courts have acknowledged that their state’s constitutional no-aid provision draws a more stringent line than the federal Establishment Clause, many have not found that the provisions bar government funding to religious organizations for secular purposes.<sup>182</sup> For example, despite a no-aid provision that facially prohibits direct and indirect funding of religious entities,<sup>183</sup> Florida courts have allowed pervasively religious institutions to provide secular social services programs.<sup>184</sup> Even the Missouri Supreme Court, which has historically strictly interpreted its state’s no-aid provision, noted the secular character of religiously affiliated Saint Louis University’s proposed sports arena in holding that government funding for the arena did not violate the state’s establishment clause.<sup>185</sup>

In addition, evidence that state legislatures enacted no-aid provisions due to any hostility to religion is likely to be insufficient to demonstrate “animus” violative of the Free Exercise Clause.<sup>186</sup> “The [*Locke*] Court rejected the

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<sup>177</sup> Katz, *supra* note 169, at 113 (“Many states have adopted programs that fund the secular charitable operations of faith-based organizations.”).

<sup>178</sup> See *supra* Section I.B.1.

<sup>179</sup> Cauthen, *supra* note 63, at 2145.

<sup>180</sup> Am. Atheists, Inc. v. City of Detroit Downtown Dev. Auth., 567 F.3d 278, 301 (6th Cir. 2009).

<sup>181</sup> *Id.* at 301.

<sup>182</sup> See, e.g., Council for Secular Humanism, Inc. v. McNeil, 44 So. 3d 112, 119 (Fla. Dist. Ct. App. 2010) (noting that “Florida’s no-aid provision [is] ‘far stricter’ than the Establishment Clause, and ‘draw[s] a more stringent line than that drawn by the United States Constitution,’” but holding that “Florida’s no-aid provision does not create a per se bar to the state providing funds to religious or faith-based institutions to furnish necessary social services”).

<sup>183</sup> FLA. CONST. art. I, § 3 (“No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.”).

<sup>184</sup> Council for Secular Humanism, 44 So. 3d at 119.

<sup>185</sup> Saint Louis Univ. v. Masonic Temple Ass’n of St. Louis, 220 S.W.3d 721, 728 (Mo. 2007) (“[Saint Louis University’s] proposed sports arena is intended to redevelop a blighted area of [St. Louis] and provide an avenue for secular student and community events; its purpose is not to advance religion.”).

<sup>186</sup> See *Locke v. Davey*, 540 U.S. 712, 720–21, 724–25 (2004); cf. *Church of the Lukumi Babalu Aye*,

notion . . . that lack of facial neutrality toward religion by a state program will render it unconstitutional.”<sup>187</sup> State compelled support provisions “can be traced to the first state constitutions that often predate the First Amendment”;<sup>188</sup> thus, the requisite legislative history is likely to be unavailable. With respect to state Blaine Amendments, Professor Lantta notes that “[w]hile anti-Catholic animus was no doubt the impetus for the federal amendment, ‘that sentiment is rarely evident in the legislative debates surrounding the enactments’ of the various state amendments.”<sup>189</sup>

More importantly, “many if not most state constitutions have been re-ratified since the inclusion of the Blaine amendments, which probably ‘cleanses’ them of any improper motivation that may have initially existed.”<sup>190</sup> Voters have specifically rejected attempts to remove language prohibiting funding to sectarian institutions from state constitutions. For example, in a 2012 referendum, Florida voters overwhelmingly rejected the proposed amendment 8 to their state constitution, which would have deleted existing no-aid provision language and “add[ed] language prohibiting the denial of government benefits and support on the basis of religious identity or belief.”<sup>191</sup> Amendment 8 did not receive the required sixty percent of the vote in any county and garnered a majority in only six of Florida’s sixty-seven counties.<sup>192</sup>

Finally, federalism concerns may ensure the viability of state Blaine Amendments and compelled support clauses. Constitutional rights have often been described with a “floor/ceiling metaphor”: the federal Constitution provides the floor—the minimum level of protection—and state constitutions provide a ceiling.<sup>193</sup> Thus, states have latitude to enact constitutional provisions that expand or contract substantive rights as long as they stay within the minimum guidelines of the federal Constitution. The Establishment Clause confers substantive rights, as evidenced by the unique taxpayer standing to challenge suspect legislative enactments under it.<sup>194</sup>

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Inc. v. City of Hialeah, 508 U.S. 520, 535 (1993).

<sup>187</sup> Lantta, *supra* note 64, at 237.

<sup>188</sup> Steven K. Green, *Locke v. Davey and the Limits to Neutrality Theory*, 77 TEMP. L. REV. 913, 919 (2004).

<sup>189</sup> Lantta, *supra* note 64, at 224 (quoting Avi Schick, *Veni, Vidi, Vouchers*, SLATE (Sept. 17, 2002), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2002/09/veni\\_vidi\\_vouchers.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2002/09/veni_vidi_vouchers.html)).

<sup>190</sup> *Id.*

<sup>191</sup> Cauthen, *supra* note 63, at 2141.

<sup>192</sup> *Id.* at 2142.

<sup>193</sup> See, e.g., *Blue Movies, Inc. v. Louisville/Jefferson Cty. Metro Gov’t*, 317 S.W.3d 23, 29 (Ky. 2010) (“[S]tate courts are free to expand individual rights beyond the federal floor”); 16 AM. JUR. 2D *Constitutional Law* § 88 (Westlaw rev. ed. 2018); Neil McCabe, *The State and Federal Religion Clauses: Differences of Degree and Kind*, 5 ST. THOMAS L. REV. 49, 50 (1992).

<sup>194</sup> *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 347 (2006) (“[A] taxpayer will have standing consistent with Article III to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of ‘the Establishment Clause.’” (quoting *Flast*

Accordingly, state Blaine Amendments can also be construed as expanding Establishment Clause rights beyond the federal minimum. Such an interpretation should be more than adequate where the nature of state funding programs threatens religious indoctrination, as with school voucher programs.

#### CONCLUSION

Despite the sweeping pronouncement of “discrimination” against religious entities in the government funding context as “odious to our Constitution,”<sup>195</sup> *Trinity Lutheran’s* reasoning should remain limited to the context in which it was decided. Broad interpretation of the majority’s nondiscrimination principle severely narrows the “play in the joints” between the Religion Clauses, where governments are free to exercise “benevolent neutrality” towards religion.<sup>196</sup>

Further, expansive application of the decision’s principles may lead to unintended and undesired results for religious and secular entities alike in the receipt and application of government benefits and accommodations. Accordingly, the relatively innocuous facts of the case should guide and restrict future interpretations, lest the Free Exercise Clause be expanded to render a swath of rational state constitutional amendments a virtual nullity.

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v. Cohen, 392 U.S. 83, 105–06 (1968)).

<sup>195</sup> *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2025 (2017).

<sup>196</sup> *Walz v. Tax Comm’n*, 397 U.S. 664, 669 (1970).