TRINITY LUTHERAN CHURCH V. COMER: AN UNFORTUNATE NEW ANTI-DISCRIMINATION PRINCIPLE

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I. INTRODUCTION

The recent *Trinity Lutheran Church*[2] opinion creates a broad anti-discrimination principle involving government provision of benefits to religious organizations. There is little doubt that it will lead to direct state financial assistance to religious organizations, including churches, far beyond any period in recent history. It also overturns, or at least limits, state constitutional provisions in almost forty states and generally eliminates states' discretion to determine their own antiestablishment interests.[3] All this grows out of a denial of a grant to a church for a playground surface made from recycled tires. From inconsequential facts, far-reaching principles are made. This article provides some background on the case and discusses why the holding of the case may fundamentally change church-state relations in the United States, and not for the better.

II. BACKGROUND

The State of Missouri made available grants to Missouri residents to purchase playground surfaces made from recycled tires. Trinity Lutheran Church applied, and it is clear that the church would have received it except for provisions in the Missouri constitution that bar the state from giving money to churches.[4] The

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[2] Trinity Lutheran Church of Columbia, Inc. v. Comer, No. 15-577, 2017 WL 2722410 (U.S. June 26, 2017).

[3] *Id.* at *2041 (Sotomayor, J., dissenting) ("The constitutional provisions of thirty-nine States–all but invalidated today–the weighty interests they protect, and the history they draw on deserve more than this judicial brush aside.").

[4] The two relevant provisions in the Missouri Constitution are these:

Art. I, § 7. That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, or denomination of religion, or in aid of any

church sued the state alleging, among other things, that the decision violated the Free Exercise Clause. The district court sided with the state and granted the Department of Natural Resources' motion to dismiss.[5] The Court of Appeals for the Eighth Circuit affirmed. The Eighth Circuit said it was "rather clear" that the grant would not violate the Establishment Clause (although it was not clear at all) and found that the Free Exercise Clause did not require the grant. In particular, according to the Eighth Circuit, the Free Exercise Clause did not require the state to ignore its own constitutional provisions.[6]

In the Supreme Court, the Court's opinion did not address the Establishment Clause.[7] Nevertheless, the Establishment Clause and antiestablishment interests hovered in the background.[8] The dissenters, in fact, based their argument primarily on the Establishment Clause. In my view, nobody got it right. The grant should not violate the Establishment Clause, but denying the grant shouldn't violate the Free Exercise Clause either. The State of Missouri should have been allowed to enforce its own version of the U.S. Establishment Clause even though the state provision draws a more cautious line than the federal one.

III. THE RELIGION CLAUSES

A simple formulation of the Religion Clauses of the First Amendment is this: The Establishment Clause prohibits government from going too far to promote religion and the Free

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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.

Art. IX, § 8. Neither the general assembly, nor any county, city, town [etc.] shall ever make an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, or to help to support or sustain any private or public school...or other institution of learning controlled by any religious creed, church or sectarian denomination whatever; nor shall any grant or donation…ever be made by the state…for any religious creed, church, or sectarian purpose whatever.

[5] *Trinity Lutheran*, 2017 WL 2722410 at *2018.

[6] Trinity Lutheran Church of Columbia, Inc. v. Pauley, 788 F.3d 779, 784 (2015).

[7] *Trinity Lutheran*, 2017 WL 2722410 at *2019 (explaining that the two parties agreed that the grant did not violate the Establishment Clause).

[8] The phrase "antiestablishment interests" refers to the concerns of the Framers that underlay the Establishment Clause, i.e., preventing the state from going too far to promote religion. A state can have antiestablishment interests even though the policy that leads to these concerns does not rise to the level of a violation of the Establishment Clause. See the discussion of Locke v. Davey, 540 U.S. 712 (2004), notes 18-19 *infra* and accompanying text.

Exercise Clause prevents the government from going too far in interfering with the practice of religion. This simple formulation gets us started on analyzing problems, even though it glosses over dozens of Supreme Court cases and accompanying battles among the Justices that have gone on for many decades.

One reason Religion Clause cases are difficult is that, even today, after more than a century of litigation, there are no Supreme Court decisions stating the basics of either clause that command a clear majority. On the Establishment Clause side, the closest is *Lemon v. Kurtzman*, with its familiar three-part test.[9] However, there may be a majority of the Supreme Court ready to overturn *Lemon* at the first opportunity.[10] On the Free Exercise side, there is no disagreement with *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[11] but that case dealt with the clearest of all Free Exercise cases, a government attempt to disfavor a particular religious sect. A city drafted a highly specific ordinance to deal with one religious practice, Santeria and animal sacrifice, which the city did not like.[12] Any time government purposely disfavors one religion, there will be a violation of the Free Exercise Clause. However, most cases are going to be more complex.

These disagreements over the meaning of the Religion Clauses naturally made their way into the *Trinity Lutheran Church* case. By the time the matter was before the Supreme Court, both the church and the state agreed that the grant would not violate the Establishment Clause.[13] The opinion for the Court accepts that as a given and addresses only the Free Exercise Clause issue. The status under the Establishment Clause was far from clear, however, since it involves a check written on the State of Missouri treasury directly to a church. The Court has previously expressed concern about public money going directly to a pervasively sectarian

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[9] *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) ("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.'"); *see also Agostini v. Felton*, 521 U.S. 203, 233 (1997) (explaining that some factors considered in the entanglement analysis might also be considered in the effects analysis).

[10] *See, e.g.,* Town of Greece v. Galloway, 134 S. Ct. 1811 (2014), which rejected a challenge to legislative prayer but did not apply *Lemon*. Lower court judges are divided on whether this case represents a significant doctrinal shift away from *Lemon*. See the various opinions in Jewish People for the Betterment of Westhampton Beach v. Village of Westhampton Beach, 778 F.3d 390 (2d Cir. 2015).

[11] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

[12] *Id.* at 526-28.

[13] *Trinity Lutheran*, 2017 WL 2722410 at *2019.

organization.[14] Nothing can be more pervasively sectarian than a church. The dissent, in fact, talks at length about why the grant should be viewed as inconsistent with a long line of Establishment Clause cases.[15]

There is certainly an argument that the grant did not raise significant antiestablishment concerns. A playground surface made out of recycled tires, at least on its face, is not sectarian in any meaningful sense.[16] Moreover, the grant was fairly modest in size and there wasn't a real risk that the funds would be diverted to general support for the church's religious mission. In addition, there did not seem to be a risk of "entanglement," that is, the state becoming too involved in reviewing the church's mission and activities in order to regulate the use of the grant funds. Thus, all the prongs of the *Lemon* test were arguably met. The fact remains, however, that based on past cases a public grant made directly to a church raises significant Establishment Clause concerns.[17]

Once the U.S. Establishment Clause issue was out of the way, the Court had to decide whether the Free Exercise Clause in the U.S. Constitution overrode Missouri's own Establishment Clause, which is stricter than the federal one. That is not a question limited to Missouri. Almost forty states have provisions that are variations of the U.S. Establishment Clause.[18] Many, including Missouri's, were clearly intended to be stricter than the U.S. Establishment Clause. Therefore, the key question was, not

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[14] *Agostini*, 521 U.S. at 228 ("[No government] funds ever reach the coffers of a religious school.").

[15] *Trinity Lutheran*, 2017 WL 2722410 at *2028 (Sotomayor, J., dissenting) ("The Establishment Clause does not allow Missouri to grant the Church's funding request because the Church uses the Learning Center, including its playground, in conjunction with its religious mission."); *Id.* at *2029 (explaining that while some cases have allowed public funds to go to churches, this was done with the assurance that public funds would not be used for religious activities, however Trinity Lutheran made no assurances of that kind).

[16] Even that assumption is not obviously justified. There is evidence that the church in its application said that it needed the grant in order to carry out its mission of providing a safe and attractive school facility as part of a program that would allow children to grow spiritually. Brief for Appellant, at 5, Trinity Lutheran Church of Columbia, Inc. v. Pauley, 788 F.3d 799 (2015) (No. 14-382). Thus, the Court could have decided to evaluate Missouri's constitutional provision on an "as applied" basis. Even if the state provision might go too far in some cases, it did not go too far in this case. This theory was apparently not argued.

[17] *Trinity Lutheran*, 2017 WL 2722410 at *2028 (Sotomayor, J., dissenting) ("This Court has repeatedly warned that funding of exactly this kind—payments from the government to a house of worship—would cross the line drawn by the Establishment Clause.").

[18] *See id.* at *2037 (Sotomayor, J., dissenting).

whether the state was *allowed* to give the grant under the U.S. Constitution, but whether it was *required* to. The Court's opinion holds that the Missouri constitutional provision amounted to discrimination against religion and, thus, the State was required to provide the grant to the church.

IV. LOCKE V. DAVEY AND "PLAY IN THE JOINTS"

The prior Supreme Court case closest to *Trinity Lutheran* was *Locke v. Davey*, which involved a somewhat similar provision in the Washington State constitution.[19] In *Locke*, the state provided scholarships for promising graduate students. A state resident was awarded a scholarship and submitted the paperwork for the funds. To his surprise, he was turned down because the state discovered that he was going to use the funds for a theology degree.[20]

The Court's opinion in *Locke* concluded that the state's denial of the funds fell into the "play in the joints" between the Establishment Clause and the Free Exercise Clause. By that phrase, the Court meant that using state funds for a theology degree was permitted under the Establishment Clause but not required under the Free Exercise Clause. Therefore, the state could enforce its own constitutional provision and deny the funds.

The "play in the joints" idea is a slippery one because the literal description – permitted by the Establishment Clause but not required by the Free Exercise Clause – covers very different situations. In *Locke,* it was used to describe a benefit, which, except for the state's constitutional provision, was available to all state residents. Since it was indirect aid and the recipients could decide how to use it, there was no U.S. Establishment Clause violation.[21]

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[19] Locke v. Davey, 540 U.S. 712 (2004).

[20] *See Id*. at 725.

[21] *See* Zelman v. Simmon-Harris, 536 U.S. 639, 652 (2002) ("[W]here government aid is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause…The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the independent recipient, not the government whose role ends with the disbursement of the benefits."); *Id*. at 655 ("[N]o reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of numerous independent decisions of private individuals, carries with it the *imprimatur* of government endorsement."); *Id*. (quoting Mitchell v. Helms, 530 U.S. 791, 842-43 (2000)) ("In terms of public perception, a government program of direct aid to religious schools…differs meaningfully from the government distributing aid directly to

At the same time, the Court found that there was no general anti-discrimination principle arising from the Free Exercise Clause that made it mandatory for the state to provide the grant to theology students.

In *Cutter v. Wilkinson*,[22] Justice Ginsburg used the "play in the joints" idea in a very different way. The case involved a constitutional challenge to a federal law, the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), which provides a special benefit to religion.[23] The Court in *Cutter* found that the special benefit was permitted by the Establishment Clause since it didn't promote religion unduly, but Congress didn't have to enact such a special benefit if it didn't want to do so. In other words, RLUIPA is an example of what we have come to call "permissible accommodation."[24] That is not what *Locke* was about.

In a permissible accommodation case such as *Cutter*, the issue of a Free Exercise anti-discrimination principle never arises because nobody's religion is restricted. In theory, in *Cutter*, we could worry about the "discrimination" that results from limiting the benefit to prisoners who make religious claims but denying it to prisoners who make non-religious claims, but that concern is subsumed within the Establishment Clause analysis. In any event, the *Locke* majority rejected what would have been a new anti-discrimination principle based on the Free Exercise Clause but the *Trinity Lutheran* majority accepted it.

A. Distinguishing Locke and Trinity Lutheran

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individual students, who, in turn, decide to use the aid at the same religious schools.").

[22] Cutter v. Wilkinson, 544 U.S. 709 (2005).

[23] 42 U.S.C.A § 2000cc (West 2000). RLUIPA provides that the government will not impose or implement a land use regulation in a manner that places a substantial burden on the religious practice of an individual nor will it impose a substantial burden on an individual residing or confined to an institution, unless it can show that it has a compelling government interest and that such implementation is the least restrictive means to furthering that interest. 42 U.S.C.A § 2000cc (a)(1)(A)-(B).

[24] Thus, it is similar to Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos**,** 483 U.S. 325 (1987), where the Court held a benefit to religion, an exemption from the bar on religious discrimination in the Civil Rights Act as applied to non-religious employees of a church, did not promote religion so much that it offended the Establishment Clause. *Id.* at 339. However, Congress didn't *have* to provide the benefit under the Free Exercise Clause if it didn't want to because the absence of the benefit would not create a substantial burden on the church. *Id.* at 433.

How can we distinguish *Locke* and *Trinity Lutheran*? The Court's principal distinction was that the state had more significant antiestablishment interests in *Locke*. Justice Rehnquist mentioned the state's strong antiestablishment interests in *Locke,*[25] and Justice Roberts referred to this point in *Trinity Lutheran*.[26] But what does that mean: That if the state has a weak antiestablishment interest, it can't discriminate against religion, but if there is "almost" a U.S. Establishment Clause violation, it can? That doesn't seem particularly persuasive. In any event, there are two problems with the Court's analysis on this point. First, both states had strong antiestablishment interests and it is not clear which state had the stronger one. Second, if the point is to balance the antiestablishment interests against the Free Exercise interest, the Free Exercise claim was stronger in *Locke.*

In arguing that the antiestablishment interest was stronger in *Locke,* Justice Roberts wrote: "Davey was not denied a scholarship [by the State of Washington] because of who he *was*; he was denied a scholarship because of what he intended *to do* – use the funds to prepare for the ministry. Here there is no question that Trinity Lutheran was denied a grant simply for what *it is* – a church."[27] (emphasis in original). Presumably, he meant that antiestablishment interests are greater if they arise in order to avoid funding a sectarian activity than if the state simply wants to avoid giving funds to a sectarian organization. Is that true? In *Locke*, the state funds went to individuals who then decided how to use them. Thus, it was an example of indirect aid. Indirect aid involves government providing benefits to a private person and allowing the person to decide whether to use it in connection with a non-religious or religious activity, such as attending a parochial school. The Court has repeatedly said that indirect aid raises less concern under the Establishment Clause because the individual decision-making creates a buffer between the government funding and the sectarian use. In fact, the majority of the Court may have arrived at the point where any indirect aid, made available equally for both religious and non-religious use, does not violate the Establishment Clause.[28]

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[25] *Locke*, 540 U.S. at 722-23.

[26] *Trinity Lutheran*, 2017 WL 2722410 at *2023.

[27] *Id.* at *2022.

[28] *See* Witters v. Washington Dept. of Services for the Blind, 474 U.S. 481, 488 (1986) ("[T]he fact that aid goes to individuals means that the decision to support religious education is made by the individual, not the State."); Mueller v. Allen, 463 U.S. 387, 399 (1983) (aid to parochial schools was only provided as a result of

Trinity Lutheran is a direct aid case because the government funds flowed directly to the church. Direct aid raises more serious Establishment Clause concerns than indirect aid. Unlike the indirect aid cases, there is no intervening decision by an individual that provides a buffer against state involvement in religion. Direct aid also presents a more significant "endorsement" issue since the direct funding is there for all to see.[29] *Trinity Lutheran* presents a particularly stark case since the funding went directly to a church rather than a school or social service organization. Thus, both states had significant antiestablishment interests. Which one had stronger antiestablishment interests is hard to say.

Moreover, the flip side of the activity/status distinction is that the "discrimination" against religion – if we want to call it that -- was even clearer in *Locke* because it was aimed at the very specific nature of ideas and beliefs Davey was going to study. A student who wanted to get a graduate degree in ancient Greek philosophy at the same college could have received the funds, but a student who wanted to get a degree in contemporary theology in order to become a minister could not. In other words, it was analogous to a viewpoint based regulation of speech, not simply a content-based one.[30] It is not surprising that three Justices – Thomas, Alito, and Gorsuch – were not persuaded by the attempt to distinguish the two cases and said they would have overruled *Locke v. Davey*.[31]

The real difference between the two cases is that the Court in *Locke* was willing to accept the State of Washington's decision about its antiestablishment interests and the enforceability of its own Establishment Clause but the Court was not willing to do that in *Trinity Lutheran*. That means that *Trinity Lutheran* is a federalism case as much as anything else. Federalism, as a broad

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the decision of individual parents and no state approval could be conferred upon a religious institution as a result of their decision and thus there could be no violation of the Establishment Clause); *Zelman,* 536 U.S. at 662-63 (voucher program did not violate the Establishment Clause because the funding would reach religious schools as a result of private choice).

[29] *See* Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring) ("Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."); *see also* note 20, *supra*.

[30] Viewpoint discrimination is a subset of content-based discrimination but more specific to the ideas expressed. *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829-31 (1995).

[31] *Trinity Lutheran*, 2017 WL 2722410 at *2026 (Gorsuch, J., concurring) ("Reliance on the status-use distinction does not suffice for me to distinguish *Locke v. Davey*.").

principle, includes the idea that the Federal Government should give some deference to state governments as to how they conduct their affairs.[32] However, federalism is a one-way ratchet. The federal courts cannot give deference to states when the states want to deny individual rights protected by the Fourteenth Amendment. For example, the federal courts cannot give deference to states when they want to violate the Equal Protection Clause because that clause provides minimal federal guarantees to all persons. On the other hand, the federal courts can and should give deference to states when they are deciding their own antiestablishment interests, at least when doing so does not result in a burden on religious beliefs and practices. Denying a grant to a church for a playground surface does not result in such a burden.

V. WHAT IS DISCRIMINATION?

The majority opinion refers to "discrimination" over and over, and that was the theme of the Church in litigation as well as commentary on the case supporting the result.[33] "Discrimination" is not a self-defining term. It depends on the perspective from which we are viewing the problem. In the direct aid cases, the Court has established several limitations on direct aid to pervasively sectarian institutions in order to comply with the Establishment Clause. First, there cannot be excessive entanglement between the government and the religious organization in the administration of the program.[34] Second, the aid can't be too substantial because of

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[32] *See* Ruhrgas Ag. v. Marathon Oil Co., 526 U.S. 574, 587 (1999) ("'Our federalism'" does not mean blind deference to 'States Rights' any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments.'" (quoting Younger v. Harris, 401 U.S. 37, 44 (1971)).

[33] Brian Miller, *Supreme Court Protects Religious Freedom In Trinity Lutheran Case,* Forbes, June 26, 2017, https://www.forbes.com/sites/briankmiller/2017/06/26/supreme-court-protects-religious-freedom-in-trinity-lutheran-case/#2bd6c6eb4415; Michael Farris, *Supreme Court Trinity Lutheran Church Decision – Saying 'No' To Discrimination Against Religious Groups*, Fox News, June 26, 2017, http://www.foxnews.com/opinion/2017/06/26/supreme-court-trinity-lutheran-church-decision-saying-no-to-discrimination-against-religious-groups.html; Elizabeth Slattery, *Religious Liberty Scores a Big Win at The Supreme Court*, The Daily Signal, June 26, 2017, http://dailysignal.com/2017/06/26/religious-liberty-scores-win-supreme-court/.

[34] *See Agostini*, 521 U.S. at 233; Larkin v. Grendel's Den, 459 U.S. 116, 126 (1982).

the concern about diversion.[35] Third, the benefits, if they are in the form of in-kind support, such as computers, cannot be used for religious purposes.[36] Fourth, if the state provides financial aid, it must be used for secular purposes, at least if the funds go to pervasively sectarian institutions.[37] Each of those limitations creates a line between how the state treats religious and non-religious institutions. We could call that "discrimination" but it is the kind of discrimination that is inherent in the Establishment Clause command that government should not unduly promote religion.

Take an example. Assume a state has a budget windfall and wants to give every school in the state $10,000 per pupil in direct aid, including private religious schools. That is likely to run afoul of the Court's concern about very substantial direct aid to pervasively religious organizations. That concern arises from the assumption that the amount of the aid is so substantial that inevitably some of the money will be used for sectarian purposes, including religious indoctrination. The government might try to prevent that diversion but the extent of regulation required to prevent it would so entangle the state in regulating the school's activities that we would still have an Establishment Clause problem. Again, there is "discrimination" but not one that is based on hostility to a particular religious sect or religion in general. Instead, the point is to avoid violating the Establishment Clause.

When a state draws a line between religious and non-religious uses of state funds, it, too, is trying to protects its own antiestablishment interests. That it draws a more cautious line than the federal Establishment Clause doesn't mean it is "discriminating" against religion any more than the Supreme Court was discriminating when it imposed limits on use of aid in *Mitchell v. Helms,* which dealt with a government grant for computers and other equipment to be used in the classroom.[38] In neither case is there hostility toward a particular religion or religion in general. There is simply a difference in judgment about when government goes too far to promote religion.

If a government distinction between religious organizations and non-religious organizations is truly burdensome, then there really is a Free Exercise Clause issue. For example, if every

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[35] *Agostini*, 521 U.S. at 228.

[36] Mitchell v. Helms, 530 U.S. 791, 840-41 (2000).

[37] *See* Roemer v. Board of Public Works, 426 U.S. 736, 765-67 (1976); Bowen v. Kendrick, 487 U.S. 588, 624-625 (1988) (Kennedy, J. concurring).

[38] *See* notes 59-61 *infra* and accompanying discussion.

building owner in a city must obtain a zoning permit, then a city shouldn't have discretion to refuse to provide a permit to religious organizations and approve them for non-religious organizations in comparable situations. That could keep the church from operating at all. That would already be the result under RLUIPA,[39] but that should be the result under a constitutional analysis as well.[40] Similarly, if a city provides police and fire protection, it should not be able to withhold police and fire protection from church buildings. That would require churches to have their own police and fire departments, which would close them down, too.[41] But these are examples of substantial burdens on religion that are the result of laws that are not generally applicable. Thus, these laws would violate the Free Exercise Clause without the need for a broad anti-discrimination principle.[42]

VI. USE OF PRECEDENT

The confusion about the meaning of "discrimination" explains how the Court in *Trinity Lutheran* misapplied the precedents it cited. The principle that emerges from the opinion is that, once the government offers a benefit that is permitted by the Establishment Clause, the Free Exercise Clause requires that it be offered to religious and non-religious entities in the same way. There is an attempt to limit the scope of the Court's opinion to the

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[39] See note 32 *supra* and accompanying text.

[40] *Smith* applied a deferential rational basis review to "generally applicable laws." *Smith*, 494 U.S. at 107. A law that denies a zoning permit or police and fire protection only to churches is not generally applicable.

[41] Justice Breyer took the position that there is no difference between a city paying for police and fire services that benefit a church and a grant for playground equipment. He also apparently read *Everson* as saying that a city would be required to provide these services to churches. See *Trinity Lutheran*, 2017 WL 2722410 at *2027 (Breyer, J., concurring). This analysis was wrong on two counts. First, *Everson* said only that the city could provide such services to churches, not that it was required to. More importantly, there is a big difference between withholding police and fire services, which could close the church down, and withholding a grant for playground equipment, which would not.

[42] A law that imposes a burden on all religions and is targeted at religion is unconstitutionally discriminatory. City of Boerne v. Flores, 521 U.S. 507, 529 (1997).

narrow factual situation of the case in a footnote.[43] However, it is hard to see how the opinion can be limited in the way the footnote suggests in light of the sweeping statements in the opinion.[44] Moreover, the precedents the Court uses were interpreted by the majority in an equally sweeping way.

The Court's opinion claims to take its principle from a long line of Supreme Court opinions. It states the following: "[T]his Court has repeatedly confirmed that denying a generally available benefit solely on account of religious identity imposes a penalty on the exercise of religion that can be justified only by a state interest 'of the highest order.'"[45] The cases cited by the majority do not support that broad claim. Instead, they support the opposite result, do not involve any antiestablishment interest, or involve government attempts to restrict a particular religious faith.

The Court cites the following quote from *Everson v. Board of Education of Ewing* in support of its broad claim*:* "[A state] cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith or lack of it*, from receiving the benefits of child welfare legislation."[46] (emphasis added by the *Trinity Lutheran* Court). *Everson* is one of the earliest Court cases involving the meaning of the Establishment Clause and one of the strongest statements in favor of a wall between church and state.[47] The State of New Jersey authorized local school districts to provide a subsidy for public transportation of students to schools, including religious schools. The program was challenged as a violation of the Establishment Clause. The Court was deeply divided and upheld the program 5-4.[48]

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[43] Footnote 3 of the Roberts opinion says: "This case involves express discrimination based on religious identity with respect to playground surfacing. We do not address religious uses of funding or other forms of discrimination."

[44] There were four votes for the opinion in full – Justices Roberts, Kennedy, Alito and Kagan, JJ. Justices Thomas, Alito and Gorsuch joined except with respect to Footnote 3. Justice Breyer concurred in the judgment and filed his own short opinion. Justice Sotomayor wrote a lengthy dissent joined by Justice Ginsburg.

[45] *Trinity Lutheran*, 2017 WL 2722410 at *2019.

[46] *Id.* at *2020 (quoting *Everson v. Board of Ed. of Ewing*, 330 U.S. 1, 16 (1947)).

[47] *Everson*, 330 U.S. at 12-14. The Court cites Thomas Jefferson's letter using this phrase. *Id.* at 16 (citing Reynolds v. United States, 98 U.S. 145, 164 (1879)).

[48] *Id.* at 18.

There were passionate arguments on both sides in *Everson* about whether the subsidy violated the Establishment Clause, but no one suggested that the city was actually *required* to include students who attended parochial schools in the program. In fact, it would have been unthinkable to argue it. The quote from *Everson* used by the *Trinity Lutheran* Court is dictum making a general point about the Free Exercise Clause and how a state cannot restrict anyone based on their particular faith. In the same paragraph, two sentences before the quote, the *Everson* opinion states: "New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to an institution that teaches the tenets and faith of any church."[49] In other words, *Everson* supports the opposite position from that claimed by the Court's opinion.

The Court cites *McDaniel v. Paty*, a decision involving Tennessee's bar on ministers serving as delegates to the constitutional convention.[50] Of all the cases cited by the Court, this is probably the one that is closest to the broad proposition the Court claims. However, there are still two problems in relying on this case. First, preventing ministers from participating in the political process does not advance any legitimate antiestablishment interest if that was what the state was trying to accomplish. Second, and more significantly, the quote from *McDaniel*, which the Court makes much of – that denying a generally available benefit on the basis of religion can be justified only by a state interest of the "highest order"[51] -- is taken from *Wisconsin v. Yoder*,[52] which applied the strict scrutiny test to a compulsory school attendance law challenged on the basis of the Free Exercise Clause.[53] That test was rejected in *Oregon v. Smith* in an opinion by Justice Scalia.[54] In other words, the Court's authority for the "highest order" test comes from a case that has been clearly rejected if not overruled outright.

The Court also tries to rely directly on S*mith* with this quote: "[The Free Exercise Clause guards against the government's imposition of] special disabilities on the basis of religious views or

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[49] *Id.* at 16.

[50] McDaniel v. Paty, 435 U.S. 617 (1978).

[51] *Trinity Lutheran*, 2017 WL 27223410 at *2019.

[52] Wisconsin v. Yoder, 406 U.S. 205 (1972).

[53] *Id.* at 215.

[54] Dept. of Human Res. Oregon v. Smith, 494 U.S. 872, 877 (1990). It has always been somewhat ironic that the strongest proponents of religious liberty often point to Justice Scalia as a model Justice even though he wrote the majority opinion in *Smith*. One wonders what the current majority would do if they addressed the facts in *Smith* again.

religious status."[55] *Smith* upheld the government's restriction on the use of peyote in a religious ceremony on the grounds that the law was generally applicable. The cited quote from *Smith* has to do with restrictions that disfavor a particular religious sect. The case had nothing to do with a general government bar on the religious use of funds when the government asserts an antiestablishment interest.

The Court cites dictum in *Lyng v. Northwest Indian Cemetery Protective Association* that the individuals affected were not being "coerced into violating their religious beliefs."[56] That statement in *Lyng* was intended to make the point that there was no Free Exercise violation when the government built a road and harvested timber on government-owned land even though some Native American tribes viewed the land as sacred.[57] There was no antiestablishment interest asserted by the government to defend what they were doing, and to suggest that the members of Trinity Lutheran Church were being "coerced into violating their religious beliefs" when Missouri turned down a grant for a playground surface is not plausible.

The Court cites *Lukumi* and quotes it as saying: "[A law may not discriminate against] some or all religious beliefs."[58] *Lukumi* dealt with the clearest Free Exercise Clause case of all, discrimination against a *particular* religious faith. Obviously, the majority liked the phrase "all religious beliefs" and that is why they used it. However, *Lukumi* had nothing to do with a state treating religious organizations differently from non-religious organizations when the state is doing so based on its own antiestablishment interest.

One more example: The Court cites the plurality opinion in *Mitchell v. Helms*,[59] for the proposition that "our decisions [bar government] from discriminating in the distribution of public benefits based upon religious status or sincerity."[60] In fact, *Mitchell requires* government to discriminate in the distribution of benefits when direct aid goes to a religious institution. The controlling opinion by Justice O'Connor in *Mitchell* (joined by Justice Breyer) says that the computers and other equipment provided to religious schools cannot be used for religious purposes although they can be

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[55] *Trinity Lutheran*, 2017 WL 2722410 at *2021.
[56] *Id.* at *2020.
[57] Lyng v. Nw. Indian Cemetery Protective Assoc., 485 U.S. 439, 449 (1988).
[58] *Trinity Lutheran*, 2017 WL 2722410 at *2021.
[59] Mitchell v. Helms, 530 U.S. 791 (2000).
[60] *Trinity Lutheran*, 2017 WL 2722410 at *2021.

used for non-religious purposes.[61] Even the plurality says that the government cannot provide religious materials, e.g., Bibles, but they would permit a parochial school to use non-religious equipment, e.g., a computer, for religious purposes. In other words, the entire Court agreed that the Establishment Clause required some level of "discrimination" in order to avoid the government getting too involved in promoting religion. 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. The dispute in *Trinity Lutheran* was really about how much (if any) deference the Supreme Court should give a state in deciding its own antiestablishment interests.

VII. PROBLEMS WITH A BROAD ANTI-DISCRIMINATION PRINCIPLE

Although the Roberts opinion, in Footnote 3, tries to limit the scope of the opinion, it is not obvious what those limits are in light of the sweeping statements used by the Court. Thus, although it is never precisely clear where a future Court will take an opinion, it is a pretty safe bet that *Trinity Lutheran* created a very broad anti-discrimination principle and rendered almost forty state Establishment Clauses a nullity. That creates a number of problems.

First, *Trinity Lutheran* creates a very narrow channel through which the government must navigate. If it goes too far in providing assistance, it violates the Establishment Clause, but once any benefit is permitted by the Establishment Clause, it is also required by the Free Exercise Clause to be offered to religious organizations, including pervasively sectarian organizations such as churches. Deciding when a government program violates the Establishment Clause in direct aid cases is not easy.[62] Thus, many states would prefer to take a more cautious approach to avoid this complicated line-drawing. The decision in *Trinity Lutheran* takes that choice away from them. There is no intermediate zone of discretion for states attempting to draw a more cautious Establishment Clause line. Or, another way of saying it is that the *Locke* version of "play in the joints" is probably dead.

As discussed above, it is true that the Court's opinion claims it did not overrule *Locke*, and government will argue in future cases that there is still some zone of discretion. Nevertheless, it is hard

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[61] *Mitchell*, 530 U.S. at 866-67 (O'Connor, J., concurring).

[62] *See* notes 33-36 *supra* and accompanying text.

to see what that zone is based on the broad statements in the Court's opinion. In any event, there will inevitably be frequent litigation by persons who claim the government went too far one way or the other. Thus, "discrimination" claims are likely to be a staple of church-state litigation.

The second problem is that the tightrope government must walk between an Establishment Clause violation and an obligation to fund religious institutions may discourage providing benefits in the first place. Imagine a city deciding whether to provide funds to private owners to rehabilitate old buildings in the downtown area. The program would provide up to $10 million to renovate exterior structures, such as walls, windows, entrance ways, etc. If the city goes ahead with the program, it knows grants must be provided to religious organizations as well as non-religious organizations. Applicants can include churches, mosques, temples, and all other types of religious organizations. Of course, if any of those organizations apply, the government will have to make sure that the funds are not being used for indoctrination or any other sectarian purpose but they can't go too far in regulating the organizations themselves.

The oldest building downtown is a two-hundred-year-old church, and the city council assumes it will apply for a renovation grant. The council assumes that the rehabilitation work will include replacing the stained-glass windows, which currently have pictures of religious figures in them. Will the city have to get into the business of reviewing the designs of the new windows to decide if they are too religious? If they are religious, can the city still give the grant? The city might conclude that it doesn't want to get into the business of deciding which grants are lawful and which are not and then overseeing their implementation.

A third potential problem is that the government will have to deal with competing claimants from different religious sects. The government cannot disfavor a particular sect based on the beliefs or practices of that sect. That is what *Lukumi* is about. If a benefit is offered, a Muslim school or mosque is entitled to the benefit on the same footing as a Baptist church, even if the school teaches an extremist Islam ideology, such as Wahhabism, an extreme branch of Sunni Islam promoted in Saudi Arabia. As long as the school meets whatever neutral criteria government establishes, all religious sects are eligible. The problem is not the ban on preferring one sect over another. That result follows inexorably from the Free Exercise Clause. The problem is having to get into the business of

reviewing applications from different religious sects in the first place.

Moreover, "religion" is not limited to long-established, major religious traditions in the United States, such as Christianity, Islam, and Judaism or even well-established traditions with a relatively small number of adherents in the U.S., such as Hinduism and Buddhism. It almost certainly includes any ideology that provides a comprehensive world view about ultimate issues of existence, and it may include other organizations that most of us have never conceived as religion at all.[63] In other words, when the grant applications come in for playground equipment or computers or books or whatever the state chooses to make available, the civil servants who have to decide among them may be sorting through applications from organizations practicing Wicca, atheism, and Satanism. The desire to avoid these sectarian conflicts has historically been one of the underpinnings of the Establishment Clause.[64]

Finally, the decision is a blow to federalism. According to the dissent, there are thirty-eight states with some version of their Establishment Clause.[65] While not all of these are intended to be stricter than the U.S. Establishment Clause, many are. There is a history of some state Establishment Clauses which arose from the effort begun by Senator Blaine in the 1870's, which was clearly hostile to Catholics. However, most states' provisions, including

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[63] *See* United States v. Meyers, 95 F.3d 1475, 1484 (10th Cir. 1996) (rejecting a claim that users and distributors of marijuana were practicing a religion and discussing criteria for deciding what activities are entitled to protection under RFRA as a religion); United States v. Seeger, 380 U.S. 163, 165-66 (1965) ("[T]he expression 'Supreme Being' rather than the designation 'God' was merely clarifying the meaning of religious training and belief so as to embrace all religions and to exclude essentially political, sociological, or philosophical views…The test of belief 'in a relation to a 'Supreme Being' is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filed by the orthodox belief in God of one who clearly qualifies for the exemption."); Welsh v. United States, 398 U.S. 338, 339-43 (1970) (expanding *Seeger* to include objections based on deeply held beliefs about domestic policy, foreign affairs and strong public policy reasons, but not objections based on 'policy, pragmatism, or expediency'); Washington Ethical Society v. District of Columbia, 249 F.2d 127, 129 (D.C. Cir. 1957) (group that believed Ethical Culture is a way of life that contributes to the moral and spiritual advancements of its believers qualified as a religious society for purposes of a tax exemption under District of Columbia law).

[64] *See* Engel v. Vitale, 370 U.S. 421, 429 (1962) (describing the "anguish, hardship and bitter strife that could come when zealous religious groups struggle with one another to obtain the Government's stamp of approval…"); *Zelman,* 536 U.S. at 717-25 (Breyer, J., dissenting).

[65] *Id.* at *2037.

Missouri's, are entitled to be taken at face value.[66] The Supreme Court does not have a monopoly of wisdom on what constitutes a legitimate antiestablishment interest. Nevertheless, it seems likely that *Trinity Lutheran* has rendered these provisions nullities. If they are more permissive than the U.S. Establishment Clause, the U.S. Clause governs. That has always been the case. But, now if a state has a stricter Establishment Clause, even if there is no hint of hostility to any particular religion or religion in general, the Free Exercise Clause requires that they be ignored.

VIII. CONCLUSION

In *Trinity Lutheran*, a church was denied funds because it was a church, so there may be a natural inclination among many to conclude that this kind of "discrimination" is harmful to religion as a part of our national life. And what could be wrong with a constitutional principle that makes churches eligible for all grants for which the YMCA or the neighborhood tennis club is eligible? But that seemingly innocuous principle will require states to fund religious organizations, including churches, in ways that the Supreme Court only a few decades ago would have found unthinkable. It disregards how individual states see their own antiestablishment interests and it introduces sectarian conflicts into demands for government benefits. It does not necessarily translate into support for religion over the long term.

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[66] See Robert F. Williams, *State Constitutional Religion Clauses: Lessons from the New Judicial Federalism*, 7 U. St. Thomas J.L. & Pub. Pol'y 192, 195-202 (2013). Missouri provisions date from the constitutional convention of 1934-44, long after the Blaine Amendment movement of the 1870's. The delegates discussed the 18th Century history in the United States of states' requiring support of churches from public funds. See DEBATES OF THE CONSTITUTIONAL CONVENTION OF MISSOURI, 1943-44 at 1504-05.