TRINITY LUTHERAN HAS DIMINISHED THE CONCEPT OF SEPARATION OF CHURCH AND STATE

*By Sean Pryzbylkowski**

I. INTRODUCTION

Since the Supreme Court's decision[1] in *Trinity Lutheran v. Comer*, legal scholars believe the Court's holding has destroyed any separation that exists between Church and State.[2] In *Trinity Lutheran*, a church was denied a state grant, which, if approved, would have been used to refurbish a playground.[3] The Supreme Court of the United States held that the church was discriminatorily denied the possibility of a grant because of its religious background.[4] Moreover, a main issue in *Trinity Lutheran* was whether these funds would be advancing religion, which would signal a violation of the Establishment Clause.[5] Regardless of the Supreme Court's holding, a precedent has been set in which public funds can be contributed to religious organizations.[6]

This note will analyze the Court's decision in *Trinity Lutheran* and the effect this case has had on the state courts' interpretation of the Free Exercise and Establishment Clauses. The Supreme Court of New Jersey recently heard a case called *Freedom From Religion Foundation v. Morris County Bd. of Chosen*

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* Associate Managing Editor for the Rutgers Journal of Law and Religion and J.D. Candidate 2020

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

[2] *See* Erwin Chemerinsky, Symposium, *The Crumbling Wall Separating Church and State*, SCOTUSBLOG, (June 27, 2017, 10:18 AM), http://www.scotusblog.com/2017/06/symposium-crumbling-wall-separating-church-state/; *see also* Sarah Pulliam Bailey, *The Supreme Court Sided with Trinity Lutheran Church. Here's why that Matters.*, THE WASH. POST, (Jun. 26, 2017, 2:46 PM), https://www.washingtonpost.com/news/acts-of-faith/wp/2017/06/26/the-supreme-court-sided-with-trinity-lutheran-church-heres-why-that-matters/?noredirect=on&utm_term=.dc23b5074ff5 ("For those concerned about government entanglement with religion this trend – and this case in particular – is a blow to the separation of church and state and thus to religious freedom.").

[3] *Trinity Lutheran*, 137 S. Ct. at 2014.

[4] *Id.* at 2024 ("The State has pursued its preferred policy to the point of expressly denying a qualified religious entity a public benefit solely because of its religious character. Under our precedents, that goes too far. The Department's policy violates the Free Exercise Clause.").

[5] *Id.* at 2025-26.

[6] *Id.* at 2019.

Freeholders, 181 A.3d 1992 (N.J. 2018). In this case, the Court denied a state grant that was given to twelve churches for purposes of historic preservation.[7] Similar to *Trinity Lutheran*, this case dealt with the issue of whether this state grant would be advancing religion.[8] This note will analyze whether *Freedom From Religion* could be overturned if the Supreme Court of the United States decided to hear the case. The note will propose that the decision in *Trinity Lutheran* has set a standard in which funds can be directly contributed to churches, therefore diminishing the impact of the Establishment Clause. As a result of a limited Establishment Clause, the concept of Church and State has begun to diminish.

II. HISTORY OF CHURCH AND STATE

Separation of Church and State is not a Constitutional Amendment. However, the concept was deeply engrained within the beliefs of the Founding Fathers.[9] In Thomas Jefferson's Letter to the Danbury Baptists, he stated:

> Religion is a matter which lies solely between Man & his God, that he owes account to none other than his faith or his worship, that the legitimate powers of government reach actions only, & not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should make no law respecting an establishment of religion, or prohibiting the free exercise thereof, thus building a wall of separation between Church & State.[10]

Later, in the seminal case *Everson v. Board of Education*[11], the Supreme Court cited to Jefferson's letter in support of the Founding

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[7] Freedom From Religion Found. v. Morris Cty. Bd. of Chosen Freeholders, 181 A.3d 992, 994 (N.J. 2018), *cert. denied*, 139 S. Ct. 909 (2019).
[8] *Id.* at 1003.
[9] Steven K. Green, *The Separation of Church and State in the United States,* OXFORD RES. ENCYCLOPEDIAS (Dec. 2014), http://oxfordre.com/americanhistory/view/10.1093/acrefore/9780199329175.001.0001/acrefore-9780199329175-e-29.
[10] *Letter from Thomas Jefferson to Danbury Baptists*, LIBRARY OF CONGRESS (Jun. 1998), https://www.loc.gov/loc/lcib/9806/danpre.html. *Letter from Thomas Jefferson to Danbury Baptists*, LIBR. OF CONGRESS (Jun. 1998), https://www.loc.gov/loc/lcib/9806/danpre.html [hereinafter *Letter*].
[11] Everson v. Bd. of Ed of Ewing Tp., 330 U.S. 1, 16 (1947).

Father's concept of separation of Church and State.[12] The Supreme Court's reference to Jefferson's letter validates that the concept of Church and State is to be upheld within the United States court system. While there is no Constitutional Amendment, Jefferson's letter provides a historical background to the Founders' understanding of the First Amendment and the scope of separation of Church and State.[13]

Additionally, John Dickinson, a Founding Father, wrote the following statement about Church and State prior to the American Revolution:

> Religion and Government are certainly very different Things, instituted for different Ends; the design of one being to promote our temporal Happiness; the design of the other to procure the Favour [sic] of God, and thereby the Salvation of our Souls. While these are kept distinct and apart, the Peace and welfare of society is preserved, and the Ends of both are answered. By mixing them together, feuds, animosities and persecutions have been raised, which have deluged the World in Blood, and disgraced human Nature.[14]

Dickinson's statement was in response to an attempt by the British to appoint an American bishop. However, this piece provides insight to the Founding Father's strict separation of Church and State.[15] Later, in 1879, the Supreme Court recognized this cultural idea of Church and State when they "first employed the term "separation of church and state . . . as shorthand for the meaning of the First Amendment's religion clauses, stating "it may be accepted almost as an authoritative declaration of the scope and effect of the amendment."[16] Although Thomas Jefferson once said there should be a "wall of separation" between Church and State, those walls have blurred as the Supreme Court has held that state grants could be awarded to churches.[17]

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[12] Green, *supra* note 9.
[13] Jefferson, *supra* note 10.
[14] Green, *supra* note 9.
[15] *Id*.
[16] *Id*.
[17] Jefferson, *supra* note 10.

A. The Free Exercise Clause

Under the First Amendment, there are two religious clauses: the Establishment Clause and the Free Exercise Clause.[18] The Free Exercise Clause was implemented within the First Amendment in order to protect the religious beliefs and rituals of American citizens.[19] Early settlers emigrated from Europe in order to escape religious persecution.[20] As a result, early American settlers had a strong belief to protect their religious freedoms and actions from government intervention.[21]

Given the significant history backing religious freedoms in the United States, the courts have begun to give deference to religious institutions.[22] Recently, in *Trinity Lutheran*, Chief Justice John Roberts noted, "The Free Exercise Clause protects religious observers against unequal treatment and subject to the strictest scrutiny laws that target the religious for special disabilities based on their religious status."[23] The only circumstance where the Free Exercise Clause can be violated is when there is a state interest of the highest order.[24]

B. The Establishment Clause

The second religious clause under the First Amendment is the Establishment Clause.[25] The Establishment Clause is in constant tension with the Free Exercise Clause. The Establishment Clause was enacted in order to place a limitation on Congress from making "any law respecting an establishment of religion. This clause not only forbids the government from establishing an official

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[18] *First Amendment and Religion*, U.S. CTS., https://www.uscourts.gov/educational-resources/educational-activities/first-amendment-and-religion.

[19] *Free Exercise Clause*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/free_exercise_clause, ("The Free Exercise Clause reserves the right of American citizens to accept any religious belief and engage in religious rituals").

[20] Frederick Gedicks and Michael McConnell, *The Free Exercise Clause*, NAT'L CONST. CTR., https://constitutioncenter.org/interactive-constitution/interpretations/the-free-exercise-clause.

[21] *Id.* ("Although the colonists often understood freedom of religion more narrowly than we do today, support for protection of some conception of religious freedom was broad and deep.").

[22] *Trinity Lutheran*, 137 S. Ct. at 2019.

[23] *Id*.

[24] *Id.* at 2019.

[25] *Establishment Clause*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/establishment_clause.

religion, but also prohibits government actions that unduly favor one religion over another."[26]

As a result of the Establishment Clause's limitation on Congress, the goal of separating Church and State can remain intact. However, the Supreme Court has been inconsistent, and sometimes there has been no clear answer to when exactly state funding to religious organizations violates the Establishment Clause.[27] In order to solve this issue, the Court has held that when a grant "will in part have the effect of advancing religion" the Establishment Clause has been violated.[28]

III. TRINITY LUTHERAN EXAMINED

A. Background

In Missouri, the Trinity Lutheran Church Child Learning Center provided daycare services and sought to replace their playground gravel.[29] Trinity Lutheran applied for a grant from the State Department of Natural Resources to replace their gravel with recycled tires.[30] However, the state denied Trinity Lutheran's application because the Department "had a strict and express policy of denying grants to any application owned or controlled by a church, sect, or other religious entity."[31] Additionally, the Missouri Constitution states, "no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof."[32]

Trinity Lutheran sued the Department of Natural Resources, claiming that the denial of their application violated the Free Exercise Clause of the First Amendment.[33] The District Court denied the claim and reasoned that the Free Exercise Clause does not prohibit an organization from denying a benefit based on the

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[26] *Id.* ("Although some government action implicating religion is permissible, and indeed unavoidable, it is not clear just how much the Establishment Clause tolerates.").
[27] *Id.* The article points out that the Supreme Court has allowed for public funds to be granted toward private school bussing and textbooks.
[28] Tilton v. Richardson, 403 U.S. 672, 683 (1971).
[29] *Trinity Lutheran*, 137 S. Ct. at 2017.
[30] *Id.*
[31] *Id.*
[32] MO. CONST. Art. I, § 7.
[33] *Trinity Lutheran*, 137 S. Ct. at 2018.

applicant's religion.[34] Later, the Eight Circuit affirmed the District Court's decision. The court ruled that the fact that the State could award a scrap tire grant to Trinity Lutheran without running afoul of the Establishment Clause of the Federal Constitution did not mean that the Free Exercise Clause compelled the State to disregard the broader antiestablishment principle reflected in its own Constitution.[35]Subsequently, the Supreme Court of the United States decided to hear *Trinity Lutheran* on appeal.

B. Precedent

Prior to *Trinity Lutheran*, *Everson v. Board of Education*[36] was a seminal case regarding the separation of Church and State. In *Everson,* a New Jersey statute granted parochial schools with taxpayer money to fund bus fares.[37] Justice Black held that the state could not cut off parochial schools from government services, because it is far separate from religious functions.[38] The Court stated "the establishment of religion clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one over another."[39] Furthermore, the Court expounded upon the clause of the First Amendment by stating:

> New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church. On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their religion.[40]

The New Jersey Supreme Court established a balancing test whereby states cannot directly fund the advancement of religion; however, they also cannot restrict the free exercise of religion.[41]

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[34] *Id.*
[35] *Id.* at 2018-19.
[36] *Everson*, 330 U.S. at 18.
[37] *Everson*, 330 U.S. at 6.
[38] *Id.* at 17.
[39] *Id.* at 15.
[40] *Id.* at 16.
[41] *Id.*

The Supreme Court of the United States confirmed that the Free Exercise Clause was violated when funding is denied solely on the account of someone's religious identity.[42] As seen in *McDaniel v. Paty*, a Minister in Tennessee wished to serve as a legislator.[43] However, he was informed that he would need to relinquish his position as a minister in order to be a legislator.[44] The Court confirmed that a Tennessee statute barring ministers from serving on the legislature violated the Free Exercise Clause.[45] The Supreme Court reasoned that these ministers were being discriminated against solely because of their status as a minister.[46]

Then, in *Tilton v. Richardson*, the Supreme Court was presented with the issue of whether a federal construction grant program could deny college facilities funding to "any facility used or to be used for sectarian instruction or as a place for religious worship, or . . . primarily in connection with any party of the program of a school or department of divinity."[47] Additionally, there was a 20-year limit where the government could recover the funds if the organization violated this restriction.[48] The Supreme Court found that the federal construction grants did not violate the Free Exercise Clause, but the 20-year limit did.[49] The Court found the Free Exercise Clause claim to be unpersuasive because there would be no conceivable way that the Establishment Clause would not be violated when a state grant is provided to build facilities that offer a secular education.[50] Therefore, this federal construction grant could be advancing religious to certain universities if this restriction was not in place.[51]

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[42] McDaniel v. Paty, 435 U.S. 618, 626 (1978); *see also id.* at 634 ("the Tennessee Supreme Court makes clear that the statute requires appellant's disqualification solely because he is a
minister of a religious faith.").
[43] *McDaniel*, at 620-21.
[44] *Id.* at 627 ("the Tennessee disqualification operates against McDaniel because of his *status* as a 'minister' or 'priest.'").
[45] *Id.* at 629.
[46] *Id.* at 627.
[47] Tilton v. Richardson, 403 U.S. 672, 675 (1971).
[48] *Id.* at 682-83.
[49] *Id.* at 689 ("We conclude that the Act does not violate the Religion Clauses of the First Amendment except that part of § 754(b)(2) providing a 20-year limitation on the religious use restrictions contained in § 751 (a)(2).").
[50] *Id.*
[51] *Id.* at 683.

Moving forward, in regards to the facts of *Trinity Lutheran*, the most analogous case is *Locke v. Davey*.[52] In *Locke*, the Supreme Court of the United States faced the question of whether a state law had violated the Free Exercise Clause.[53] In *Locke*, Washington State created an educational scholarship called Promise Scholarship Program, which aided students with postsecondary educational expenses.[54] If students accepted this funding, they were unable to pursue a degree in theology. However, these students were still able to take theology courses.[55] Washington State reasoned that the educational restriction was made in order to comply with their State Constitution.[56]

The Supreme Court sided with Washington State and struck down the Free Exercise claim.[57] *McDaniel* was not applicable because, here, the law did not require individuals to choose between their religious beliefs and receiving a government benefit.[58] Davey was not denied a scholarship because of who he *was*; he was denied a scholarship because of what he proposed to *do*.[59]

In Chief Justice Reinquist's opinion, he analyzed the issue through a "play in the joints" analysis, which balances the Establishment and Free Exercise Clauses.[60] Chief Justice Reinquist described "play in the joints" as state action that is permitted under the Establishment Clause, but not mandatory under the Free Exercise Clause.[61] Under the "play in the joints" analysis, there is space for states to act where they can comply with the Establishment Clause without violating the Free Exercise Clause.[62]

Based on Chief Justice Reinquist analysis, *Locke* was the perfect case to analyze the "play in the joints" breakdown.[63] In *Locke*, there was a significant state interest in denying public funds for religious

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[52] *Trinity Lutheran*, 137 S. Ct. at 2018 ("The District Court likened the case before it to *Locke v. Davey*, 540 U.S. 712, 124 S. Ct. 1307, 158 L. Ed. 2d 1. In that case, [the Supreme Court] upheld against a free exercise challenge.").
[53] Locke v. Davey, 540 U.S. 712, 719 (2004).
[54] *Id.* at 715.
[55] *Id.* at 725.
[56] *Id.* at 716.
[57] *Id.* at 715.
[58] *Locke*, 540 U.S. at 720-721.
[59] *See Trinity Lutheran*, 137 S. Ct. at 2023.
[60] *Locke*, 540 U.S. at 718-19.
[61] *Id*.
[62] *Id*.
[63] *Id.* at 719.

purposes, whereas there was only a minor burden on restricting the student's use of the funds.[64]

C. Analysis

Chief Justice John Robert's opinion in *Trinity Lutheran* draws parallels to *McDaniel*.[65] Similar to *McDaniel*, the exclusionary effect of the Tennessee statute was vastly similar to *Trinity Lutheran*'s denial of a grant.[66] In the present case:

> Trinity Lutheran is free to continue operating as a church, just as McDaniel was free to continue being a minister. But that freedom comes at the cost of automatic and absolute exclusion from the benefits of a public program for which the Center is otherwise fully qualified.[67]

The majority found this analysis to be persuasive.[68] The reasoning behind the Court's analysis is that when an organization or individual has to give up religious identity to receive a benefit, that individual or organization is being punished for its religious liberties.[69]

Since Trinity Lutheran was excluded solely because it is a religious entity, the defendants were subject to the most strict level of scrutiny.[70] The defendants believed *Locke* was the controlling case in *Trinity Lutheran*.[71] When considering the Missouri State Constitution prohibits state funding to churches, the claim should be denied.[72] Justice Roberts found *Locke* to be distinguishable from the facts in *Trinity Lutheran.*[73] From Justice Robert's perspective, in *Locke*, the student was not denied a scholarship fund because of his religious background, but rather because he intended to use to funds to practice for the ministry.[74] Moreover, the student in *Locke*

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[64] *Id.* at 725. The Court's conclusion describes the balancing of burdens, which is the play in the joints analysis.
[65] *Trinity Lutheran*, 137 S. Ct. at 2020.
[66] *Id.*
[67] *Id.* at 2022.
[68] *Id.*
[69] *Id.*
[70] *Trinity Lutheran*, 137 S. Ct. at 2021.
[71] *Id.* at 2023 (the respondent relies on *Locke* to note Missouri's constitutional tradition that is against funding churches through taxes).
[72] *Id.* at 2017.
[73] *Id.* at 2022-23.
[74] *Id.* at 2023.

was still able to take religious courses. However, he was only restricted from receiving a degree in theology.[75] Unlike *Locke*, Trinity Lutheran was excluded from the grant solely because of its religious identity.[76]

Chief Justice John Roberts applied the "play in the joints" analysis in *Trinity Lutheran*.[77] Justice Roberts held that the State violated the Free Exercise Clause because, under the most strict level of scrutiny, all the state claimed was that Missouri had a policy of achieving "greater separation of Church and State."[78] However, as Justice Roberts explained, this policy is already guaranteed under the Establishment Clause.[79] Rather, the only effect on the Department of Natural Resources policy is a total exclusion of an organization solely because of its religious identity.[80] Therefore, under the "play in the joints" standard, the State had failed to defeat Trinity Lutheran's claim.[81]

Justice Thomas and Gorsuch concurred in Justice Roberts' decision. Together, they failed to recognize that the Establishment Clause protected the Department of Natural Resources policy.[82] However, Justice Gorsuch found Justice Roberts' opinion troubling because of the discriminatory "play in the joints" that can occur between the distinction of religious *status* and *use*.[83] In their concurring opinion, the two Justices found no reason to address *Locke* because the majority construed it appropriately.[84] The Justices felt that the Court should not be concerned with whether the funds were used for a playground.[85] Rather, the analysis should focus on when a religious identity is used to bar religious persons from receiving benefits they are otherwise qualified to receive. At this point, the Justices believed the Free Exercise Clause had been violated.[86]

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[75] *Trinity Lutheran*, 137 S.Ct. at 2023-24.
[76] *Id.* at 2025 (Thomas, J., concurring).
[77] *Id.* at 2019.
[78] *Id.* at 2024.
[79] *Id*.
[80] *Trinity Lutheran*, 137 S.Ct. at 2024. In Justice Robert's opinion, he holds that the State has pursued a policy that denies a qualified religious entity on the account of their religious character.
[81] *Id.* at 2019.
[82] *Id.* at 2025.
[83] *Id.* at 2025.
[84] *Id*.
[85] *Trinity Lutheran*, 137 S.Ct. at 2026.
[86] *Id.* ("Of course the footnote is entirely correct, but I worry that some might mistakenly read it to suggest that only playground resurfacing cases."). The

D. Trinity Lutheran Dissent

Justice Ginsburg and Sotomayor wrote dissenting opinions in *Trinity Lutheran*.[87] Ginsburg and Sotomayor were entirely worrisome of the effects of *Trinity Lutheran*, as they stated:

> The Court today profoundly charges that relationship by holding, for the first time, that the Constitution requires the government to provide public funds directly to a church . . . its reasoning weakens this country's longstanding commitment to a separation of church and state.[88]

In the dissent's view, the majority completely overrode the Establishment Clause because even in cases where religions institutions received funding, they were never for religious purposes.[89]

In the present case, the Trinity Lutheran Church Child Learning Center operated "as a ministry of the Church and incorporates daily religion and developmentally appropriate activities into . . . its program."[90] Furthermore, Trinity Lutheran stated on its website, "through the Learning Center, the Church teaches a Christian world view to children of members of the Church, as well as children of non-member residents."[91] With this mission statement by Trinity Lutheran, Justices Ginsburg and Sotomayor found difficultly in understanding how the Court's decision would not be funding a church to advance religious beliefs.[92]

In the dissent's opinion, they believed *Trinity Lutheran* was about whether the Department of Natural Resources has the right to exclude churches that intend to use state funds to improve their churches.[93] Justices Ginsburg and Sotomayor thought *Trinity Lutheran* was analogous to *Tilton*, because the Court *in Tilton* denied a college a construction grant where the funds would be used

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Justices join the majority in their holding but wish to reword how the case is analyzed.

[87] *Id.* at 2027.

[88] *Id.*

[89] Justice Ginsburg and Sotomayor opinion focuses on the "play in the joints" analysis that Justice Roberts discussed. However, this is the opposing view, which favors denying the funding because it violates the Free Exercise Clause.

[90] *Trinity Lutheran*, 137 S. Ct. at 2027.

[91] *Id.*

[92] *Id.*

[93] *Id.* at 2028.

in order to advance secular education.[94] Here however, Trinity Lutheran sought state funds in order to construct a facility for the purpose of spreading faith to children.

Justices Ginsburg and Sotomayor believed there was no separation between the funds being used for improvements on the church and the advancement of religion.[95] This belief was backed by the church's own mission statement, which expressed that the Learning Center's facilities, like the playground, were used for the growth of children's religious beliefs.[96] This fact created a line-drawing issue within the dissent. Justices Ginsburg and Sotomayor stated, "The Church's playground surface – like a Sunday School room's walls or the sanctuary's pews – are integrated with and integral to its religious mission."[97] As a result of this reasoning, there will be difficulty in predicting how the Supreme Court will rule in future cases. As shown by Justices Ginsburg and Sotomayor, the majority is not clear within their opinion on the separation between when state grants are or are not used to advance religion.

IV. EXPLORATION OF THE CURRENT APPLICATION OF *TRINITY LUTHERAN* THROUGH THE CASE OF *FREEDOM FROM RELIGION FOUNDATION*

Recently, state courts have begun to apply the precedent set forth in *Trinity Lutheran*. Recently, the New Jersey Supreme Court heard a Free Exercise Clause claim in *Freedom From Religion Foundation v. Morris County Bd. of Chosen Freeholders*.[98] *Freedom From Religion Foundation* shapes how separation of Church and State is applied in New Jersey.[99]

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[94] *Id.* at 2027. Justice Ginsburg states in her opinion, "This case is no different" when referring to Tilton v. Richardson.

[95] *Trinity Lutheran*, 137 S. Ct. at 2028 ("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").

[96] *Id.* at 2029.

[97] *Id.*

[98] *Freedom From Religion Found.*, 181 A.3d at 992.

[99] *See* Nick Corasaniti, *New Jersey Ruling Could Reignite Battle Over Church-State Separation*, N.Y. TIMES (Apr. 24, 2018). https://www.nytimes.com/2018/04/24/nyregion/new-jersey-ruling-could-reignite-battle-over-church-state-separation.html, ("But a unanimous decision by the New Jersey Supreme Court found that public money could no longer be used by churches, citing a clause in the State Constitution expressly forbidding it, a decision that could reverberate beyond New Jersey and reignite a national debate over the separation of church and state").

In *Freedom From Religion Foundation*, the Morris County Board granted twelve churches $4.6 million in taxpayer funds for the purpose of historic preservation.[100] All twelve churches are followers of Christianity. Additionally, each of these churches hold congregations and have religious worship services.[101] Furthermore, several of the churches stated that they sought out grants in order to continue their congregations.[102]

In 2015, the Freedom from Religion Foundation filed a complaint in Superior Court.[103] The Freedom from Religion Foundation claimed this grant violated the Religious Aid Clause of the New Jersey, which states that:

> No person shall be obliged to pay tithes, taxes, or other rates for building or repairing any church or churches, place or places of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right or has deliberately and voluntarily engaged to perform.[104]

In response, under *Trinity Lutheran*, the defendants claimed these state grants should be permitted under the Free Exercise Clause.[105] The trial court granted the defendant's motion for summary judgment and upheld the grant to the Morris County Churches.[106]

New Jersey is special with regard to the First Amendment because during the adoption of the state Constitution in 1776, the state included a Religious Aid Clause.[107] The meaning of the Religious Aid Clause was intended to reveal that: "(1) the freedom from being compelled to fund religious institutions through taxation – including the repair of churches -- was a grant of personal liberty, and (2) unlike other rights, that freedom was not limited to Protestants."[108] During the adoption of the Constitution, the Religious Aid Clause was out of the ordinary. At the time, no other state had adopted a provision that clearly refuted the funding of

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[100] *Freedom From Religion Found.*, 181 A.3d at 994.
[101] *Id.* at 994.
[102] *Id.*
[103] *Id.* at 996.
[104] *Id.* at 997.
[105] *Freedom From Religion Found.*, 181 A.3d at 994.
[106] *Id.* at 996.
[107] *Id.* at 998-99 ("The Religious Aid Clause . . . provides . . . that no person shall . . . be obliged to pay . . . or for the maintenance of any minister or ministry.") The clause reflects a historical and substantial state interest.
[108] *Id.* at 999.

establishments.[109] To further solidify New Jersey's long history of denying public funding to religious institutions, not all states expressly followed this principle. For example, in 1776, Maryland's first Constitution allowed for the collection of public funding to support religious institutions.[110] By showing a disparity of thought in 1776, this shows that, from the onset, New Jersey always had an interest in denying public funds to support religious advancement.[111]

A. Freedom From Religion Case Analysis

In *Trinity Lutheran*, the New Jersey Supreme Court found the defendants' argument unpersuasive. The New Jersey Supreme Court found that the facts of the *Freedom From Religion* far exceed the scope of *Trinity Lutheran*.[112] The Court was able to distinguish *Trinity Lutheran* because the funds actually went to the advancement of religion, rather than the resurfacing of a playground.[113] As mentioned above, the church sought out these state grants in order to "historically preserve the building *allowing its continued use by our congregation for worship services* as well as by the community and many other outside organizations that use it on a regular basis."[114] From this statement, the Court had difficulty in reasoning that these funds would not go towards the advancement of religion.[115]

Furthermore, when considering whether the facts of *Freedom From Religion* were outside the scope of *Trinity Lutheran*, the Court felt this case was analogous to *Tilton*.[116] Like the construction grants in *Tilton*, the majority in *Freedom From Religion* noted that these public funds were being used to "sustain the continued use of active houses of worship for religious services and finance repairs to religious imagery."[117] From the majority's understanding, sustaining the use of religious services would be considered the state directly funding religious organizations, which

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[109] *Id.*
[110] *Freedom From Religion Found.*, 181 A.3d at 1000.
[111] *Id.*
[112] *Id.* at 1009.
[113] *Id.*
[114] *Id.*
[115] *Freedom From Religion Found.,* 181 A.3d at 1010.
[116] *Id.* at 1010-11.
[117] *Id.* at 1010.

is not permitted under Article 1, Paragraph 3 of the New Jersey Constitution.[118]

The Court found *Locke* to be the controlling precedent in *Freedom From Religion*,[119] considering the student in *Locke* was denied a scholarship grant because of what he planned to do with it, rather than who he was in a religious sense.[120] Here, the majority noted the same principle applied:

> The Churches are not being denied grant funds because they are religious institutions; they are being denied public funds because of what they plan to do – and in many cases have done: use public funds to repair church buildings so that religious worship services can be held there.[121]

Clearly, as seen in *Trinity Lutheran*, the same "play in the joints" analysis of the Establishment and Free Exercise Clauses had a significant role in *Freedom From Religion*.[122]

Additionally, the defendant in *Trinity Lutheran* had to find a compelling interest to survive the strict scrutiny standard.[123] In *Trinity Lutheran*, the state referenced the Missouri Constitution, which showed there was a policy disfavoring the public funding of religious institutions.[124] However, the Supreme Court found this was not compelling because they were "skating as far as possible from religious establishment concerns."[125] Based on the state's actions in *Trinity Lutheran*, they were denying the church funds simply because of their religious status.[126]

In *Freedom From Religion Foundation*, the plaintiff argued the state's interest was compelling and referenced New Jersey's Religious Aid Clause to meet this burden.[127] The reason the plaintiff referenced the Religious Aid Clause is because it "reflects a substantial concern of the State's founders in 1776: to ensure that

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[118] N.J. CONST. art. I, para. 3.
[119] *Freedom From Religion Found.*, 181 A.3d at 1012.
[120] *See Establishment Clause, supra* n. 25.
[121] *Freedom From Religion Found.*, 181 A.3d at 1010.
[122] *Trinity Lutheran*, 137 S. Ct. at 2019.
[123] *Id.* at 2024.
[124] *Id.* at 2023.
[125] *Id*. at 2024.
[126] *Id.*
[127] *Freedom From Religion Found.*, 181 A.3d at 1011 ("the Court in *Trinity Lutheran* did not find the state interest . . . sufficiently compelling to survive strict scrutiny . . . New Jersey's Religious Aid Clause and the granted awarded in this matter stand in stark contrast to the setting in *Trinity Lutheran*").

taxpayer funds would not be used to rebuild or repair houses of worship, or to maintain any ministry."[128] The New Jersey Supreme Court found this reasoning persuasive because there is a long history of anti-funding for religious establishments.[129]

The majority points towards *Locke* when analyzing the compelling state interest.[130] Like *Locke*, in New Jersey the state has their restrictive clause in order to uphold their antiestablishment principle of not granting public funds to religious organizations[131] The New Jersey Supreme Court states, "Also as in *Locke*, the antiestablishment interest New Jersey Expressed in 1776 did not reflect animus toward any religion."[132] Therefore, the Free Exercise Clause analysis in *Trinity Lutheran* is substantially different from the application in *Freedom From Religion Foundation*.[133]

While discussing a state's constitutional antiestablishment principle, the Supreme Court found this argument to be unpersuasive in *Trinity Lutheran* because they found it violated the Free Exercise Clause.[134] However in *Freedom From Religion Foundation*, the New Jersey Supreme Court had a different interpretation under the same Free Exercise argument as *Trinity Lutheran*. The New Jersey Supreme Court believed their long-standing principle of not funding religious organizations through grants was in line with the Establishment Clause.[135] These arguments show there is a split between the analysis between the Supreme Court and the New Jersey Supreme Court.

Furthermore, Justice Solomon filed a separate concurring opinion.[136] Justice Solomon's opinion is important because he

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[128] *Id.*

[129] *Freedom From Religion Found.*, 181 A.2d at 994 ("The clause reflects a historic and substantial state interest. We find that the plain language of the Religious Aid Clause bars the use of taxpayer funds to repair and restore churches, and that Morris County's program ran afoul of the longstanding provision.").

[130] *Id.*

[131] *Id.*; *see also* Scott Bomboy, *The Supreme Court Mulls Historic Church Preservation Case*, CONST. DAILY (January 18, 2019), https://constitutioncenter.org/blog/the-supreme-court-mulls-historic-church-preservation-case ("New Jersey's long-standing choice in its constitution to not provide funding of churches thus should be upheld based on history and based on the recognition since the earliest days of the nation that it is wrong to tax people to support the churches of others.).

[132] *Freedom From Religion Found.*, 181 A.2d at 1011.

[133] *Id* at 1013.

[134] *Trinity Lutheran Church of Columbia,*, 137 S. Ct. at 2025.

[135] *Freedom From Religion Found., 232* N.J. at 578.

[136] *Id.* at 580.

discussed the limitations of the Religious Aid Clause.[137] Within Solomon's opinion, he expressed that the Religious Aid Clause cannot categorically ban all churches from grants because the Free Exercise Clause limits the Court.[138] While the majority gave a strong amount of deference to the Religious Aid Clause, Solomon wanted to remind the Court that the Supremacy Clause limited this principle.[139] Solomon stated that under certain circumstances, churches could not be barred from receiving government grants. During each case, the Court has to ensure that Free Exercise Clause protects their equal treatment towards churches.[140]

Additionally, Justice Solomon offered an interesting analysis regarding the historic preservations of churches in New Jersey. The New Jersey Constitution has stated that historic preservation is an important government interest.[141] Solomon felt that under the Free Exercise Clause, the Court should examine legislation that has passed to understand the motives of the state to fund religious organizations.[142] In the present case, the government interest of historic preservation severely diminishes the application of the Religious Aid Clause to deny public grants to churches.[143] Therefore, Solomon expressed that the court's reliance on *Locke* is not as compelling in the present case.[144] However:

> In reaching this conclusion, the majority refers for support to Footnote 3 of the *Trinity Lutheran* Decision . . .that conclusion ignores New Jersey's separate and substantial government interest at stake in this case – historical preservation. I believe that had Morris County's program been applied in a fundamentally neutral manner, the Religious Aid Clause could not bar funding to an otherwise qualified institution.[145]

But for Morris County's lack of neutrality in their grant, which was overwhelmingly arranged for twelve churches, and for religious purposes, Solomon's approach shows how funding could correctly be given to churches.

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[137] *Id.* at 581.
[138] *Id.*
[139] *Id.*
[140] *Id.*
[141] N.J. CONST. art. VIII, § II, ¶ 7.
[142] *Freedom From Religion Found.*, 232 N.J. at 585 (Solomon, J., concurring).
[143] *Id.*
[144] *Id.* at 586.
[145] *Id.*

B. Implications of Freedom From Religion Foundation in New Jersey

The overall theme of *Freedom From Religion Foundation* shows how significant New Jersey's history is with regard to the impermissibility of public funds being granted to religious organizations.[146] Within the "play in joints" analysis, there seems to be deference given towards the Establishment Clause in New Jersey. The reasoning behind this statement is that the Establishment Clause is given deference due to New Jersey's application of the deeply engrained Religious Aid Clause.[147] For future cases, as long as there is a compelling state interest, the New Jersey Supreme Court will likely favor *Locke* rather than *Trinity Lutheran* due to the history behind the Religious Aid Clause.

However, given Justice Solomon's dissent, the state potentially has a route to publicly fund churches.[148] If the majority adopts Solomon's opinion, churches could receive funds to preserve their buildings. If government entities are able to neutrally apply their grants, churches could receive funding to improve their facilities. Since the New Jersey Constitution adopted an article that gave the government a purpose to preserve historical buildings, churches could receive funds. This preservation clause would diminish the compelling interest the state needs in order to meet the standards for the Religious Aid Clause.

V. PREDICTION OF FUTURE SUPREME COURT ANALYSIS

The defendant's, Morris County Board of Chosen Freeholders, recently sent a petition to the Supreme Court of the United States to hear the case.[149] Based on the facts of *Freedom From Religion Foundation*, the case presents interesting arguments

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[146] *Id.* at 566 ("for most of its existence, the Religious Aid Clause has banned public funding to repair a house of worship without regard to some other non-religious purpose. In short, there is not exception for historic preservation.").
[147] *Id.* at 556 (The Court notes how deeply engrained the Religious Aid Clause is due to its implementation in New Jersey's 1776 Constitution).
[148] *Id.* at 585 (Solomon, J., concurring).
[149] *See* Michael Booth, *Morris County, Churches Ask US Supreme Court to Take Up Preservation Grants Case*, N.J. L. J., (Sep. 19, 2018, 5:19 PM), https://www.law.com/njlawjournal/2018/09/19/morris-county-churches-ask-us-supreme-court-to-take-up-preservation-grants-case/?slreturn=20190011131111, ("The petition for a writ of certiorari was filed Tuesday on behalf of the county and a group of churches by the Becket Fund for Religious Liberty, a Washington, D.C. based group that advocates for the rights of religious institutions").

for the Court to hear. The only concept that kept Justice Solomon from dissenting in the case was Morris County's lack of neutrality in the application of its funds.[150] Justice Solomon stated, "41.7 percent of the grant money was awarded to twelve churches which, in some instances, sought funding to continue religious services; and the program's Rules and Regulations explicitly name religious institutions as eligible applicants."[151] If the Morris County's funding was granted towards the churches in a neural manner, the Court's decision could rule in favor of the defendant.[152]

However, Justice Solomon's language is remarkably similar to Justice Ginsburg's dissent in *Trinity Lutheran*.[153] Justice Ginsburg noted:

> The Church's religious beliefs include its desire to associate with the Trinity Church Child Learning Center . . . The Learning Center serves as a ministry of the Church and incorporates daily religion and developmentally appropriate activities into . . . its program.[154]

Through the "play in the joints" standard, the Supreme Court may rule in favor of the Morris County Board of Chosen Freeholders. The majority did not find the Learning Center's goal of incorporating daily religion in the programs routine problematic.[155] Similar to the analysis in *Trinity Lutheran*, the majority in the Supreme Court may not find an issue with these churches expressly stating that their funds would be used to continue religious services.[156] Moreover, the majority may support the Free Exercise Clause due to the historical preservation article in New Jersey's

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[150] *Freedom From Religion Found.,* 232 N.J. at 586 (Solomon, J., concurring).
[151] *Id.*
[152] *See* Nick Corasaniti, *New Jersey Ruling Could Reignite Battle Over Church-State Separation*, N.Y. TIMES, (Apr. 24, 2018), https://www.nytimes.com/2018/04/24/nyregion/new-jersey-ruling-could-reignite-battle-over-church-state-separation.html, (Attorney for Board of Freeholders stated, "To me it was very clear from Trinity Lutheran, that where the state has a program opened to basically all of its citizens or some of the citizens you can't exclude an applicant solely because of their religious beliefs").
[153] *Trinity Lutheran Church of Columbia*, 137 S. Ct. at 2026 (Thomas, J., concurring).
[154] *Id.* at 2027.
[155] *Id.* at 2028 (Sotomayor, S., dissenting), ("through the Learning Center, the Church teaches a Christian world view to children of members of the Church . . .to use the Learning Center to teach the Gospel to children of its members, as well to bring the Gospel message to non-members.").
[156] *Freedom From Religion Found.,* 232 N.J. at 586.

Constitution.[157] If *Freedom From Religion Foundation* is heard in the Supreme Court, this potentially could be a landmark case that could diminish any separation that exists between Church and State.

Recently, *Freedom From Religion Foundation* has garnered the attention of the Supreme Court.[158] Due to the decision in *Trinity Lutheran*, state courts have begun to split on whether funds should be granted towards religious institutions.[159] With the continued divide among the state courts, the Supreme Court may hear *Freedom From Religion Foundation*, and if they do, the holding would cause for a landmark decision that would present the future of the separation of Church and State in the United States.

VI. TRINITY LUTHERAN APPLIED IN VERMONT

In 2017, the Vermont Supreme Court heard *Taylor v. Town of Cabot*. In *Taylor*, the Town of Cabot granted municipal funds to a historic church for preservation needs.[160] The issue in the case was whether the plaintiff could pursue its claims and whether trial court erred in granting a preliminary injunction that barred the town from giving any more funds to the church.[161]

In *Taylor*, the Town of Cabot was awarded two million dollars in a grant from the U.S. Department of Housing and Urban Development (UDAG).[162] The town has kept this federal grant in their Community Investment Fund of Cabot (CIFC fund).[163] This CIFC fund gives grants to "local individuals or groups to promote its goals, including to "protect and enhance the quality of life and character of the town" and to "improve community infrastructure, facilities and services."[164] The groups that are eligible to apply for a grant from the CIFC fund include "community groups, non-profits, civic organizations, and fraternal organizations, as well as entities

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[157] N.J. CONST. art. VIII, § II, ¶ 7.
[158] *See* Scott Bomboy, *The Supreme Court Mulls Historic Church Preservation Case*, CONST. DAILY, (January 18, 2019), https://constitutioncenter.org/blog/the-supreme-court-mulls-historic-church-preservation-case (the Supreme Court has had the *Morris County* case under review at three private conferences and it could take action on the case as soon as today . . .*Trinity Lutheran* have deepened the split among the lower courts on the religious use question.").
[159] *Id*.
[160] Taylor v. Town of Cabot, 2017 VT 92 (2017).
[161] *Id.*
[162] *Id.* at P3.
[163] *Id*.
[164] *Id.* at P4.

created by the Town, such as the Cabot Historical Society and the Cemetery Commission."[165] In 2016, the United Church of Cabot was approved for a $10,000 grant, which would be used to repair the church.[166] Additionally, the approval of the grant had to be put through a town vote.[167] The question presented to the town was whether, the UDAG funds should be given to the Cabot Historical Society for the purposes of "repairing the steeple, stairwell and other interior sections."[168] Subsequently, the committee that reviewed applications for the CIFC fund approved the churches request.[169] Next, the application was put to a town vote and the voters approved the grant in a town meeting.[170]

The plaintiffs in this case challenged the grant under the "Compelled Support Clause of the Vermont Constitution."[171] The Compelled Support Clause is "analogous to an Establishment Clause violation."[172] In *Taylor* the plaintiff challenged "the Town of Cabot's award of a grant to fund repairs to the United Church of Cabot, and sought a preliminary injunction enjoining the grant."[173]

VII. TAYLOR'S LIKELIHOOD OF SUCCESS ON THE MERITS

The Court remands the case down to the lower court, however the Vermont Supreme Court offers their opinion on whether the plaintiff could succeed on their claims.[174] With regard to the Compelled Support Clause, the Court believes the plaintiff's claims have a narrow chance of being successful.[175] The Court stated:

> Plaintiffs face strong headwinds in arguing that the Compelled Support Clause embodies a categorical prohibition against any public funding for physical repairs to a place of worship, and plaintiffs have not yet present sufficient evidence to demonstrate a high likelihood of success.[176]

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[165] *Id.*
[166] *Taylor,* 2017 VT at P5.
[167] *Id.*
[168] *Id.*
[169] *Id.* at P4.
[170] *Id.*
[171] *Taylor,* 2017 VT at P1.
[172] *Id.* at P6.
[173] *Id.* at P1.
[174] *Id.* at P21.
[175] *Id.*
[176] *Taylor,* 2017 VT at P21.

Within Vermont, the Compelled Support Clause is not violated "by mere compelled support for a place of worship unless the compelled support is for the 'worship' itself."[177] Under this standard, Vermont is not overly focused on funds being granted to churches but rather, whether the funds are supporting religious worship.[178]

While this case has been remanded, the Vermont Supreme Court provided an analysis of whether the church could receive a state grant. In this case, in order for the plaintiff to be successful on its motion for a preliminary injunction, they must prove that the funds will support worship.[179] The Court states:

> Plaintiffs will have to demonstrate that painting the church building and assessing its sills is more like funding devotional training for future clergy, as in *Locke*, than paying for a new playground surface on church property, as in *Trinity Lutheran*. Specified repairs to the church building itself admittedly fall somewhere between these two poles.[180]

In *Taylor*, the Vermont Supreme Court found their reasoning to be influenced by *American Atheists, Inc. v. City of Detroit Downtown Development Authority*, 567 F. 3d 278 (6th Cir. 2009).[181] In *American Atheists*, the City of Detroit granted money for improvements of buildings and sidewalks within a designated area.[182] Three churches were within this designated area and were granted $11.5 million dollars by the City of Detroit.[183] In *American Atheists* the court analyzed whether a broad spectrum of groups could be recipients of the grants.[184] The court stated:

Although the funds were used to upgrade some buildings in which religious worship took place, they were available to religious and secular entities alike based on criteria that have nothing to do with religion. *Id.* The vast majority of the upgrades at issue – renovation of exterior lights, pieces of masonry and brickwork . . . lacked any content at all, much less a religious content.[185]

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[177] *Id.* at P23.
[178] *Id.*
[179] *Id.* at P30.
[180] *Id.*
[181] *Taylor,* 2017 VT at P31.
[182] *Id.*
[183] *Id.* at P31.
[184] *Id.* at P32.
[185] *Id.*

Furthermore, the Court in *American Atheists* noted "if a city may save the exterior of a church from a fire, it is hard to understand why it cannot help that same church with peeling paint or tuckpointing."[186]

In *American Atheists*, the central issue in the case was analyzed under the Establishment Clause.[187] In analyzing *Taylor, American Atheist* is applicable because Vermont's Compelled Support Clause is analogous to the Establishment Clause.[188] Due to the CIFC grant being available to a broad range of groups on a neutral basis, the plaintiff will have a difficult argument to force a preliminary injunction.[189] Under the grant, groups such as fraternal organizations, nonprofits, committees created by the town, and the Cabot School District were all eligible to receive grants from the Town of Cabot.[190] Moreover, the criteria to receive these grants have no religious components.[191] In order to receive a CIFC grant, there are general requirements, such as:
Enhance the quality of life and the character of the Town, promote commercial development consistent with the scale and character of the community, promoted education, and improve community infrastructure, facilities, and services.[192]

The Court states:

> There is no indication that the funds are intended to or do advantage religious organizations or activity, and the funds are used for structural repairs rather than, for examples erecting religious symbols, we cannot conclude that such funds support worship within the meaning of Article Three.[193]

As seen under this analysis, funds can be contributed for the refurbishing a church, however the content of the refurbishing determines whether the grant can be awarded.[194]

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[186] *Taylor,* 2017 VT at P33.
[187] *Id.*
[188] *Id.* ("The focus of the Compelled Support Clause is the support for worship itself").
[189] *Id.* at P32.
[190] *Id.* at P36.
[191] *Taylor,* 2017 VT at P36.
[192] *Id.*
[193] *Id.*
[194] *Id.* at P32.

VIII. TAYLOR'S APPLICATION COMPARED TO *FREEDOM FROM RELIGION FOUNDATION*

As seen in state court cases such as *Taylor* and *Freedom From Religion Foundation*, the application of *Trinity Lutheran* has varied. Similar to the numerous groups that could apply for a grant in *Taylor*, in *Freedom From Religion Foundation*, a variety of groups were also able to receive grants under the historic preservation fund which were "municipal governments within Morris County; Morris County government; charitable conservancies whose purpose includes historic preservation; and religious institutions."[195] The funds in *Freedom From Religion Foundation* were awarded to churches for the use of restoring their exteriors.[196]

As seen in *Freedom From Religion Foundation,* various churches explained the reasoning for the need of state grants. For example, the Presbyterian Church in Morristown used funds to, "The Church received a preservation grant to repair the chapel's roof and the air shaft in the church building; to pay for finishes, moisture protection, and other costs; and to finance interior carpentry, masonry, and concrete work."[197] Whereas, the Church of the Redeemer received funds to restore "the large slate roof and tower is entirely positive. It will restore a key structural element that has failed and assist in assuring that the building can continue in its existing use as a church and as an important building in Morristown."[198] As seen in *American Atheists*, certain federal courts focus on the content of the upgrades.[199] As in *American Atheists*, brickwork and peeling paint on a church was not an issue because there was not a religious content.[200] Then, in *Freedom From Religion Foundation*, if the case makes it to the Supreme Court of the United States, potentially the Court could find that the content of upgrades were not religious because they repaired roofs, airshafts, carpentry, masonry, and concrete work.[201]

Furthermore, New Jersey's historical background seems to provide less deference for churches receiving grants than in Vermont. As seen in *Freedom From Religion Foundation,* there has been a long standing principle of not funding churches through state

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[195] *Freedom From Religion Found.*, 232 N.J. at 549.
[196] *Id.* at 550.
[197] *Id.*
[198] *Id.*
[199] *Taylor*, 2017 VT at P36.
[200] *Id.* at P32.
[201] *Freedom From Religion Found.*, 232 N.J. 550.

grants.[202] Within the opinion of *Freedom From Religion Foundation*, the Court even dates back to New Jersey's Constitution in 1776 to show that public grants should not be given to churches.[203] While New Jersey expressed long-standing principles of the Establishment Clause, Vermont is silent on any historical background within their opinion. In *Taylor*, the opinion shows that they are primarily concerned with the broad amount of recipients and the content of the improvements.[204] Under this rationale, New Jersey could be more difficult for churches to be successful on an Establishment Clause claim.

IX. A STATE'S ADOPTION OF TRINITY LUTHERAN

State courts have begun to adopt the United States Supreme Court holding in *Trinity Lutheran*, such as *Moses v. Ruszkowski*, 2018 N.M. LEXIS 70, (2018). In light of the decision in *Trinity Lutheran*, the United States Supreme Court remanded *Moses* back to the Supreme Court of New Mexico for further considerations.[205] Prior to the United States Supreme Court's decision, the New Mexico Supreme Court originally held, "that the plain meaning and history of Article XII, Section 3 forbids the provision of books for use by students attending private schools, whether such schools are secular or sectarian."[206] However, after the decision in *Trinity Lutheran* was made, the Supreme Court of New Mexico's interpretation of the First amendment changed.[207]

In *Moses*, the New Mexico Public Education Department used public funds to loan both public and private schools books without charging any fees.[208] New Mexico's Instruction Material Law (IML) is the public benefit program that distributes the books to public and private schools.[209] The petitioners in this case filed a

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[202] *Id.* at 578.
[203] *Id.* at 565-66 ("In fact, the change from the 1776 Constitution to the 1844 Constitution removed the bracketed phrase "no taxes . . . for [the purpose of] building or repairing any church."). The change in text provides for an understanding that New Jersey wanted to make it clear, by removing a broad phrase, that grants should not be given to building or repairing churches.
[204] *Taylor,* 2017 VT at P32.
[205] *Moses v. Ruszkowski*, 2018 N.M. LEXIS 70, *2 (2018).
[206] *Id.*
[207] *Id.* at *5 ("In accordance with the Supreme Court's directive, in this opinion we take a fresh look at the constitutionality of the textbook loan program under the New Mexico Constitution").
[208] *Id.* at *3.
[209] *Id.* at *37.

complaint and argued that the Instructional Material Law violates several clauses within New Mexico's Constitution.[210] The issue in *Moses* was whether "using public funds to lend textbooks to private school students violated Article XII, Section 3 support of any sectarian, denominational or private school, college or university."[211]

The Court was forced to reconsider if *Trinity Lutheran* would uphold New Mexico's Instruction Material Law. The majority stated:

> In *Trinity Lutheran*, the Supreme Court changed the landscape of First Amendment law. Under *Trinity Lutheran*, if a state permits private schools to participate in a generally available public benefit program, the state must provide the benefit to religious schools on equal terms.[212]

This language is important because there is an understanding that under the Constitution's Free Exercise Clause, governments are obligated to provide public funds towards religious institutions.[213] Furthermore, the Supreme Court of New Mexico noted from *Trinity Lutheran* that although a recipient is a religious entity, that does not mean they can be denied a public benefit due to the separation of Church and State.[214]

Similar to *Trinity Lutheran*, the grant in *Moses* was generally a public benefit. However, the grant in *Moses* allowed the state to loan textbooks to private schools through the use of taxpayer money.[215] Moreover, a critical difference between *Trinity Lutheran* and *Moses* is the language within their constitutions. In *Trinity Lutheran*, article I, section 7 of the Missouri Constitution stated, "that no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion."[216] In *Moses*, Article XII, Section 3 of the New Mexico

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[210] *Moses*, 2018 N.M. LEXIS at *5. Petitioners argued, IML violated "Article XII, Section 3 of the New Mexico Constitution . . . Article IV, Section 31 of the New Mexico Constitution . . . Article IX, Section 14 of the New Mexico Constitution . . . Article II, Section 11 of the New Mexico Constitution."

[211] *Id.* at *1.

[212] *Id.* at *21.

[213] *Id.* at *22 ("*Trinity Lutheran* was the first Supreme Court opinion to hold that the Free Exercise Clause required a state to provide public funds directly to a religious institution").

[214] *Id.* at *22.

[215] *Moses*, 2018 N.M. LEXIS at *22.

[216] *Id.* at *23.

Constitution states, "no funds appropriated, levied or collected for educational purposes, shall be used for the support of any sectarian, denominational or private school, college or university."[217] The language in the Missouri Constitution specifically excludes groups based on a "religious status", whereas New Mexico's Constitution does not contain such language.[218] The New Mexico Constitution is facially neutral, as the only distinction that is made is between public and private schools.[219]

The Supreme Court of New Mexico highlights that the Free Exercise Clause can be implicated even when a law is facially neutral.[220] The Court states, "the Free Exercise Clause forbids subtle departures from neutrality and covert suppression of particular religious beliefs."[221] Due to recent First Amendment cases, factors to be considered when deciding whether facially neutral laws violate the Free Exercise Clause are:

> The historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decision making body.[222]

In light of *Trinity Lutheran* and *Masterpiece Cakeshop*, there is an evolving First Amendment standard that goes beyond facially neutral laws.[223]

After carefully reviewing the history behind Article XII, Section 3 the Supreme Court of New Mexico reversed their previous holding.[224] The Court reasoned:

> In *Moses II* we concluded that New Mexico's interest in restricting public funding for *private* schools was a lawful basis for restricting funding for *religious* schools. Following *Moses II*, the Supreme Court emphasized that the Free Exercise Clause is

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[217] *Id*.
[218] *Id*.
[219] *Id.*
[220] *Moses*, 2018 N.M. LEXIS at *2.
[221] *Id.* at *23.
[222] *Id.* at *24 citing *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 U.S. 1719 (2018)).
[223] *Moses*, 2018 N.M. LEXIS at *34.
[224] *Id.* at *41.

> implicated by a law that single[s] out the religious for disfavored treatment.[225]

As a result of *Trinity Lutheran*, the Court's previous holding raised concerns under the Free Exercise Clause by restricting public funding to private schools. Therefore, the case was reversed.[226] Therefore, the Court was able to conclude that the Instruction Material Law's loans to private schools "does not constitute support within the meaning of Article XII, Section 3" but rather, this loan promotes the state's interest in increasing education and reducing illiteracy.[227]

A. *The Dissent in Moses*

Chief Justice Nakamura authored the dissenting opinion in *Moses*.[228] Justice Nakamura believed the Court's original holding was correct since the IML program's preclusion of private school students does not go against the principles in *Trinity Lutheran*.[229] Additionally, New Mexico case law reveals "it has never been held that if private schools are not given some share of public funds allocated for education that such schools are isolated into a classification violative of the Equal Protection Clause."[230] Justice Nakamura understood that *Trinity Lutheran* holds that "the Constitution requires the government to provide public funds directly to a church" when a religious entity is denied a public benefit as a result of its identity.[231] However, Justice Nakamura requests further guidance of the holding in *Trinity Lutheran* in order to resolve the issue in *Moses*.[232] In the dissent, Justice Nakamura did not believe the Court would have a full understanding of what *Trinity Lutheran* requires the court a do.[233] In the dissent, Justice Nakamura notes that *Trinity Lutheran* dealt with express discrimination, whereas in *Moses*, the state programs

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[225] *Id.* at *35.
[226] *Id.* at *2.
[227] *Id.* at *36-37.
[228] *Moses*, 2018 N.M. LEXIS at *41.
[229] *Id.* at *41-*42.
[230] *Id.* at *54 citing *Norwood v. Harrison*, 413 U.S. 455 (1973).
[231] *Id.* at *43 (citing *Trinity Lutheran*, 137 S. Ct. at 2027).
[232] *Id.* at **44-45.
[233] *Moses*, 2018 N.M. LEXIS at *41-42. ("Understanding what *Trinity Lutheran* does and does not do makes clear that this Court should not abandon this conclusion").

guidelines were facially neutral.[234] With regard to *Moses*, the dissent could not resolve the issue of whether "there is sufficient evidence that the motivations for the enactment of Article XII, Section 3 were discriminatory."[235]

Moreover, the dissent had an issue with the majority's holding that Article XII, Section 3 must permit the loans to private school student in order to "avoid constitutional concerns."[236] Justice Nakamura believed that these constitutional concerns do not exist.[237] Therefore, the original holding in *Moses* was correct, that IML preclusion does not violation Article XII, Section 3.[238]

B. *Breakdown of Church and State in Morris*

After reviewing *Morris*, the Court indicates that there is a shift in the interpretation of the Free Exercise Clause under *Trinity Lutheran*.[239] The Court in *Morris* notes that *Trinity Lutheran*, "The Supreme Court also emphasized that a state's interest in maintaining church-state separation does not justify the withholding of generally available public benefits based on the religious status of the recipient."[240] The *Morris* decision makes this statement clear, the *Trinity Lutheran* decision has broken down the walls between Church and State.[241] Moreover, the dissent notes Justice Sotomayor's language, which stated *Trinity Lutheran* "weakens this country's longstanding commitment to a separation of church and state."[242] Justice Nakamura responds to this statement by saying "We need to understand with equal certainty what *Trinity Lutheran* does not do.[243] From these statements, there is an understanding that the separation of Church and State is weakening, however state courts remain in discomfort as they are unsure how to correctly apply *Trinity Lutheran*.[244]

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[234] *Id.* at *43.
[235] *Id.*
[236] *Id.* at *52.
[237] *Id.*
[238] *Moses*, 2018 N.M. LEXIS at *54.
[239] *Id.* at *2.
[240] *Id.* at *22. Another key note was taken from Justice Solomon's dissent when he stated, profoundly changes [the] relationship [between church and state] by holding, for the first time, that the Constitution requires the government to provide public funds directly to a church."
[241] *Id.* at *43.
[242] *Id.*
[243] *Moses*, 2018 N.M. LEXIS at *43.
[244] *Id.* at *54.

Although the IML loans were facially neutral, the majority reasons that the Free Exercise Clause is violated if private schools are unable to receive the loan.[245] Based on the majority's wording, they seem to side with the reasoning in *Trinity Lutheran*, although they are seem to be unsure of what that ruling implies.[246] For example, the majority states, "to avoid constitutional concerns, we adopt a construction of Article XII, Section 3 that does not implicate the Free Exercise Clause under *Trinity Lutheran*.[247]As the dissent wisely points out, these "constitutional concerns" do not exists based on the interpretation of *Trinity Lutheran*.[248] In the majority's opinion they should have been clearly on the "constitutional concerns" that would be implicated if they denied private schools loans through the use of public funds. As a result of *Morris*, *Trinity Lutheran* has left state courts uncertain on the boundaries of its application.[249]

X. CONCLUSION

After analyzing the precedent that *Trinity Lutheran* has set, the ruling likely has begun to break down the separation between Church and State.[250] For the first time, *Trinity Lutheran* held that the Constitution requires the government to provide public benefits to churches under certain scenarios.[251] From this holding, there is an understanding that there is a shift in the interpretation of Church and State within the Supreme Court. *Trinity Lutheran* has set a precedent that has allowed state to directly fund religious entities through public grants.[252] Moving forward, the United States Supreme Court must hear cases that are similar to *Trinity Lutheran* in order to get a clear understanding of how the case should be applied.

In order to achieve this goal, the United States Supreme Court should hear *Freedom From Religion Foundation v. Morris County Bd. of Chosen Freeholders*. *Freedom From Religion*

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[245] *Id.* at *37. "Any benefit to private schools is purely incidental and does not constitute 'support' within the meaning of Article XII, Section 3").
[246] *Id.* at *36.
[247] *Id.* at *36.
[248] *Moses*, 2018 N.M. LEXIS at *52.
[249] *Id.* Noting that *Trinity Lutheran* does not address religious uses of funding or other forms of discrimination.
[250] *Id.* at *22. References Justice Sotomayor opinion describing the breakdown of Church and State.
[251] *Id.* at *43.
[252] *Trinity Lutheran Church of Columbia,* 137 S. Ct. at 2014.

Foundation could be a seminal case that would provide insight on how the separation of Church and State will be applied in the United States. Based on the United States Supreme Court interpretation of *Trinity Lutheran*, if the Court hears *Freedom From Religion Foundation* they may find the holding in the New Jersey Supreme Court violates the Free Exercise Clause. As shown throughout this note, although Thomas Jefferson once called for a "wall of separation" between Church and State, however the Supreme Court has likely set a precedent that is contrary to this belief.[253]

[253] *Letter*, *supra* note 10.