HOLY *TRINITY*: CHURCH, STATE, AND MONEY

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I. INTRODUCTION

The *Trinity Lutheran* Court ruled that a state could not deny a church equal access to money to improve its property despite the state's constitutional prohibition against doing so, and contrary to Supreme Court precedent. The Court's decision on Free Exercise grounds, which all but ignored the Establishment Clause and summarily disposed of the non-establishment interests of the states in drawing lines stricter than the Establishment Clause against the funding of religion, has paved the way for discrimination against particular faith communities[2] and interference in the religious practices—the mission and ministry—of faith communities. This article focuses on the non-establishment interests of the state and religion and why forcing states to fund faith communities and their activities is detrimental to religion.

II. *TRINITY LUTHERAN*: A BRIEF SUMMARY OF THE FACTS AND SUPREME COURT OPINION

Trinity Lutheran Church ("Trinity Lutheran") operates a preschool as a ministry of its church on its church property.[3] Trinity Lutheran applied for a grant from the Missouri Department of Natural Resources ("the Department"), under the Department's Scrap Tire Program, to resurface the preschool's playground. The

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[2] "Faith communities" in this article refers to bodies of people who gather at churches, temples, mosques, and other houses of worship for the purpose of worship, mission, and ministry.

[3] Trinity Lutheran Church of Columbia, Inc. v. Comer, Dir., Mo. Dept. of Nat. Res., No. 15-557, slip op. at 2-3 (U.S. June 26, 2017).

Scrap Tire Program collects a tax on the sale of new tires and uses the money, in part, to give competitive monetary grants to qualifying nonprofit organizations for playground surfaces.[4] Churches were prohibited from applying for grants under the Scrap Tire Program because Missouri's constitution prohibits state funds from being given to churches.[5] Trinity Lutheran scored high on the application and would have received a grant except that it is a church.[6] After Trinity Lutheran's grant application was denied, it sued, claiming the Department's policy violated its right to free exercise of religion under the First Amendment.[7] The district court dismissed the case, and the Eighth Circuit affirmed.[8]

The Supreme Court reversed. It held that the Department's policy violated Trinity Lutheran's right to free exercise of its religion, because it prohibited Trinity Lutheran from participating in a public benefit program on the basis of its religious status.[9] The Court rejected the Department's argument that *Locke v. Davey,* which held that a state's interest in non-establishment could draw stricter lines against the funding of religion than that permitted by the Establishment Clause, controlled the case.[10] It held that Missouri's interest in excluding churches from the Scrap Tire Program, which it characterized as a "policy preference for skating as far as possible from religious establishment concerns," did not survive strict scrutiny and was limited by the Free Exercise Clause.[11] The Court did not analyze whether the Establishment Clause applied to prohibit the Department from funding improvements to a church's property.[12]

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[4] *Id.* at 2. The Scrap Tire Program provides grants to a limited number of non-profit organizations each year. Whether an organization receives a grant is based upon the amount of funds available from the tax assessed on new tire purchases and how high the state scores the organization's grant application in comparison to other applicants. *Id.*

[5] *Id.* at 2-3. In April of 2017, the Missouri Governor announced that the Department would allow religious organizations, including churches, to compete for the grants. *Id.* at 5 n.1.

[6] *Id.* at 3.

[7] *Id.* at 4.

[8] *Id.*

[9] *Trinity Lutheran,* slip op. at 11.

[10] *Id.* at 12-13 (citing Locke v. Davey, 540 U.S. 712 (2004)). *Locke* and its holding are discussed in more detail *infra* at §III.A.

[11] *Id.* at 14.

[12] The Court's opinion noted that "[t]he parties agree that the Establishment Clause of [the First] Amendment does not prevent Missouri from including Trinity Lutheran in the Scrap Tire Program." *Id.* at 6. As Justice Sotomayor points out, the agreement of the parties does not dispose of the issue:

III. HALLMARKS OF NON-ESTABLISHMENT: GOVERNMENT FUNDS CANNOT BE USED TO MAINTAIN HOUSES OF WORSHIP.

The facts of *Trinity Lutheran* present the problem of direct financial aid to churches in the wider context of federalism. Current Establishment Clause[13] law does not prohibit direct in-kind aid to an institution simply because of the religious character of that institution. Justice O'Connor's concurrence in *Mitchell v. Helms* represents the controlling law in direct-aid cases.[14] *Mitchell* held that if the in-kind aid is for a secular purpose, and the government has established sufficient safeguards to ensure that the aid will not be diverted to a religious purpose, the aid is not prohibited by the Establishment Clause.[15] This holding, with its secular purpose limitation and requirement that the government ensure that limitation is respected, recognized the constitutional problems with giving even in-kind aid to a faith community. But *Mitchell* did not consider direct cash aid to a faith community, nor did it consider a state's interest in non-establishment.

A. Supreme Court Precedent Supports the States' Interest in Non-establishment Where the Interest Goes Beyond What Is Prohibited by the Establishment Clause.

The nation has not always been a place where non-establishment was the law of the land. In the colonial days, religious establishment was common. Along with religious tests for office, blasphemy laws, and church attendance laws, a common hallmark of establishment was financial support of religion.[16]

"Constitutional questions are decided by this Court, not the parties' concessions." *Id.* at 3 (Sotomayor, J., dissenting).

[13] The Religion Clauses of the First Amendment provide that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; . . . ." U.S. CONST. AMEND. I.

[14] 530 U.S. 793 (1999). *Mitchell* considered a federal program where books and computers were loaned to state and local education authorities for use in schools, including use in religious schools. The program required that the educational materials be used for nonreligious educational purposes, and the safeguards established to ensure that the materials were not diverted to religious use included affidavits of compliance by school officials and occasional inspections by public officials. *Id.* at 862.

[15] *Id.* at 836-864 (O'Connor, J., concurring).

[16] Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion,* 44 WM. & MARY L. REV. 2105, 2131 (2003). McConnell describes the following categories evidencing establishment of religion: "(1) control over doctrine, governance, and personnel of the church; (2)

Taxpayer money was used to support clergy, ministerial education, and the construction of houses of worship.[17] In the course of disestablishment, every state ultimately rejected taxpayer supported funding of religion, despite proposals to the contrary.[18] Support of the Baptists, Presbyterians, and other at-the-time minority denominations was key, as they recognized the detrimental effect that the influence of the state had on religion.[19]

States have taken a variety of approaches to implement non-establishment, and the majority of states have adopted constitutional provisions that restrict the funding of religion.[20] In fact, in the late nineteenth and early twentieth centuries, Congress required territories seeking admission to the Union as states to include such restrictions in their constitutions.[21] Missouri has

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compulsory church attendance; (3) financial support; (4) prohibitions on worship in dissenting churches; (5) use of church institutions for public functions; and (6) restriction of political participation to members of the established church."

[17] *See* IRA C. LUPU AND ROBERT TUTTLE, SECULAR GOVERNMENT RELIGIOUS PEOPLE 75-76 (2014). "Although official establishments of religion vary in many details, all share the practice of government subsidy for the key features of religious life. Those features include public provision of places for worship as well as payments for ministers and teachers of the faith." *Id.*

[18] *See* Douglas Laycock, *Church and State in the United States: Competing Conceptions and Historic Changes*, 13 IND. J. GLOBAL LEG. STUD. 503, 508 (2006). "In the wake of the American Revolution, each state and the new federal government wrote a constitution. The evangelical dissenters insisted that these new constitutions address issues of religious liberty. Immediately in most states, eventually in all states, the established churches were disestablished—deprived of government sponsorship and deprived of tax support." *Id.* Patrick Henry's "A Bill Establishing a Provision for the Teachers of Christian Religion" is probably the most well-known of the proposals to the contrary. *See* LUPU, *supra* note 17, at 77.

[19] Laycock, 13 IND. J. GLOBAL LEGAL STUD. at 508. "The details varied from state to state, but disestablishment was not the work of secular revolutionaries. It was mostly the work of evangelical religious dissenters." *Id.*

[20] *See* ALA. CONST. ART. I, § 3; ARIZ. CONST. ART. II, § 12, ART. IX, § 10; ARK. CONST. ART. II, § 24; CAL. CONST. ART. XVI, § 5; COLO. CONST. ART. II, § 4, ART. IX, § 7; CONN. CONST. ART. SEVENTH; DEL. CONST. ART. I, § 1; FLA. CONST. ART. I, § 3; GA. CONST. ART. I, § 2, PARA. VII; IDAHO CONST. ART. IX, § 5; ILL. CONST. ART. I, § 3, ART. X, § 3; IND. CONST. ART. 1, §§ 4, 6; IOWA CONST., ART. 1, § 3; KY. CONST. § 5; MD. CONST., DECL. OF RIGHTS ART. 36; MASS. CONST. AMEND. ART. XVIII, § 2; MICH. CONST. ART. I, § 4; MINN. CONST., ART. I, § 16; MO. CONST. ART. I, §§ 6, 7, ART. IX, § 8; MONT. CONST. ART. X, § 6; NEB. CONST. ART. I, § 4; N. H. CONST. PT. 2 ART. 83; N. J. CONST. ART. I, § 3; N. M. CONST. ART. II, § 11; OHIO CONST. ART. I, § 7; OKLA. CONST. ART. II, § 5; ORE. CONST. ART. I, § 5; PA. CONST. ART. I, § 3, ART. III, § 29; R. I. CONST. ART. I, § 3; S. D. CONST. ART. VI, § 3; TENN. CONST. ART. I, § 3; TEX. CONST. ART. I, §§ 6, 7; UTAH CONST. ART. I, § 4; VT. CONST. CH. I, ART. 3; VA. CONST. ART. I, § 16, ART. IV, § 16; WASH. CONST. ART. I, § 11; W. VA. CONST. ART. III, § 15; WIS. CONST. ART. I, § 18; WYO. CONST. ART. I, § 19, ART. III, § 36.

[21] LUPU, *supra* note 17, at 80.

prohibited state funding of religion since 1820, before it was admitted to the Union in 1821. It currently has three provisions prohibiting state sponsorship of religion, the language of which were originally enacted between 1820 and 1875.[22] One of the provisions, enacted in 1875, states "[t]hat 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 . . . ."[23] A direct cash payment by the state to a faith community is thus absolutely prohibited under the Missouri constitution. Some of the states' constitutional provisions are stricter than the Establishment Clause, and like Missouri's, prohibit direct or even indirect funding of religion.[24] Many of the states' constitutional provisions specifically prohibit aid in support of building and maintaining houses of worship.[25] The

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[22] MO. CONST. ART. I, § 6 (language originally enacted in 1820): "That no person can be compelled to erect, support or attend any place or system of worship, or to maintain or support any priest, minister, preacher or teacher of any sect, church, creed or denomination of religion; but if any person shall voluntarily make a contract for any such object, he shall be held to the performance of the same." MO. CONST. ART. I, § 7 (language originally enacted in 1875): "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 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." MO. CONST. ART. IX, § 8 (language originally enacted in 1870): "Neither the general assembly, nor any county, city, town, township, school district or other municipal corporation, 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, academy, seminary, college, university, or other institution of learning controlled by any religious creed, church or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the state, or any county, city, town, or other municipal corporation, for any religious creed, church, or sectarian purpose whatever."

[23] MO. CONST. ART. I, § 7.

[24] *Id*.

[25] *See, e.g.,* ALA. CONST. ART. I, § 3 (providing that "no one shall be compelled by law to attend any place of worship; nor to pay any tithes, taxes or other rate for building or repairing any place of worship, . . ."); IOWA CONST. ART. I, § 3 (providing that "[no person shall] be compelled to attend any place of worship, pay tithes, taxes, or other rates for building or repairing places of worship, . . .); N.J. CONST. ART. I, § 3 (similar). For the complete text of the state constitutional provisions prohibiting state funding of faith communities, see Brief of Baptist Joint Committee for Religious Liberty and General Synod of the United Church of Christ As Amici Curiae in Support of Respondent, Trinity Lutheran v. Comer, at Appendix.

Supreme Court recognizes that the states have strong non-establishment interests.[26]

The Court addressed these interests, as well as the difference between what the federal constitution allows under the Establishment Clause and a state constitution's limits under the Free Exercise Clause in *Locke v. Davey*.[27] *Locke* considered these interests in the context of a Free Exercise challenge to the state of Washington's constitutional provision that provides "[n]o public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment."[28] The Court held that a state-funded scholarship program that was available to students meeting particular academic criteria could exclude degree programs in devotional theology and not impinge upon free exercise of religion.[29] In acknowledging that education in preparation for ministry is an "essentially religious endeavor," Chief Judge Rehnquist wrote, "Even though the differently worded Washington Constitution draws a more stringent line than that drawn by the United States Constitution, the interest it seeks to further is scarcely novel. In fact, we can think of few areas in which a State's antiestablishment interests come more into play."[30]

Trinity Lutheran held that Missouri violated the Free Exercise clause of the First Amendment when it "disqualif[ied] [Trinity Lutheran] from a public benefit solely because of [its] religious character."[31] In rejecting Missouri's non-establishment interests, the Court noted that in *Locke v. Davey*, the scholarship

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[26] For example, in *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), the Court considered a challenge to a Washington Supreme Court decision that held a program providing educational funds to blind students who used those funds to pursue a theological education violated the federal Establishment Clause. The Court found that the program provided no direct subsidy to religion because the use of the funds was up to individual recipients, and thus did not violate the Establishment Clause. *Id.* at 489. But the Court reversed and remanded the decision, noting that the Washington Supreme Court was "of course free to consider the applicability of the 'far stricter' dictates of the Washington State Constitution." *Id.* The state constitution provides that no public money shall be appropriated or applied to any course of religious instruction, and on remand, the Washington Supreme Court held that the program violated the state constitution. Witters v. Comm'n for Blind, 771 P.2d 1119 (Wash. 1989). Further review was denied by the Supreme Court. Witters v. Wash. Dept. of Svcs. for the Blind, 493 U.S. 850 (1989).

[27] *Locke,* 540 U.S. 712.

[28] *Id.* at 718 (citing WASH. CONST. ART. I, § 11).

[29] *Id.* at 725.

[30] *Id.* at 721-22.

[31] *Trinity Lutheran*, slip op. at 10.

program did not require the student to choose between their religious beliefs and receiving a government benefit. This analysis fails to appreciate that houses of worship, like preparation for ministry, are also essentially religious endeavors—a faith community cannot use a grant to improve the grounds upon which its house of worship sits in a secular way, like the student in *Locke* could.[32]

The Court also cited *McDaniel v. Paty*[33] to support the holding.[34] In *McDaniel*, a minister was disqualified from serving as a delegate to Tennessee's constitutional convention solely because he was a minister.[35] The *Trinity Lutheran* Court described McDaniel's quandary: "McDaniel could not seek to participate in the convention while also maintaining his role as a minister; to pursue the one, he would have to give up the other."[36] Ultimately, the *McDaniel* Court held that Tennessee's non-establishment concerns did not outweigh the minister's Free Exercise protections because a minister could carry out the functions of a secular office as well as a person who was not a minister.[37]

The *Trinity Lutheran* Court's choice to cite *McDaniel* as support is forced, as *McDaniel* involved a minister ultimately seeking to participate in a nonreligious activity—one that presumably did not require the state to give him a cash payment in support of his ministry and one that presumably had some secular

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[32] *See infra* § IV.A for a discussion on the inherently religious nature of faith communities and their houses of worship. *See also Tilton v. Richardson,* 403 U.S. 672 (1971) (holding that government funding of buildings used for worship has the effect of advancing religion).

[33] 435 U.S. 618 (1978).

[34] *Trinity Lutheran,* slip op. at 10.

[35] *McDaniel,* 435 U.S. at 627. At that time, Tennessee also "acknowledge[d] the right of its adult citizens generally to seek and hold office as legislators or delegates to the state constitutional convention." *Id.* at 626. Tennessee claimed an interest in non-establishment as the reason it disqualified clergy, arguing that "if elected to public office [ministers] will necessarily exercise their powers and influence to promote the interests of one sect or thwart the interests of another, thus pitting one against the others, contrary to the anti-establishment principle with its command of neutrality." *Id.* at 628-29.

[36] *Trinity Lutheran,* slip op. at 10.

[37] *McDaniel*, 433 U.S. at 629. "However widely that view may have been held in the 18th century by many, including enlightened statesmen of that day, the American experience provides no persuasive support for the fear that clergymen in public office will be less careful of anti-establishment interests or less faithful to their oaths of civil office than their unordained counterparts." *Id.* The Court also explained that because the struggle for disestablishment was waged to a significant extent by clergy, the assumption that clergy would promote established religion was not supported. *Id.* at 629 n.9.

benefit to the state reflected in the oath of civil office. Indeed, without a change in the law, McDaniel could not have participated in the state constitutional convention. Trinity Lutheran, on the other hand, sought to have the state pay for an improvement to a property that is used for *religious* purposes: "The Learning Center formerly operated as a separate entity but merged into the [Trinity Lutheran] Church in 1995 and has operated as a Church ministry ever since."[38]

B. The U.S. Constitution's Establishment Clause Also Forbids Supporting Houses of Worship.

Like the funding of ministerial education, the use of taxpayer funds to construct and maintain houses of worship is a hallmark of establishment that has already been rejected by the states.[39] The essential purpose for which like-minded individuals gather together and form a faith community is to engage in worship and ministry.[40] Constructing and maintaining a house of worship to carry out these activities is essentially a religious endeavor, one that is fundamentally the responsibility of the adherents of that particular faith community. Funding the maintenance of a house of worship is therefore funding religious activity. It is not surprising that a state constitutional provision that prohibits the funding of religion would be interpreted as prohibiting the funding for the construction and maintenance of houses of worship without violating the Free Exercise Clause, as the Department interpreted Missouri's constitution.

The Supreme Court has also held that the funding and maintenance of a building used for worship is a religious activity. In *Tilton v. Richardson*,[41] the Court considered a federal grant program that provided construction grants to colleges and universities. The grant program excluded "any facility used or to be used for sectarian instruction or as a place for religious worship, or

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[38] *See* Brief for Petitioner at 3, Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017) (No. 15-577).

[39] *See* LUPU, *supra* note 17; LAYCOCK, *supra* note 18. *See also supra* note 23 (various states' laws).

[40] *See, e.g.*, Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 565 U.S. 171, 188 (2012) (noting a church has a right to shape its faith and mission).

[41] 403 U.S. 672 (1971). The Court described the three main concerns relating to the Establishment Clause as sponsorship, financial support, and active involvement of the sovereign in religious activity. *Id.* at 677 (citing Walz v. Tax Comm'n, 397 U.S. 664 (1970)).

. . . any facility which . . . is used or to be used primarily in connection with any part of the program of a school or department of divinity . . . ."[42] The federal government retained a 20-year interest in any building built under the program; at the end of the 20 years, the building could be used for any purpose.[43]

Taxpayers brought suit alleging that, as applied to religious colleges and universities, the program violated the Establishment Clause. The Court agreed, finding that if a building was converted to religious use at the end of the 20-year period, "the original federal grant will in part have the effect of advancing religion."[44] The Court severed the 20-year limitation from the statute as applied to religious colleges and universities, perpetually restricting grant recipients from using the buildings funded by grant money for religious purposes.[45]

A few years later, the Court struck down a New York law reimbursing private elementary and secondary schools located in low-income areas for repair and maintenance costs in *Committee for Public Education and Religious Liberty v. Nyquist*.[46] Virtually all of the private schools that qualified for the grant were Roman Catholic schools.[47] In holding that the law violated the Establishment Clause because it had a primary effect of advancing the religious mission of the schools, the Court noted: "No attempt is made to restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes, *nor do we think it possible within the context of these religion- oriented institutions to impose such restrictions*."[48] Despite significant changes in Establishment Clause law over the past several decades, the Supreme Court has not revisited these decisions on direct funding of religious structures,[49] nor were these decisions considered or even mentioned by the *Trinity Lutheran* court.

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[42] *Id.* at 675 (quoting the Higher Education Facilities Act of 1963, 20 U.S.C.S. § 751 (repealed 1972) (internal quotations omitted)).

[43] *Id.* at 683.

[44] *Id.*

[45] *Id.* at 689.

[46] 413 U.S. 765 (1973).

[47] *Id.* at 774.

[48] *Id.* (emphasis added).

[49] The portion of the *Nyquist* decision relating to tuition grants and vouchers may be in question given the Court's decision in Zelman v. Simmons-Harris, 536 U.S. 639 (2002), holding that Cleveland's tuition voucher program did not violate the Establishment Clause, but *Zelman* did not reconsider the portion of the *Nyquist* decision relating to directly funding the maintenance and repair expenses for religious structures.

IV. RELIGION'S NON-ESTABLISHMENT INTERESTS

The facts in *Trinity Lutheran* raise at least two non-establishment interests that may be held by faith communities. First, the case highlights the problems of judicial review—or the lack thereof, as demonstrated by the opinion—of a church's designation of its activities or property as secular in order to qualify for public funds. Second, the requirements of the grant program demonstrate how the faith community's receipt of a state grant can influence the faith community's ministry in such a way as to turn the faith community into an instrument of civil policy—one of the very reasons the Religion Clauses came into being. A faith community that sees free money from the state as a boon to its coffers, or, as may be the case in many smaller and shrinking faith communities, as simply relief from having to ask its declining membership to pay for one more repair to a decaying century-old house of worship, may not be considering the full implications of accepting money from the state.

A. Judicial Review of a Faith Community's "Secular" Activities Is Problematic.

After *Trinity Lutheran*, the law seems to be that faith communities are capable of engaging in secular activities—that is, activities that are not the worship, mission, or ministry of the faith community. The Court did not expressly say this, but distinguished *Locke* by noting that "[t]he claimant in *Locke* sought funding for an 'essentially religious endeavor . . . akin to religious calling as well as an academic pursuit,' and opposition to such funding 'to support church leaders' lay at the historic core of the Religion Clauses."[50] Without any further analysis, the Court then concluded, "[h]ere nothing of the sort can be said about a program to use recycled tires to resurface playgrounds."[51] The Court thus agreed with Trinity Lutheran that the playground, and its use, are secular. It followed up with a footnote asserting that "[t]his case involves express discrimination based on religious identity with respect to playground resurfacing. *We do not address religious uses of funding or other forms of discrimination.*"[52]

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[50] *Trinity Lutheran,* slip op. at 13.

[51] *Id.*

[52] *Id.* at 14 n.3 (emphasis added). The footnote was only joined by four of the seven justices who joined the judgment of the Court. The opinion of the Court is Roberts' opinion, excluding footnote 3. Two of the concurrences, however,

The Court's statement that nothing about the Scrap Tire Program itself is an essentially religious endeavor is self-evident, but the Court's analysis as to the use of the funds by Trinity Lutheran is completely absent. Trinity Lutheran and the Court acknowledge that the preschool is a ministry of the Church.[53] That preschool has a playground, and Trinity Lutheran argues that its playground is secular. Not just that the raw materials are secular, or that the Scrap Tire Program is secular, but that the playground itself is secular.[54]

But the playground is not secular. The playground is used primarily by the children who attend the church's preschool. Trinity Lutheran's preschool is a ministry of the church, the school's curriculum is religious in nature, and the children who attend the preschool are exposed to a Christian worldview. Trinity Lutheran describes no efforts to segregate the property from religious use or even to represent that no ministry occurs when the children are on the playground. Repeating over and over in the briefs that the playground of a ministry is secular does not make it so. If the Court is going to allow direct funding of faith communities, the Court should at least require the funds to be used for a secular purpose and to show that sufficient safeguards are in place to prevent diversion to a religious use.

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exhibited a strong preference for broadening the Court's opinion to include religious activities. *Id.* at 1 (Thomas, J., concurring in part) ("*Locke* did not suggest that discrimination against religion outside the limited context of support for ministerial training would be similarly exempt from exacting review . . . . This Court's endorsement in *Locke* of even a 'mil[d] kind' of discrimination against religion remains troubling." (internal citations omitted)); *id.* at 1 (Gorsuch, J., concurring in part) ("First, the Court leaves open the possibility a useful distinction might be drawn between laws that discriminate on the basis of religious *status* and religious *use*. Respectfully, I harbor doubts about the stability of such a line . . . . Neither do I see why the First Amendment's Free Exercise Clause should care. After all, that Clause guarantees the free *exercise* of religion, not just the right to inward belief (or status)" (emphases in original)).

[53] *Id.* at 3 (majority opinion) ("In its application, the Center disclosed its status as a ministry of Trinity Lutheran Church and specified that the Center's mission was 'to provide a safe, clean, and attractive school facility in conjunction with an educational program structured to allow a child to grow spiritually, physically, socially, and cognitively.'").

[54] In Trinity Lutheran's opening brief, it states, "There is no way for Trinity Lutheran to convert rubber protecting children from injury into the advancement of religious doctrines." Br. for Pet'r, Trinity Lutheran v. Comer, at 39. And "[The aid] cannot possibly be diverted to a religious use." *Id.* at 31. In its reply brief, its assertion becomes even stronger: "The playground is purely secular so it is implausible to argue that making it safer subsidizes religious activities," and finally, "The playground is not religious." Reply Br. for Pet'r at 4, 6.

If we presume that at least for the time being, given the controlling law of *Mitchell v. Helms*, any faith community activity that receives state funding must be a secular activity, a faith community may be willing to accept judicial review of its designation of an activity or corner of its property as secular, in exchange for a grant to subsidize that activity or corner. Any argument by a faith community that it has departed from its essential purpose of worship, mission, and ministry and diverted its property to a nonreligious use should require at a minimum the faith community to prove that it has actually taken measures to segregate the property and insulate it from any religious use. The faith community's self-designation is not enough.[55]

Even if a faith community did attempt to prove a nonreligious use of its house of worship, courts are not likely to be competent to review that determination as made by a faith community. The Supreme Court has spoken about the concerns related to the line-drawing between the religious and the secular in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*,[56] which addressed the ability of a church to engage in employment discrimination on the basis of religion against an employee providing arguably secular services at a community gymnasium owned by a church. Justice White, writing for the Court, said, "[I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission."[57] Although *Amos* considered the application to religious organizations of laws prohibiting employment discrimination based on religion, the same concerns are present whenever a faith community makes a claim that its activities are not religious, and asks a court to pass judgment upon that.

If a faith community claims its playground is not religious to obtain a grant to make improvements to it, perhaps the religious nature of the rest of its grounds upon which its house of worship sits is up for discussion, as well as its ability to choose to hire only

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[55] Trinity Lutheran has not even made a minimal attempt to show that the playground is insulated from religious use, and given how the playground actually operates as an integral part of its ministry, it is unlikely that it could. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2029 (2017).

[56] Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987).

[57] *Id.* at 336.

persons who adhere to its faith to maintain those grounds. If a faith community claims its soup kitchen is not religious to obtain a government grant to support it, perhaps the faith community should be required to keep separate books and file a nonprofit information return to a taxing authority for that part of its operations. If it does not file a nonprofit information return, perhaps that shows that the activity is in fact religious, or perhaps shows that the soup kitchen has been out of compliance. These questions are important whenever a faith community considers accepting money from the state, because that necessarily invokes a closer relationship with the state, resulting in less autonomy for the faith community.[58] Religion is treated as special in many areas of the law, not to discriminate against it, but to preserve its independence.

B. A Faith Community's Ministry Will Be Influenced by State Funding.

Many faith communities today are feeling the effects of declining membership, aging infrastructure, and increasing costs.[59] Accepting money from the state to perpetuate its current existence is easier than convincing members that how the faith community is functioning needs to change so that it can be adequately supported by its adherents.[60] But states do not deliver money without strings—whether that is as innocuous as an application requesting the most basic information, or complex reporting or use requirements.[61] A faith community accepting money from the state

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[58] For example, the General Terms and Conditions of the Scrap Tire Program ("General Terms and Conditions"), require grant recipients to produce and maintain certain records related to the grant, a reasonable requirement for the state to ensure that the money it gives out is being used for the intended purpose. The recipient's records relating to the grant, however, are required to be "maintained as public records" under the law. MISSOURI DEPARTMENT OF NATURAL RESOURCES, SOLID WASTE MANAGEMENT PROGRAM GENERAL TERMS AND CONDITIONS, SCRAP TIRE SURFACE MATERIAL GRANT 6 (2017). Grantee faith communities, who generally have no accountability to the general public for their financial record-keeping, should consider the ramifications of opening their books, even in a limited way, to public scrutiny.

[59] *See, e.g.*, DAVID A. ROOZEN, AMERICAN CONGREGATIONS 2015: SURVIVING AND THRIVING, 2, 7-8 (2015) (describing decline in small congregations and noting, inter alia, "dipping into savings or investments, postponing capital projects, and reducing mission and benevolence giving were among the most typical ways congregations dealt with recession induced financial shortfalls").

[60] *Id.* at 14 (describing an overall decline in the willingness of congregations to change to increase spiritual vitality).

[61] *See infra* § V.

should be aware that it opens the faith community to being used as an instrument of the state's civil policy—at the expense of its ministry and mission.

Even in a program as seemingly simple as the Scrap Tire Program, the state's reporting requirements influence how a faith community conducts and focuses its ministry, one of the very dangers that the Religion Clauses were designed to protect against.[62] The state has a civil policy of encouraging the recycling and reuse of used tires.[63] It promotes this policy through the Scrap Tire Program.[64] The program has a number of requirements for grant recipients.[65] And the requirements of the program are not restricted to the resurfaced so-called secular playground.

For example, one requirement of the program is that the grant recipient have significant exposure to the media.[66] The more media exposure opportunities the grant applicant includes in its application, the higher it scores. Indeed, once the grant has been received, the grantee is required to include the Missouri Department of Natural Resources as a source of funding, and the Department's logo, "on all publications and other printed materials [about the funded project] which are intended for distribution."[67] It is not difficult to imagine a request or a requirement that the recipient link to the grant program's webpage, or that the recipient distribute a brochure, email blast, newspaper advertisement, or radio spot advertising the state's contribution to the newly upgraded facilities. A grant recipient must also either incorporate solid waste management education into its curriculum or design

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[62] *See Trinity Lutheran,* at 2027 (Sotomayor, J., dissenting) ("To hear the Court tell it, this is a simple case about recycling tires to resurface a playground. The stakes are higher. This case is about nothing less than the relationship between religious institutions and the civil government—that is, between church and state.").

[63] MISSOURI DEPT. OF NAT. RES., SCRAP TIRE AND ILLEGAL DUMPING UNIT - GENERAL INFORMATION (2017) (describing priority and regulation of scrap tires).

[64] *Id.*

[65] *See* Br. for Pet., Addendum, Playground Scrap Tire Surface Material Grant Application Instructions ("Instructions"). *See also* General Terms and Conditions, *supra* note 58. It is unclear when the General Terms and Conditions went into effect but it does not matter; the General Terms and Conditions are in effect now, apply to the playground scrap tire material grant, and faith communities are now eligible to apply for the grant.

[66] Instructions, *supra* note 65, at 14a.

[67] General Terms and Conditions, *supra* note 58, at 5. The requirement applies to "publications, news releases, videos, displays, signs, and all other project material from which information may be obtained by reading, watching, hearing, or simply seeing the material." *Id.*

and provide informational material about solid waste management to the public.[68]

When that grant recipient is a faith community, the faith community accepts the state's influence in shaping the public perception of its religious identity through its communications to its members and to the public, along with the state's influence over the content of its ministry through the required educational information about solid waste. Whether it is the state's logo on the faith community's website, or a brochure about tire recycling next to the leaflets explaining its theology, the faith community is sending a message about its values and mission. The faith community thus has agreed to use its religious means to promote the state's civil policy. Even if Trinity Lutheran could have credibly argued that its playground is secular, its mission focus certainly is not.

V. GOVERNMENT SUPPORT OF HOUSES OF WORSHIP WILL LEAD TO RELIGIOUS FAVORITISM AND DISCRIMINATION.

States that decline to fund religious activities are not discriminating against religion, but are demonstrating the success of the Religion Clauses.[69] The states' non-establishment concerns are not merely historical.[70] If a state distributes funds to faith communities, whether to maintain houses of worship or educate clergy or for some other religious activity, the criteria upon which it does so will necessarily lead to discrimination among religions and favoritism of some.

Nonprofit organizations are generally accountable to both the government and the public. A nonprofit organization is required, with some exceptions, to file a publicly-available information return with the Internal Revenue Service and may be required to submit to other various reporting requirements according to state law.[71] Faith communities, however, are

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[68] Instructions, *supra* note 65, at 14a-15a.

[69] "[S]pecial treatment of churches in our constitutional tradition, like the special treatment of religion itself, is a means of protecting religious liberty and the freedom and integrity of religious institutions, not a mark of hostility toward or discrimination against religion." Brief of Baptist Joint Committee on Religious Liberty, *Trinity Lutheran*, No. 15-557, *supra* note 1, at 3.

[70] "[The Religion] Clauses guard against a return to the past, and so that past properly informs their meaning." *Trinity Lutheran,* No. 15-557, at 11 (Sotomayor, J., dissenting).

[71] *See, e.g.*, 26 U.S.C. §§ 6033(a)(3)(A)(i) (showing organizations required to file information returns and mandatory exemptions); RICHARD R. HAMMAR, PASTOR,

ordinarily exempt from certain reporting obligations that apply to other organizations. These exemptions are the result of government trying to avoid excessive entanglement with religion.[72] Faith communities are in general exempt from filing tax returns, and the IRS has special requirements that must be met to subject a faith community to an IRS audit.[73] Many states exempt faith communities from registering for charitable solicitation purposes, and from submitting annual public reports to the state attorney general's office.[74] Faith communities are accountable largely to their members.

A state, however, does not distribute funds without requiring accountability (nor should it), both in how the organization asks for the money and subsequent reporting on its use. Any degree of discretion in those requirements, such as that present in the Missouri Scrap Tire program, will open the door for the state to discriminate between religions and to be influenced by religion. The Department, for example, requires proof of ownership of the property.[75] Depending upon how rigid a standard is set for such proof, certain faith communities may be excluded or put to a higher burden, especially when a faith community's ecclesiastical organization does not conform to the state's expectations of how an organization should be structured.[76] The Department also requires

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CHURCH AND LAW VOLUME FOUR: LIABILITY & CHURCH AND STATE ISSUES 16 (2008) (noting that most states have enacted laws requiring registration of organizations prior to solicitation in the state).

[72] *See, e.g.*, Walz v. Tax Comm'n of New York, 397 U.S. 664, 676 (1970) (holding that a religious property tax exemption "restricts the fiscal relationship between church and state, and tends to complement and reinforce the desired separation insulating each from the other").

[73] *See* 26 U.S.C. §§ 6033(a)(3)(A)(i) (organizations required to file and mandatory exemptions) and 7611 (restrictions on church tax inquiries and examinations). *See also* Church Audit Procedures Act of 1984, Pub. L. No. 98-369, § 1033(a), 98 Stat. 494 (hereinafter CAPA) (CAPA was passed to address church-state entanglement issues in IRS audits of churches). *See generally Church Audit Procedures Act: Hearing Before the Subcomm. on Oversight of the I.R.S. of the S. Comm. on Finance, 98th Cong.* (1983).

[74] HAMMAR, *supra* note 52, at 17 ("Most state laws that regulate the solicitation of charitable contributions exempt religious organizations.").

[75] Br. for Pet'r., Trinity Lutheran v. Comer, at 9a-10a.

[76] Patricia B. Carlson, *Unincorporated Associations and Charitable Trusts,* in RELIGIOUS ORGANIZATIONS IN THE UNITED STATES: A STUDY OF IDENTITY, LIBERTY, AND THE LAW 263-64 (James A. Serritella et al. eds., 2006). Faith communities that operate as unincorporated associations have addressed this challenge in a number of ways, including having its members hold title to the property. *Id.* Some states have also enacted laws addressing property ownership of unincorporated religious associations. *Id.* at 265-68. Unincorporated associations also raise other challenges, such as the association's ability to enter into a

that grantees keep books and records related to the project, that Department officials have access to those records, and that the grantee maintain those records as public records under Missouri law.[77] Faith communities who are willing to bend to the state's reporting requirements, even if they are as simple as submitting annual reports on the use of the funds, will develop a closer relationship with the state.

State funding of religious activities will also cause state funds to be used for purposes that discriminate against others based on religion. A faith community could exclude others not subscribing to the tenets of its faith from its property (as it should be free to do), and yet accept funding from the state for property improvements. Because Trinity Lutheran accepts students regardless of their religion,[78] the Court's decision did not analyze whether states can deny funding if the faith community does discriminate in such a manner.[79]

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contract. *Id.* at 269. These challenges are not insurmountable but may require significant education of reviewing officials to prevent free exercise issues. Ecclesiastical organization is not merely a governance choice but has deep theological roots, which has been acknowledged and respected by the Supreme Court. *See Watson v. Jones,* 80 U.S. 679, 729 (1872) ("[Religious denominations] ha[ve] a body of constitutional and ecclesiastical law of [their] own, to be found in their written organic laws, their books of discipline, their collections of precedents, in their usage and customs, which as to each constitute a system of ecclesiastical law and religious faith . . . ."). For a case challenging a state law because the laws exhibited a denominational preference, see *Larson v. Valente*, 456 U.S. 228 (1982). In *Larson,* a Minnesota charitable registration statute was challenged because it exempted only religious organizations whose members provided more than half of their total contributions. The Court held that the "more than half" requirement for exemption was a violation of the Establishment Clause because it preferred some denominations over others. *Id.* at 246-247. "The clearest command of the Establishment Clause is that one denomination cannot be officially preferred over another. . . . This constitutional prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause. . . . Free exercise thus can be guaranteed only when legislators—and voters—are required to accord to their own religions the very same treatment given to small, new, or unpopular denominations." *Id.* at 245. *See also* Heritage Village Church and Missionary Fellowship, Inc. v. State, 263 S.E.2d 726 (N.C. 1980) (holding that the Establishment Clause prohibits any state from subjecting religious organizations to charitable registration laws and noting that religions differ in whether they have members at all and what the rights of those members are).

[77] General Terms and Conditions, *supra* note 58, at 3-4.

[78] *Trinity Lutheran,* slip op. at 2.

[79] General Terms and Conditions, *supra* note 58, at 10 (showing the General Terms and Conditions require grant recipients to be in compliance with all local, state, and federal nondiscrimination laws, but as faith communities are exempt from certain nondiscrimination laws, a faith community will not be out of

But the *Trinity Lutheran* Court did not see the Religion Clauses operating as they were intended to operate. Instead, the Court focused exclusively on discrimination. Rejecting the Department's argument that *Locke* controlled the case, Justice Roberts wrote, "Davey was not denied a scholarship because of who he *was*; he was denied a scholarship because of what he proposed *to do*—use the funds to prepare for the ministry. Here there is no question that Trinity Lutheran was denied a grant simply because of what it is—a church."[80]

With those two sentences, Chief Justice Roberts rejected centuries of states protecting their non-establishment interests, and fundamentally mischaracterized the essential nature of faith communities. Prior to the Supreme Court's decision in *Trinity Lutheran,* the Supreme Court had never before held that states could directly fund religious activities. Indeed, as Justice O'Connor explained in *Mitchell*, when aid flows from the government to a religious organization, the aid must be for a secular purpose.[81] But a faith community's house of worship is inherently religious.

VI. Conclusion

Trinity Lutheran ignores decades of Supreme Court Establishment Clause precedent. It confuses discrimination with the protection of the independence of religion and the state—at which the Religion Clauses were originally aimed. And it paves the way for bringing together religion and the state in a way to the detriment of both. As Justice Black stated in *Engel v. Vitale,* the "first and most immediate purpose [of the Establishment Clause] rested on the belief that a union of government and religion tends to destroy government and to degrade religion."[82]

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compliance when it engages in permissible discrimination using state funds). *See also Hosanna Tabor,* 565 U.S. 171 (holding the Religion Clauses barred a suit by a minister against her church for violation disability discrimination laws).

[80] *Trinity Lutheran,* slip op. at 12 (emphasis in original).

[81] Mitchell v. Helms, 530 U.S. 793, 862 (1999) (O'Connor, J., concurring).

[82] Engel v. Vitale, 370 U.S. 421, 431 (1962).