Trinity Lutheran and Its Implications for Federalism in the United States

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Abstract

This article considers the 'tire scrap' playground case, Trinity Lutheran Church of Columbia, Inc. v. Comer, *decided by the U.S. Supreme Court in the summer of 2017, and its implications for federalism in the United States. In Trinity Lutheran the U.S. Supreme Court held that the state of Missouri violated the Free Exercise Clause of the First Amendment by disqualifying a church-owned school from participating in a programme that provided state funding for updating playgrounds. The case has interesting Free Exercise Clause implications, because the Court emphasized the non-discrimination component of Free Exercise. It also has interesting implications for federalism, because Missouri's State constitutional provision prohibiting state funding of religion was rooted in an era of anti-Catholic bias. These so-called State constitutional 'Blaine Amendments' exist in some form in as many as forty states. Although the Court did not explicitly address whether state Blaine Amendments violate the U.S. Constitution per se due to their history of religious animus, the Court held that this Blaine Amendment as applied here violated the Federal Constitution. This could have significant effects for the wall of separation between religion and the state, and might have especially significant implications for state funding of religion, including the 'elephant in the room' in this case, state educational 'voucher' programmes that provide state funding to parents who send their children to religiously affiliated schools.*

Keywords: anti-Catholic bias, Baby Blaine Amendments, Blaine Amendments, federalism, free exercise, non-discrimination, religious animus.

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A Introduction

In the United States, federalism refers to the constitutional relationship between the federal government of the United States and state governments.[1] The long arc of the history of federalism in the United States over the past 200 years is for the most part a story of the gradual decline of state power and an increase in federal power.[2] Nevertheless, there are occasional developments that merit attention, including an interesting case decided in the summer of 2017, *Trinity Lutheran Church of Columbia, Inc. v. Comer*.[3] This case is noteworthy not only for what it signals about the complex relationship between state and federal law, but also how those complexities are compounded when they occur at the intersection of different U.S. constitutional law imperatives, in this case the protection of 'free exercise' of religion and the prohibition of an 'establishment' of religion.

On its face, the case could hardly be more prosaic. It was about whether the state of Missouri could exclude a church-owned school from participating in a 'tire scrap' programme for resurfacing playgrounds, pursuant to the constitutional provision of Missouri prohibiting state funding of religion, or whether by excluding the church, the State was in violation of the Free Exercise Clause of the First Amendment. But the case was about much more than scraped knees. It created a standoff between a State constitutional provision forbidding any state funds to aid religion (known as state 'Blaine Amendments') and the Federal constitutional Free Exercise provision guaranteeing neutrality and non-discrimination in matters of religion.

To the surprise of many observers, the U.S. Supreme Court held that Missouri's policy amounted to unlawful discrimination against churches, and was thus a violation of the Free Exercise Clause. As Justice Sonja Sotomayor pointed out in her dissent, in so holding the Court 'profoundly change[d]' 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".[4] Justice Sotomayor asserts that this outcome "weakens this country's longstanding commitment to a separation of church and state beneficial to both".[5]

This article is a brief introduction to the *Trinity Lutheran* case and the federalism dimension of the case. To some extent, the federalism issue was the lion that did not roar in the case. But the relative silence of that lion does not mean its presence was not significant, nor that the lion has disappeared. The Court did not directly address the question of whether the State constitutional law provision was itself a violation of the Free Exercise Clause. Thus, the great unknown

1 *See* L.D. Kramer, 'Understanding Federalism', *Vanderbilt Law Review*, Vol. 47, 1994, p. 1488, n. 5. (Defining federalism in the United States.)

2 *See* J. Bulman-Polzen, 'From Sovereignty and Process to Administration and Politics: The Afterlife of American Federalism', *Yale Law Journal*, Vol. 123, 2014, p. 1920-1957; H.N. Scheiber, 'Redesigning the Architecture of Federalism – An American Tradition: Modern Devolution Policies in Perspective', *Yale Law and Policy Review*, Vol. 14, 1996, p. 227-296.

3 137 S. Ct. 2012 (2017).

4 *Ibid.*, at 2027 (Sotomayor, J., dissenting).

5 *Ibid.*

European Journal of Law Reform 2018 (20) 2-3
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remains unknown – whether these state law provisions can be used to prohibit religious schools from receiving other forms of state aid, including the politically and economically significant form of school vouchers.

Section B will set the stage for the case by describing the history of the unsuccessful 'Blaine Amendment' to the U.S. Constitution, as well as the proliferation of State constitutional provisions known as 'Baby Blaine' Amendments. It will also briefly summarize a few of the key precedents important to the *Trinity Lutheran* case. Section C will describe the *Trinity Lutheran* case in greater detail, focusing upon how the federalism issue was addressed by the Court. Section C addresses the question of what the *Trinity Lutheran* case means for the future of the state Blaine Amendments, as well as for the future of federalism in the United States.

B Setting the Stage

I The Failed Blaine Amendment and Its State Law Counterparts

In the 1870s, James G. Blaine was a Republican U.S. Representative and eventually Senator from Maine, who wanted to be president.[6] He was the child of a Catholic mother, and a Protestant father who may have converted to Catholicism, but he lived in post-Civil War America at a time when anti-Catholic sentiment was high.[7] Public 'common schools' were gaining momentum and became an important battleground for the tensions between the country's Protestant majority and

6 *See* Ph. Hamburger, 'Prejudice and the Blaine Amendments', *First Things* (20 June 2017), available at: https://www.firstthings.com/web-exclusives/2017/06/prejudice-and-the-blaine-amendments (Explaining the political context surrounding Blaine Amendments.) "For decades, states had used taxes to support public and private schools controlled by Protestants, with the goal not merely of Americanizing but of Protestantizing Catholic children." *Ibid.* As the number of Catholic immigrants increased, "there were widespread fears that Catholics would balance this out by voting for politicians, mostly Democrats, who would direct tax funds to public or private schools dominated by Catholics." *Ibid.* Blaine's amendment would have prevented tax money from coming under the control of any 'religious sect'. *Ibid.* As Professor Hamburger explains, "Existing constitutional provisions against establishments of religion did not bar public spending on education from reaching schools with religious affiliations, and Blaine's amendment did not propose to alter this arrangement except by excluding Catholics. *Ibid.* The Catholic Church, being attached to its orthodoxies, had theological objections to cooperating theologically with Protestants, and it therefore could only operate schools that were distinctly Catholic or 'sectarian'. *Ibid.* In contrast, Protestants were willing to join with Protestants of other denominations in running schools. *Ibid.* Thus, when the Blaine Amendment stated that public money could not go to institutions belonging to any one 'sect', it effectively proposed to prevent money from reaching Catholic institutions – without cutting off funds for institutions shared by Protestant denominations." *Ibid.*

7 *See* S.K. Green, *The Bible, the School, and the Constitution: The Clash that Shaped Modern Church-State Doctrine*, Oxford, Oxford University Press, 2012, p. 94-95, 170 & 187-190 ("By the early 1870s, focus shifted to ... how to preserve the public school system while ensuring that Catholic schools did not obtain a share of the school funds."); P. Hamburger, *Separation Of Church And State*, Cambridge, Harvard University Press, 2002, p. 191-478 (Detailing virulent anti-Catholicism in church-state issues); *see also* S.K. Green, 'The Blaine Amendment Reconsidered', *American Journal of Legal History*, Vol. 36, 1992, p. 42-55. (Reviewing the 1870 political efforts to remove religious activities from schools.)

its Catholic minority. In most parts of the country, the public schools were de facto Protestant institutions,[8] and Catholic immigrants were setting up schools of their own where their children could receive a Catholic education.[9] It was also a time when U.S. politics in general, and Republican politics in particular, had a powerful anti-Catholic current.[10]

In 1875, President Ulysses S. Grant, in his annual message to Congress, proposed amending the Constitution to "establish and forever maintain free public schools" for all children, and forbidding the teaching of "religious, atheistic, or pagan tenets" in public schools, and banning spending public money "in aid, directly or indirectly, of any religious sect or denomination".[11]

In response, Congressman Blaine proposed in 1875 an Amendment to the U.S. Constitution to prohibit spending any public money on religious institutions including religious schools.[12] Because this would have been a federal constitutional amendment, it would have applied to the federal government as well as all the states. The federal Blaine Amendment eventually failed to pass in Congress, so it was never sent to the states for ratification.[13] Senator Blaine was unsuccessful in his bid to win the Republican nomination for president in 1876, but was twice named Secretary of State and was the Republican nominee for president in 1884, an election he narrowly lost to Grover Cleveland.[14]

Although the federal Constitutional provision failed, in the 1870s and the decades that followed a number of states adopted State constitutional provisions,

8 D.L. Drakeman, 'Book Review: K. Green, *The Bible, the School, and the Constitution: The Clash that Shaped Modern Church-State Doctrine*, Oxford University Press, 2012', *American Political Thought*, Vol. 1, 2012, p. 331-332.

9 *Ibid.*

10 R.G. Bacon, 'Rum, Romanism and Romer: Equal Protection and the Blaine Amendment in State Constitutions', *Delaware Law Review*, Vol. 6, 2003, p. 3-4. "The huge midcentury Catholic wave ... stirred Protestant fury" and Irish Catholics became something of "urban bogeymen" (quoting K. Phillips, *The Cousins' Wars*, New York, Basic Books, 1999, p. 483).

11 Ph.R. Moran, *Ulysses S. Grant 1822-1885*, New York, Oceana, 1968, p. 92 (Quoting Grant's comments from his Seventh Annual Message on December 7, 1875.); M.E. DeForrest, 'An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns', *Harvard Journal of Law and Public Policy*, Vol. 26, 2003, p. 565.

12 S.K. Green, 'The Blaine Amendment Reconsidered', *American Journal of Legal History*, Vol. 36, 1992, p. 50. The proposed Blaine Amendment read, "[n]o state shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefore, nor any public lands devoted thereto, shall ever be under the control of any religious sect, nor shall any money so raised or lands so devoted be divided between religious sects or denominations." *Ibid.*

13 Philip Hamburger explains, "Blaine's proposal passed in the House by 180 to 7. But, in the Senate, it was criticized as an 'election dodge,' and it fell two votes short of the two-thirds required to propose a constitutional amendment. Revealingly, Blaine, who by this time was a senator, did not even attend the vote. His goal all along, as *The Nation* commented, had been merely to 'catch anti-Catholic votes' for his campaign." P. Hamburger, 'Prejudice and the Blaine Amendments', *First Things* (20 June 2017), available at: https://www.firstthings.com/web-exclusives/2017/06/prejudice-and-the-blaine-amendments

14 Office of the Historian, *Biographies of the Secretaries of State: James Gillespie Blaine (1830-1893)*, available at: https://history.state.gov/departmenthistory/people/blaine-james-gillespie.

European Journal of Law Reform 2018 (20) 2-3
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which came to be known as 'Baby Blaine' Amendments.[15] These provisions varied somewhat in wording, but shared the goal of limiting state funding of churches and religious schools. For some states, adopting such provisions was a precondition for their being accepted into the Union as states.[16] Today, nearly forty states have such State constitutional provisions.[17]

The failed Blaine Amendment, along with its state law counterparts, have been widely criticized for being motivated by anti-Catholic bias and animus.[18] Some historians have argued persuasively that these clauses were based largely on anti-Catholic bigotry, but others have pointed out that there were multiple reasons for these laws, including a desire to promote a strong system of public education in the aftermath of the Civil War.[19]

There is some question whether the Missouri law in question is really a 'Baby Blaine' Amendment, since it was debated a few months before the federal constitutional provision was introduced.[20] But, as Mark Edward DeForrest has explained, Missouri's State constitutional provision arose from the same cultural and political milieu and is one of the most restrictive versions of these type of laws.

> Missouri teams an extensive prohibition on government aid to religious bodies and religious schools with another constitutional provision that mandates

15 *See* M.E. DeForrest, 'An Overview and Evaluation of State Blaine Amendment: Origins, Scope, and First Amendment Concerns', *Harvard Journal of Law and Public Policy*, Vol. 26, 2003, p. 573; E. Smith, 'Blaine Amendments and the Unconstitutionality of Excluding Religious Options from School Choice Programs', *Federalist Society Review*, Vol. 18, 2017, p. 53.

16 "6 states ... were compelled to include a Blaine Amendment as a condition of admission to the Union after 1889." U.S. Commission on Human Rights, *School Choice: The Blaine Amendments & Anti-Catholicism*, 2007, p. 48, available at: www.usccr.gov/pubs/BlaineReport.pdf (Providing a table in appendix one that lists the following states as those which were compelled to adopt a Blaine Amendment: New Mexico, North Dakota, South Dakota, Oklahoma, Washington, and Utah.)

17 Due to the variety of wording, exact counts of the number of State Blaine Amendments vary. Most counts are between 37 and 39. In her dissenting opinion, Justice Sotomayor states that in addition to Missouri, thirty-eight states have such provisions in their State constitutions. *Trinity Lutheran Church of Col., Inc. v. Comer*, 137 S. Ct. 2012, 2037 (2017) (Sotomayor, J., dissenting).

18 *See, e.g.*, D. Laycock, 'Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty', *Harvard Law Review*, Vol. 118, 2004, p. 185-187 ("Much of the American tradition of refusing to fund private schools is derived from nineteenth-century anti-Catholicism."); G. Bacon, 'Rum, Romanism and Romer: Equal Protection and the Blaine Amendment in State Constitutions', *Delaware Law Review*, Vol. 6, 2003, p. 40.

19 *See* Brief for Legal and Religious Historians as Amici Curiae Supporting Respondent, *Trinity Lutheran Church of Col., Inc. v. Comer*, No. 15-577 (U.S. 26 June, 2017). (Arguing that Missouri's Blaine Amendment did not "ar[ise] from pervasive anti-Catholic animus".)

20 Professor Ravitch notes, "It is true that Article I, Section 7 of the Missouri Constitution was passed in 1875 – the same year the failed federal Blaine Amendment was introduced. ... The key, however, is not the year it was passed, but rather the dates on which it was debated. The Missouri provision was discussed by the Missouri Constitutional Convention months before Senator Blaine proposed the federal amendment. This adds some fuel to the argument that it is not a baby-Blaine." F.S. Ravitch, 'A 147-Year-Old Dispute between Church and State Spills onto a School Playground', *Observer.com* (4 May 2017).

> that the state educational fund be used only for the establishment and maintenance of "free public schools".[21]

The Missouri Constitution contains several provisions that prohibit state funding of religion. Article I, Section 7 provides:

> 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

And Article I, Section 8 provides:

> 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.

In the run-up to the *Trinity Lutheran* case, some commentators speculated that the Court might use the case as an opportunity to strike down Missouri's Blaine Amendment, and by implication other similar state provisions, on the grounds that it was motivated by religious animus. This would have significant impact for contemporary controversies in the United States about state funding of religious schools through voucher programmes. The U.S. Supreme Court has interpreted the Establishment Clause of the First Amendment to limit direct government funding of religion, but state law provisions like Missouri's have been even more restrictive of state funding.[22] Thus, for example, while the U.S. Supreme Court has said that school voucher programmes that include religious schools do not violate the Establishment Clause, Blaine Amendments in state constitutions have been cited by a number of state Supreme courts as a basis for limiting religious schools access to such funding. As a result, the State laws have often been more

21 M.E. DeForrest, 'An Overview and Evaluation of State Blaine Amendment: Origins, Scope, and First Amendment Concerns', *Harvard Journal of Law and Public Policy*, Vol. 26, 2003, p. 587.

22 "The government may not directly fund religious exercise." *Trinity Lutheran*, 137 S. Ct. at 2028 (Sotomayor, J., dissenting) (*Citing Everson v. Board of Educ. of Ewing*, 330 U.S. 1 (1947).); *Mitchell v. Helms*, 530 U.S. 793 (2000)); *see also, e.g., Locke v. Davey*, 540 U.S. 712 (2004). (Holding that Washington did not violate the Free Exercise Clause by refusing to fund a devotional theology instruction, pursuant to Washington's statute that prohibits direct and indirect funding to religious entities; moreover, noting that a "differently worded Washington Constitution draws a more stringent line than that drawn by the United States Constitution ...".)

European Journal of Law Reform 2018 (20) 2-3
doi: 10.5553/EJLR/138723702018020002011

restrictive of government funding of religious schools than the Establishment Clause. And a holding by the Supreme Court that state Blaine Amendments violate the Free Exercise Clause would remove a significant obstacle to state funding of religious schools. Thus, to a significant extent, the *Trinity Lutheran* case could be viewed as a stalking horse for the school voucher controversy.

II Free Exercise and Non-Establishment

It is generally understood that there is some tension between the Free Exercise Clause and the Establishment Clause. The tension is most noticeable in controversies involving funding. Funding religion would seem to violate the Establishment Clause, but prohibiting some types of funding, especially when it is available to non-religious actors, might interfere with Free Exercise. Grappling with this potential paradox has been one of the central challenges of the Supreme Court's religion clause jurisprudence. An early case, *Everson v. Board of Education*, illustrates the tension.[23]

1 Everson v. Board of Education

In *Everson*, a New Jersey statute authorized local school districts to establish rules for transportation of children to and from school.[24] One township board of education, acting pursuant to the statute, authorized reimbursement payments to parents who spent personal funds transporting their kids on local bus systems.[25] A portion of these reimbursements went to parents who sent their children to religious schools that provided secular and religious education.[26] In response, a district taxpayer filed suit contending that the New Jersey statute violated both the state and federal constitutions because taxpayer dollars were being expended to aid children who were receiving a religious education.[27]

The key question before the Court was whether the New Jersey statute was a "law respecting the establishment of religion".[28] The Court's opinion can fairly be described as being of two minds. The first half of the opinion stresses the importance of separation of church and state and invokes Thomas Jefferson's metaphor of a 'wall of separation' between church and state, which would suggest that

23 *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1 (1947).
24 *Ibid.*, at p. 3.
25 *Ibid.*
26 *Ibid.*
27 *Ibid.*, at p. 3-4.
28 *Ibid.*, at p. 8.

funding is constitutionally impermissible.[29] The second half of the opinion emphasizes the concept of neutrality, and concludes that the State's programme did nothing more than "provide a general programme to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools".[30]

The *Everson* case set the stage for the next fifty years of Establishment Clause jurisprudence, which is characterized by a struggle between 'separationist' readings and 'accommodationist' readings. These two visions of the meaning of the anti-establishment principle came to a head in 2002 in a school voucher case, *Zelman v. Simon-Harris*.[31]

2 Zelman v. Simon-Harris

In *Zelman*, state taxpayers filed an action challenging the Ohio Pilot Scholarship programme – a voucher programme providing tuition aid to both public and private school students in the city of Cleveland, Ohio. Because roughly 96% of private school students receiving the aid attended religiously affiliated schools, Ohio taxpayers sought to enjoin the programme as a violation of the Establishment Clause.[32] The Supreme Court upheld the Ohio programme on the grounds that it provided 'true private choice', and was 'neutral in all respects toward religion'.[33] The Court concluded that the programme only incidentally, and not through a direct 'purpose or effect',[34] provided government aid to religious institutions by the deliberate intervening choice of individuals. Thus, the Court concluded the Ohio programme did not violate the Establishment Clause.[35]

The *Zelman* case left unresolved the question of "whether government *must* fund religious entities when it opens up a generally available funding program".[36] The question whether government *may* fund religious organizations through such

29 *Ibid.*, at p. 16. In a letter to the Danbury Baptist Association, Jefferson commented that "religion is a matter which lies solely between man & his god, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only1 and 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 and state". T. Jefferson, 'Draft Reply to the Danbury Baptist Association, [on or before 31 December 1801]', *Founders Online*, available at: https://founders.archives.gov/?q=Thomas%20Jefferson%201802%20Author%3A%22Jefferson%2C%20Thomas%22%20danbury&s=1411311111&sa=&r=3&sr=.

30 *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 18 (1947).

31 *Zelman v. Simon-Harris*, 536 U.S. 639 (2002).

32 *Ibid.*

33 *Ibid.*, at p. 639-640.

34 *Ibid.*, at p. 648-649.

35 *Ibid.*, at p. 662.

36 F. Ravitch, 'Symposium: Trinity Lutheran and Zelman – Saved by Footnote 3 or a Dream Come True for Voucher Advocates?', *SCOTUSBlog* (26 June 2017, 10:59 PM), available at: www.scotusblog.com/2017/06/symposium-trinity-lutheran-church-v-comer-zelman-v-simmons-harris-saved-footnote-3-dream-come-true-voucher-advocates/(emphasis added).

European Journal of Law Reform 2018 (20) 2-3
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programmes was clearly answered by the Court, but the resolution of whether it *must* was left untouched. This question arose in a 2004 case, *Locke v. Davey*.[37]

3 Locke v. Davey

In *Locke*, a student sought to use a generally available Washington State scholarship programme to pursue a double major in pastoral studies and business administration at Northwest College.[38] Washington has a State constitutional provision prohibiting funding religion,[39] and so Washington did not permit this scholarship to be used in the pursuit of a theology degree.[40] Locke brought an action arguing that the denial of his scholarship violated his First Amendment right to Free Exercise.[41]

The Court's framing of the issue is significant:

> [T]here is no doubt that the State *could*, consistent with the Federal Constitution, *permit* Promise Scholars to pursue a degree in devotional theology, and the State does not contend otherwise. The question before us, however, is whether Washington, pursuant to its own constitution, which has been authoritatively interpreted as prohibiting even indirectly funding religious instruction that will prepare students for the ministry, can deny them such funding without violating the Free Exercise Clause.[42]

The Court concluded that the State did not violate the Free Exercise Clause by excluding religious uses from the scholarship programme:

> Washington's exclusion of the pursuit of a devotional theology degree from its otherwise-inclusive scholarship aid program does not violate the Free Exercise Clause. This case involves the "play in the joints" between the Establishment and Free Exercise Clauses ... . The State's interest in not funding the pursuit of devotional degrees is substantial, and the exclusion of such funding places a relatively minor burden on Promise Scholars. If any room exists between the two Religion Clauses, it must be here.[43]

37 *Locke v. Davey*, 540 U.S. 712 (2004).

38 *Ibid.*, at p. 716-718.

39 The relevant portion of the Washington Constitution states that "[n]o public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment ...". Constitution of Washington, Art. I Section 11 (amended in 1993).

40 *Ibid.*, at p. 717.

41 *Ibid.*, at p. 712.

42 *Ibid.* (citation omitted) (emphasis added).

43 *Ibid.*

III Vouchers and School Choice

School choice is a slogan attached to any policy that enables parents "to choose the best [educational] opportunity for their children",[44] whether by attending a public or private school. Since the early 1990s when this movement began gaining traction, school choice and vouchers have gained significant ground.[45] Today there are an estimated twenty-six operating voucher programmes in fifteen states, most of which are small and targeted on failing school systems.[46] Statistics also show that the majority of private schools are religiously affiliated.[47] Thus, the question of whether voucher programmes can or must include religious schools is important to the viability of voucher programmes, and also raises important issues of the non-establishment and free exercise of religion.

There has been extensive litigation in the United States about whether voucher programmes that permit religious schools are permitted (under the Establishment Clause), or whether religious schools can be excluded (without violating the Free Exercise Clause). As noted above, the most significant case was the 2002 case, *Zelman v. Simon-Harris*,[48] where the Supreme Court answered the first question, whether vouchers used to fund education at religious institutions violate the Establishment Clause.[49] The Court concluded that the voucher programme did not violate the Establishment Clause, even though a large portion of the vouchers were used at religiously affiliated schools. Left unanswered, however, was the question of whether a state *must* include religious organizations in its voucher programmes.[50]

At the time, there was a general expectation that the *Zelman* case would open the floodgates to voucher programmes that included funding religious schools, but this expectation for better or worse has not been realized. One significant obstacle has been the existence of State constitutional 'Blaine Amendments', which provide further state-based limitations to school choice and voucher programmes. Thus, we arrive at one of the crucial federalism debates that many

44 *See* R.D. Komer & O. Grady, *School Choice and State Constitutions: A Guide to Designing School Choice Programs*, 2nd ed., Institute for Justice, 2016, p. 9, available at: http://ij.org/wp-content/uploads/2016/09/50-state-SC-report-2016-web.pdf.

45 *See* E. Smith, 'Blaine Amendments and the Unconstitutionality of Excluding Religious Options from School Choice Programs', *Federalist Society Review*, Vol. 18, 2017, p. 49.

46 *Resource Hub: Fast Facts*, EdChoice, available at: https://www.edchoice.org/resource-hub/fast-facts/#voucher-fast-facts. (Showing a dramatic increase in interest since programmes were initially sparked by the 1990 Milwaukee Parental Choice Program.)

47 *Facts and Studies*, Council of American Private Education, available at: http://www.capenet.org/facts.html (Providing facts that show that 25% of all US schools are private schools, and within these schools, 79% are religiously affiliated organizations.)

48 536 U.S. 639 (2002).

49 U.S. Const. Amend. I ("Congress shall make no law respecting an establishment of religion ... .").

50 *See* F. Ravitch, 'Symposium: Trinity Lutheran and Zelman – Saved by Footnote 3 or a Dream Come True for Voucher Advocates?', *SCOTUSBlog* (26 June 2017, 10:59 PM), available at: http://www.scotusblog.com/2017/06/symposium-trinity-lutheran-church-v-comer-zelman-v-simmons-harris-saved-footnote-3-dream-come-true-voucher-advocates ("Still, a question left open in *Zelman* was whether government *must* fund religious entities when it opens up a generally available funding program ... .")

European Journal of Law Reform 2018 (20) 2-3
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hoped to see resolved in *Trinity Lutheran*: whether the federal courts would strike down or uphold state Blaine Amendments.

C *Trinity Lutheran Church v. Missouri*

I Facts and Holding

The Trinity Lutheran Church Child Learning Center, originally set up as a non-profit organization and later merged with the Trinity Lutheran Church, is a pre-school that operates on church property and enrols approximately ninety children in its educational programme.[51] The Center admits students of any religion but its curriculum and mission are religious in character. The Center maintains a playground with an assortment of children's equipment, and the equipment is located over a surface of course pea gravel that can be 'unforgiving' when children fall.[52]

In 2012, the Center began looking into options for replacing the gravel.[53] The Center applied for a grant from 'Missouri's Scrap Tire Program',[54] which offered grants to non-profit groups to replace their playground surfaces with pour-in-place rubber surfaces made from recycled tyres. The Center's application was ranked fifth among the forty-four applicants, and the top fourteen programmes received grants.[55] But the Center was disqualified on the grounds that it was a religious organization.[56] This disqualification was based on Article I, Section 7 of the Missouri Constitution.[57] Following the rejection, the Center brought suit against the Director of the Department, alleging that the grant denial was in violation of the Free Exercise Clause because it was based entirely on the Center's status as a religion.

The Federal District Court of Missouri granted the Missouri Department's motion to dismiss because it found the facts to be 'nearly indistinguishable' from those encountered in *Locke v. Davey*.[58] The Eighth Circuit Court of Appeals affirmed the District Court's decision because it thought clear that Missouri *could* award the grant based on the Establishment Clause, but was not *compelled* to do so under the Free Exercise Clause.[59] The U.S. Supreme Court granted *certiorari*, agreeing to decide whether Missouri's policy violated the Free Exercise Clause.

51 *Trinity Lutheran Church of Col., Inc. v. Comer*, 137 S. Ct. 2012, 2017 (2017).
52 *Ibid.*
53 *Ibid.*
54 *Ibid.*
55 *Ibid.*, at p. 2018.
56 *Ibid.*
57 "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." Constitution of Missouri, Art. I, Section 7.
58 *Trinity Lutheran*, 137 S. Ct. at 2018.
59 *Ibid.*

The Supreme Court held in favour of the Center, because it found that the Department's denial of a generally available State grant 'solely on account of religious identity' violated the Free Exercise Clause.[60] Further, the Court found that this case was distinguishable from *Locke v. Davey* because the Missouri policy directly targeted religions based on who they are as opposed to what they are doing.[61] Based on this type of targeting, the Court found that such a policy required the 'most exacting scrutiny'.[62] The Court concluded that Missouri's exclusion of the Center from a public benefit "for which it is otherwise qualified, solely because it is a church, is odious to our Constitution all the same, and cannot stand".[63]

II Key Propositions of the Court's Majority Opinion

Chief Justice Roberts begins the majority opinion by reinforcing the importance of neutrality as set forth in cases including *Everson* and *McDaniel v. Paty*, which struck down a state law prohibiting religious clergy from holding public office.[64] Justice Roberts emphasized that the Center was not claiming an entitlement, but rather the right to participate as an applicant in a general programme and to not be singled out for disfavourable treatment solely on the basis of religious identity.

The majority opinion distinguishes the *Locke* case by emphasizing that Locke was disqualified based on what he planned to do with government funding, not a denial because of *who he was*.[65] In contrast, the Court concluded, Missouri's denial was based on the Center's identity as a church and was therefore a violation of the Free Exercise Clause.

The breadth of the Court's holding, however, is a matter of considerable doubt, due to limiting language included in 'footnote 3' of the opinion, where Chief Justice Roberts stated,

> This case involves express discrimination based on religious identity with respect to playground resurfacing. *We do not address religious uses of funding or other forms of discrimination*.[66]

60 *Ibid.*, at p. 2015.

61 *Ibid.*, at p. 2022-2024.

62 *Ibid.*, at p. 2021. (Comparing this case to the prior case of *McDaniel v. Paty*, 435 U.S. 618, (1978), where both situations put the religion to a choice: participate in a benefit or remain a religious institution.)

63 *Ibid.*, at p. 2025.

64 *Ibid.* (J. Gorsuch, concurring). (Explaining that "denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest 'of the highest order'".)

65 *Ibid.*, at p. 2023 (majority opinion) (emphasis added).

66 *Ibid.*, at p. 2024, n. 3 (emphasis added).

European Journal of Law Reform 2018 (20) 2-3
doi: 10.5553/EJLR/138723702018020002011

This part of the opinion is not binding, as two justices (Neil Gorsuch and Clarence Thomas) explicitly decline to join it.[67]

As law and religion scholar Frank Ravitch has noted, on its face, this footnote seems to "limit the ruling to programs that have no direct religious content".[68] This would have significant repercussions for school voucher programmes, since religiously affiliated schools include religious content in their curriculum.

On the other hand, perhaps footnote 3 does not project such a definitive answer to future questions, but rather simply narrowly defines the scope of the holding in this case. In support of this view, it is important to note the recurring importance of neutrality in the Court's reasoning. An underlying theme throughout the Chief Justice's opinion is the idea that States cannot discriminate against religious organizations solely because of who they are.[69] Although this point does not seem novel in and of itself, it might indicate that religious liberty is being treated as being to a large extent a non-discrimination norm.

Also noteworthy, the majority opinion remains steadfastly silent about the constitutionality of state Blaine Amendments. One might conclude that Missouri's Blaine Amendment was unconstitutional 'as applied' in this case, without concluding that the State's Blaine Amendment itself violates the Free Exercise Clause of the Federal Constitution.[70]

III The Concurring and Dissenting Opinions

Justices Clarence Thomas, Neil Gorsuch and Stephen Breyer penned three concurring opinions. Justice Thomas (together with Justice Gorsuch) joined the Court's opinion, but voiced his concern regarding the court's endorsement of

67 Justice Gorsuch explains, "[o]f course the footnote is entirely correct, but I worry that some might mistakenly read it to suggest that only 'playground resurfacing' cases, or only those with some association with children's safety or health, or perhaps some other social good we find sufficiently worthy, are governed by the legal rules recounted in and faithfully applied by the Court's opinion. Such a reading would be unreasonable for our cases are 'governed by general principles, rather than ad hoc improvisations.' And the general principles here do not permit discrimination against religious exercise – whether on the playground or anywhere else." *Ibid.* 2026 (J. Gorsuch, concurring) (citation omitted).

68 Ravitch, 2017.

69 By our count, there are at least 15 references to discrimination in the majority opinion, and another 13 in the other opinions. *See Trinity Lutheran*, 137 S. Ct. at 2012.

70 "[C]ourts define an *as-applied* challenge as one 'under which the plaintiff argues that a statute, even though generally constitutional, operates unconstitutionally as to him or her because of the plaintiff's particular circumstances.'" A. Kreit, 'Making Sense of Facial and As-Applied Challenges', *William and Mary Bill of Rights Journal*, Vol. 18, 2010, p. 657. In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), *e.g.*, the Supreme Court stated that "[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for government neutrality if it unduly burdens the free exercise of religion". M.W. McConnel, 'Free Exercise Revisionism and the Smith Decision', *The University of Chicago Law Review*, Vol. 57, 1990, p. 1109-1153. In *Yoder*, the Court held that a generally applicable compulsory school attendance law could not constitutionally be *applied* to Amish parents who kept their children out of school, even though there was no constitutional deficiency in the statute itself. *Yoder*, 406 U.S. at p. 218-219.

Locke. In his words, the holding in *Locke* was 'troubling',[71] but because the Court construed *Locke* narrowly he joined the judgement.

Justice Gorsuch (joined by Justice Thomas) took issue with footnote 3, and further expressed his apprehension with the Court's drawing a line between religious status and how funds are used.[72] The distinction between 'status' and 'use', he says, is blurry, "much the same way the line between acts and omissions can blur when stared at too long ...".[73]

The final concurring opinion, written by Justice Breyer, emphasized the narrowness of the Court's holding, noting that the Court needed only to consider the nature of the public benefit at issue in this case (a general programme to protect the health and safety of children, which he likened to cases involving ordinary police and fire protection), and that it could "leave the application of the Free Exercise Clause to other kinds of public benefits for another day".[74]

Justice Sonia Sotomayor's dissent (joined by Justice Ruth Bader Ginsburg) expresses alarm that the Court mandates state funding for a religious school. Justice Sotomayor asserts that the Court 'profoundly changes' the relationship of church and state "by holding, for the first time, that the Constitution requires the government to provide public funds directly to a church".[75] This move, she maintains, "weakens this country's longstanding commitment to a separation of church and state beneficial to both".[76]

Justice Sotomayor contends that discussions of 'discrimination' against religion must be nuanced. For example, sometimes the government is permitted to "relieve religious entities from the requirements of government programs", such as by providing property tax exemptions to houses of worship, or allowing religious non-profit entities to make "employment decisions on the basis of religion".[77] At other times, the government is permitted to "close off certain government aid programs to religious entities", for example by declining to fund "the training of a religious group's leaders".[78] Justice Sotomayor notes that, "in this area of law, a decision to treat entities differently based on distinctions that the Religion Clauses make relevant does not amount to discrimination".[79] Then Justice Sotomayor issues a stern warning, that if different treatment is discriminatory, then favourable treatment that accommodates religion could be viewed as discriminatory as well.

71 *Trinity Lutheran*, 137 S. Ct. 2025 (J. Thomas, concurring).
72 *Ibid.*, at p. 2025-2026 (J. Gorsuch, concurring).
73 *Ibid.*, at p. 2025.
74 *Ibid.*, at p. 2026-2027 (Breyer, J., concurring).
75 *Ibid.*, at p. 2027 (Sotomayor, J., dissenting).
76 *Ibid.*, at p. 2031-2032.
77 *Ibid.*, at p. 2032.
78 *Ibid.*
79 *Ibid.*, at p. 2039.

European Journal of Law Reform 2018 (20) 2-3
doi: 10.5553/EJLR/138723702018020002011

> If the denial of a benefit others may receive is discrimination that violates the Free Exercise Clause, then the accommodations of religious entities we have approved would violate the free exercise rights of nonreligious entities.[80]

Justice Sotomayor argues that the U.S. experience with state establishments, and the implementation of the non-establishment principle, is intimately tied up with the question of state funding of religion. "The use of public funds to support core religious institutions can safely be described as a hallmark of the States' early experiences with religious establishment." As all of the state's with religious establishments pursued the path of disestablishment,

> those who fought to end the public funding of religion based their opposition on a powerful set of arguments, all stemming from the basic premise that the practice harmed both civil government and religion.

Respecting Missouri's Blaine Amendment, Justice Sotomayor asserts, is a matter of respecting this history.

Significantly, Justice Sotomayor sidesteps entirely the anti-Catholic history of these State constitutional provisions, and does not even refer to them as 'Blaine Amendments'. Rather, she says,

> Today, thirty-eight States have a counterpart to Missouri's Article I, § 7. The provisions, as a general matter, date back to or before these States' original Constitutions. That so many States have for so long drawn a line that prohibits public funding for houses of worship, based on principles rooted in this Nation's understanding of how best to foster religious liberty, supports the conclusion that public funding of houses of worship 'is of a different ilk'.[81]

Justice Sotomayor's invocation of the history of these provisions as a rationale for respecting them may result in unintended consequences. If their history is considered closely, the anti-Catholic animus and bigotry that motivated these state laws may open the door for striking them down on Free Exercise, anti-Establishment, or Equal Protection grounds.

D What Does Trinity Lutheran Mean for the Future?

We are yet to see what the implications of the *Trinity Lutheran* case will be for federalism in general, or for the more specific question of the constitutionality of state 'baby' Blaine Amendments.

We do not know whether the case stood for a broad proposition (that it is unconstitutional for states to discriminate against religion when offering state funding), or a narrow proposition (that a state must not discriminate on the basis

80 *Ibid.* (citing *Corp. of Pres. Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987), which permitted religious non-profits to utilize religion as a criterion in hiring.

81 *Ibid.*, at p. 2037-2038 (citation omitted).

of religious status in general programmes that have no religious content such as 'playground resurfacing').[82] Because the Court also sidestepped the question of whether state Blaine Amendments violate the Free Exercise Clause, the future of the financial dimension of church–state relations remains uncertain. So, the elephant in the room remains: whether these State constitutional provisions are a legitimate basis for denying religious organizations the right to participate in state educational voucher programmes? Also unanswered is the question of whether the Free Exercise Clause requires states to include religious institutions in voucher programmes.

Justice Sotomayor's dissent certainly foresees a broad application of the non-discrimination principle, noting that in *Trinity Lutheran* the Court held for the first time "that the Constitution requires the government to provide public funds directly to a church".[83] Thus, the dissenters seem warranted in their worry that this case may significantly alter the relationship between civil government and religious institutions.

But the case might stand for a much narrower proposition, as reflected in footnote 3. At face value, footnote 3 might limit the non-discrimination principle to state programmes that have no direct religious content. Under such an interpretation, *Trinity Lutheran* might not create a wedge to force state and local governments to include religious organizations in school voucher or many other funding programmes. As Professor Frank Ravitch notes,

> how much footnote 3 limits the broader holding in *Trinity Lutheran* is unclear, especially given some of the strong language used in the majority opinion suggesting that excluding religious entities from 'public benefit' programs based on the fact that they are religious entities is inherently discriminatory.[84]

Less noticed, but also of potential significance is another footnote in the majority opinion – footnote 4, which seems to be an oblique reference to the status of the Missouri Constitutional provision. In footnote 4, the Court states, "we have held that 'a law targeting religious beliefs as such is never permissible.'"[85] The Court then says, somewhat cryptically, "We do not need to decide whether the condition Missouri imposes in this case falls within the scope of that rule, because it cannot survive strict scrutiny in any event."[86] Reading between the lines, this may be a suggestion by Chief Justice Roberts that the state Blaine Amendments are themselves unconstitutional if they are laws 'targeting religious beliefs as such', which seems like a real possibility.

Another clue about the scope of the Court's holding can be found in the immediate aftermath of the case. A few days after deciding *Trinity Lutheran*, the

82 *Ibid.*, at p. 2024 n. 3 (majority opinion).
83 *Ibid.*, at p. 2027 (Sotomayor, J., dissenting).
84 Ravitch, 2017
85 *Trinity Lutheran*, 137 S. Ct. 2024 n. 4 (majority opinion).
86 *Ibid.*

European Journal of Law Reform 2018 (20) 2-3
doi: 10.5553/EJLR/138723702018020002011

Supreme Court sent two cases about state aid to religious schools back to lower courts to be reconsidered in light of their decision. One of these cases involved a state textbook-lending programme for private schools, including religious schools, in New Mexico.[87] There the Supreme Court of New Mexico held that the State's Blaine Amendment prohibited the aid. According to the private schools appealing the decision,

> Here, the New Mexico Supreme Court explicitly acknowledged that [the state constitution's provision barring aid to religious schools] is a Blaine Amendment that was forced upon the state by a federal Congress driven by nativist religious animosity against Catholics.[88]

The other case (or group of cases) is from Colorado and involves vouchers for a tuition scholarship programme for students to attend private schools, including religious schools.[89] The Colorado Supreme Court held in 2015 that Colorado's Blaine Amendment prohibited vouchers being used at religious schools.

In responding to the Court's order for these cases to be reconsidered in light of *Trinity Lutheran*, Michael Bindas, an attorney with the Institute for Justice, which represents the private schools in the Colorado case, expressed the view that this was good news for voucher advocates.

> Today's order sends a strong signal that just as the U.S. Supreme Court would not tolerate the use of a Blaine Amendment to exclude a religious preschool from a playground resurfacing program, it will not tolerate the use of Blaine Amendments to exclude religious options from school choice programs.[90]

President Trump's Secretary of Education, Betsy DeVos, a strong supporter of school choice, was similarly optimistic about the implications of the *Trinity Lutheran* decision, saying it

> sends a clear message that religious discrimination in any form cannot be tolerated in a society that values the First Amendment. We should all celebrate the fact that programs designed to help students will no longer be discriminated against by the government based solely on religious affiliation.[91]

87 *Moses v. Skandera*, 367 P.3d 838 (2015), vacated and remanded by *N. M. Ass'n of Nonpublic Sch. v. Moses*, No. 15-1409 (U.S. 27 June 2017). In *Moses*, the New Mexico Supreme Court held that the long-standing state programme for lending textbooks to students attending public and private schools violated the State's Blaine Amendment. *Moses*, 367 P.3d at p. 849.

88 Petition for Writ of Certiorari at 17, *N. M. Ass'n of Nonpublic Sch. v. Moses*, No. 15-1409 (U.S. June 27, 2017).

89 The Colorado cases include *Doyle v. Taxpayers for Pub. Educ.* (No. 15-556), *Douglas Cty. Sch. Dist. v. Taxpayers for Pub. Educ.* (No. 15-557), and *Colo. Bd. of Educ. v Taxpayers for Pub. Educ.* (No. 15-558).

90 Quoted in M. Walsh, 'Justices Ask Lower Courts to Reconsider Rulings Blocking Religious School Aid', *Education Week's blog* (27 June 2017 1:35 PM).

91 *Ibid.* (quoting U.S. secretary of Education Betsy DeVos).

From the opposite end of the political spectrum, Rev. Barry W. Lynn, executive director of Americans United for Separation of Church and State, expressed the view that, "[t]his ruling threatens to open the door to more taxpayer support for religion, which is at odds with our history, traditions and common sense".[92]

E Conclusion

In conclusion, *Trinity Lutheran* appears to have generated more questions than answers. With so many uncertainties (including the status of state Blaine Amendments under the Free Exercise Clause), it is apparent that the federalism issues the Court faced, and will continue to face, have no easy resolution. After *Trinity Lutheran*, we remain at an important constitutional crossroads, uncertain whether state Blaine Amendments that prohibit state funding of religion will stand, or whether the non-discrimination principle will be applied liberally in a way that forecloses such disadvantaging of religion.

92 *Ibid.* (quoting Rev. Barry W. Lynn, Executive Director, Americans United for Separation of Church and State).

European Journal of Law Reform 2018 (20) 2-3
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