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2017

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American Society for Public Administration (ASPA)

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Philip J. Candrea, "Playground or Church? Implications for Public Administration from Trinity Lutheran v. Comer" *Public Administration Review*, (2017), 9 p.  
<https://hdl.handle.net/10945/57653>

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## Playground or Church? Implications for Public Administration from *Trinity Lutheran v. Comer*

**Abstract:** *The roots of public administration are in the fields of management, political science, and the law. The law is underrepresented in the literature and is not as well understood by nonlawyer practitioners, yet it increasingly enables, constrains, and prescribes government action. In 2017, the U.S. Supreme Court ruled on a case involving whether a government grant awarded on secular criteria must be provided to a qualified church. This article contributes to the field's understanding of the interplay of law and administration by examining the constitutional issues in the case and their implications for public administration. By considering how this dispute was framed and the ways in which the court approached its resolution, public officials can better understand the issues in similar cases; anticipate potential disputes; and (re)design policies that will serve their communities, remain within constitutional limits, and reduce the likelihood of litigation.*

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### Evidence for Practice

- Public administration is based in management, political science, and the law, so effective public administrators need to stay abreast of developments in the law when designing policies and programs.
- A given set of facts can be interpreted through different legal lenses, each with unique implications for public administration.
- While direct service areas of government such as education, housing, and human resources have become sensitive to constitutional considerations, other areas of public service are becoming increasingly affected.
- The contours of the constitutional requirement of government neutrality toward religion continue to be tested and evolve.

Rosenbloom, O’Leary, and Chanin (2010a) remind us that legal developments have significant implications for public administration. “Government can no longer distribute benefits with little or no regard for equal protection. It cannot attach whatever conditions it desires to the receipt of public benefits” (2010b, 144). Rosenbloom and Naff, commenting on public administration education, emphasize that “[t]here is no doubt that law is relevant to public administrative practice. Law establishes, empowers, structures, and constrains agencies and programs” (2010, 217). And Wright suggests that public administration practitioners look to U.S. Supreme Court decisions to guide behavior, and he notes the need for scholars to “identify and interpret important cases for public administration practitioners and scholars who have limited formal legal training” (2011, 99). He suggests that law journals fill that need, but public administrators are less likely to read law journals than *PAR*. This article is one step in that direction.

*Columbia, Inc. v. Comer* (137 S. Ct. 2012), a dispute over whether a state grant, generally available to the public, must be provided to a church that meets the program’s secular eligibility criteria. It had been 15 years since the Supreme Court dealt with a case involving public monies going to a church. The issues in this case were significant enough that 19 states filed amici curiae briefs with the court.<sup>1</sup>

This article begins with a short recitation of the facts of the case and then explains the legal landscape in which the case sat. The arguments of the two parties are described, followed by a discussion of the several opinions delivered by the justices of the Supreme Court. The goal of providing this background, and not simply explaining the outcome, is to provide public administration scholars and practitioners some insight into how such controversies arise and are resolved. The article concludes with implications for public administration.

In June 2017, the U.S. Supreme Court rendered its decision in the case of *Trinity Lutheran Church of*

The Missouri Department of Natural Resources (DNR) runs a waste management program that

*Public Administration Review*,  
Vol. 00, Iss. 00, pp. 00. Published 2017.  
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DOI: 10.1111/puar.12898.

recycles vehicle tires and converts them into a cushiony material for playground surfaces. The DNR offers grants that provide funds to reimburse nonprofit playground operators that install this material. The funds are sourced from fees paid by buyers of new tires. The goal of the program is to reduce solid waste in landfills; it has the secondary aim of protecting playground children by assisting the owner nonprofit organizations. In 2012, Trinity Lutheran Church of Columbia, Missouri, applied for a grant. The church maintains a playground in support of its preschool and child care center. Trinity considers the preschool part of its ministry, and it features religious programming. The playground is also open to the public in the evenings and weekends when the center is not operating. Forty-four grant applications were submitted; Trinity's ranked fifth against the DNR's criteria, and the top 14 were funded.

However, the DNR noticed that Trinity is a church. Article I, section 7 of the Missouri Constitution says, "No money shall ever be taken from the public treasury, directly or indirectly, in aid of any church." It was undisputed in the case that the sole reason the DNR refused to fund Trinity's playground grant was that the playground is owned by a church, and such a grant would violate the "no aid" provisions in the state constitution. Trinity sued in federal district court with a First and Fourteenth Amendment claim. The district court dismissed the suit, Trinity appealed, and the U.S. Court of Appeals for the Eighth Circuit affirmed (sub nom. *Trinity Lutheran v. Pauley* 2015). The U.S. Supreme Court agreed to hear the case in January 2016, less than a month before Justice Antonin Scalia died. Perhaps fearing a 4–4 tie, the court deferred oral arguments until April 2017, after the investiture of Justice Neil Gorsuch.

## The Legal Landscape

Before looking at the dispute between Trinity and the DNR, it is important to consider the legal landscape in which this case rested with respect to the relationship between church and state. Because that relationship is extremely complex, the reader must be mindful that the landscape being painted here is limited to only what is necessary to comprehend the principal issues in this case. Those who wish to dive more deeply into this area are referred to Hamburger (2002) and Ledewitz (2011). Of greatest concern here are cases involving the use of public funds for purposes that intersect with religion and cases involving government actions that specifically target religion.

The First Amendment to the U.S. Constitution restricts Congress from "respecting an establishment of religion" and from "prohibiting the free exercise thereof." These are referred to as the establishment and free exercise clauses, respectively, or the religion clauses, collectively. These restrictions are incorporated into the Fourteenth Amendment in the due process clause and therefore apply to state and local government actions. Of course, the devil in the details is what constitutes respecting an establishment or prohibiting free exercise. This case rests on a few key precedents.

The appellate court held that *Luetkemeyer v. Kaufmann* (364 F. Supp. 376 [W.D. Mo. 1973]) was the controlling precedent over *Trinity*. The Luetkemeyers had enrolled their elementary-school-age children in a Catholic school in Missouri. The state of Missouri at the time bused only public school children to school but not children attending parochial or secular private schools.

Relying on *Everson v. Board of Education of the Township of Ewing* (67 S. Ct. 504 [1947]), a case in which a community's choice to bus children to parochial schools was upheld, the Luetkemeyers sued under the theory that busing is a public service to students, not churches, and that denying them a bus ride was a violation of the free exercise clause. The *Luetkemeyer* court ruled in favor of the school district, holding that although the state may choose to bus privately schooled children, including parochial school children, it was not compelled to do so. Given that "Missouri has a long history of maintaining a very high wall between church and state" (*Luetkemeyer*, 364 F. Supp. at 383), the decision to limit its resources to busing only public school students was rational and not discriminatory against religion.

In *Locke v. Davey* (124 S. Ct. 1307 [2004]), the State of Washington established a scholarship program for gifted students. Students could receive these scholarships if they met both academic and needs-based merit requirements and attended any accredited Washington school (including religiously affiliated schools), provided they did not major in devotional theology. The concern was that devotional theology prepared clergy for religious duties and would violate the establishment clause. Other academic majors, including subjects such as comparative religion, were permissible as being primarily academic and not professional. Davey, who majored in devotional theology, sued and lost in a 7–2 U.S. Supreme Court decision. The court held that "there are some state actions permitted by the establishment Clause but not required by the free exercise Clause" and that this case sat in that "play in the joints" (*Locke*, 124 S. Ct. at 719).

In another funding case, the University of Wisconsin–Madison collected activity fees from students and distributed them to organized student groups, a program that it explained created "a public forum that advances its academic mission using viewpoint-neutral criteria" for allocating the funds (*Badger Catholic, Inc. v. Walsh*, 620 F.3d 775 [7th Cir. 2010]). Student groups submitted budgets to the university to have their expenses funded. One religiously affiliated group, Badger Catholic, was not reimbursed for expenses the university deemed worship, proselytizing, or religious instruction out of establishment clause concerns. Because the university claimed it was creating a public forum for student speech, the Supreme Court found it unconstitutional to refuse to fund a particular form of speech. Funding all of Badger Catholic's expenses would not offend the establishment clause, but refusing to fund the group did offend the free exercise clause.

*Locke* and *Badger Catholic* might appear to come to opposite conclusions: in one case, a state university was permitted to not fund something devotional, but the second university was compelled to fund a similar activity. The distinction drawn by the court was that the State of Washington was exercising plenary control over what it was funding and, to the extent that funding something is viewed as speech, the state may choose the message it wishes to convey (see, e.g., *Buckley v. Valeo*, 96 S. Ct. 612 [1976]; *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 [2015]). Conversely, the University of Wisconsin funded free speech—speech chosen by the students, not the university—but then denied a specific group of students a particular form of protected speech (*Badger Catholic*, 620 F.3d at 780).

But *Locke* has not been consistently interpreted, which is what made *Trinity* especially ripe for the Supreme Court. The First and Eighth Circuit courts have interpreted *Locke* to permit states to exclude religious groups from secular benefits. Meanwhile, the Seventh and Tenth Circuits have held that states must cite historical and substantial interests to constitutionally exclude religious groups from otherwise neutral benefits. As described here, the Supreme Court's opinions in *Trinity* do not provide the degree of clarity hoped for.

In *Mitchell v. Helms* (120 S. Ct. 2530 [2000]), a federal program distributed funds to state and local government agencies, which, in turn, lent educational materials to public and private schools. By statute, the things acquired were secular—library services and computers, for example—but 30 percent of the schools that received this benefit were private, most of which were religiously affiliated. The program was challenged on establishment clause grounds. By a 6–3 decision, the Supreme Court held that the program was constitutionally permissible after applying the Lemon test, derived from case precedent. The test asks whether the statute (a) has a secular purpose, (b) has a primary effect of advancing or inhibiting religion, and (c) creates an excessive entanglement between government and religion. The computers and other items were deemed secular, they did not advance or inhibit religion (even though the possibility existed to divert some of those materials to religious use, such diversion would not be caused by government action), and there was no continuing monitoring or oversight by government. The cases concerning public monies and religion are summarized in table 1.

Moving from funding cases to cases targeting religion, in *McDaniel v. Paty* (98 S. Ct. 1322 [1978]), Paul McDaniel, a Baptist minister, filed as a candidate for the Tennessee state constitutional convention. Selma Paty sought an injunction declaring McDaniel ineligible because a state statute prohibited ministers from serving as legislators. The U.S. Supreme Court unanimously held for McDaniel because the statute made the ability to exercise civil rights conditional on surrendering religious rights and therefore violated the free exercise clause. “As construed, the exclusion manifests patent hostility toward, not neutrality respecting, religion; forces or influences a minister or priest to abandon his ministry as the price of public office; and, in sum, has a primary effect which inhibits religion. . . . Government generally may not use religion as a basis of classification for the imposition of duties, penalties, privileges, or benefits” (*McDaniel*, 98 S. Ct. at 636–38).

Finally, a pair of cases establish an important principle regarding the justification necessary by the state for laws that impact religious acts: *Employment Div. v. Smith* (110 S. Ct. 1595 [1990]) and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* (113 S. Ct. 2217 [1993]). In the first case, a public employee was fired for ingesting peyote (an illegal hallucinogenic drug) as part of a Native American religious ceremony. In the second, the city adopted ordinances banning ritualistic animal sacrifice after it was announced that a Santeria church was to be established in the town. In the Supreme Court's opinion on the *Smith* case, it provided that “the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a

**Table 1** Summary of Cases Concerning the Use of Public Funds and Religion

	<i>Lutkemeyer v. Kaufmann</i>	<i>Locke v. Davey</i>	<i>Badger Catholic v. Walsh</i>	<i>Mitchell v. Helms</i>
What did government provide?	Busing for public school children	College scholarships	A public forum for speech, through student fees	Federal funds to state and local governments that provided secular educational materials and services
Did a government retain plenary control over the allocation of funds, goods or services?	Yes	No—the student could decide what to study	Yes—the university reimbursed student groups after they submitted budgets	Yes—state and local governments chose what to buy
Was the benefit generally available or restricted in its availability?	Restricted to children attending public schools	Available to any student who met academic and needs criteria and attended any accredited school, except students who studied devotional theology	None of the funding could be used for religious worship or proselytizing or religious instruction	Generally available to all public and private schools, including religious schools
Question before the court	Does the denial of transportation for private school children when the state provides public transportation for public school children violate the equal protection or free exercise clauses?	Does the First Amendment's free exercise clause require a state to fund religious instruction if the state provides college scholarships for secular instruction?	Does the refusal to fund a student organization's activities that are regarded as religious worship or proselytizing from an account created to be a limited public forum violate the free exercise clause?	Does chapter 2 of the Education Consolidation and Improvement Act of 1981 (program authorizing legislation) violate the establishment clause?
Court decision	No (2–1)	No (7–2)	Yes (unanimous)	No (6–3 plurality)
Brief rationale for the decision	The state is free to decide how to allocate its resources so long as it does not discriminate unconstitutionally. Choosing to bus only public school students was a rational limitation of public services that was not offensive to the constitution.	The state drew a line to avoid paying for the devotional preparation of clergy but still permitted the academic study of religion. The court held that was a reasonable balance between the establishment and free exercise clauses.	By establishing a forum for free speech, the public university could not then restrict the type of speech funded from the account. This was deemed viewpoint discrimination and a violation of the free exercise clause.	Applied the Lemon test to determine whether there is an establishment clause violation: whether the statute (a) has a secular purpose, (b) has a primary effect of advancing or inhibiting religion, and (c) creates an excessive entanglement between government and religion.

**Table 2** Summary of Cases Concerning Government Actions Targeting Religion

	<i>McDaniel v. Paty</i>	<i>Employment Division v. Smith</i>	<i>Church of Lukumi Babalu Aye v. City of Hialeah</i>
What did government do?	State statute regarding eligibility to be a legislator excluded members of the clergy.	Smith was denied unemployment benefits because he was fired for ingesting peyote; he had done so as part of his Native American religious practice.	City passed ordinances “forbidding the unnecessary killing of an animal in a ritual or ceremony not for the purpose of food consumption” in an emergency session shortly after being informed a Santeria church was being established in town.
Question before the court	Does the statute barring “Minister[s] of the Gospel or priest[s] of any denomination whatever” from serving as legislators violate the free exercise clause?	Does the free exercise clause of the First Amendment permit the State of Oregon to include religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug?	Does an ordinance that appears neutral violate the free exercise clause if its legislative history shows it was motivated by religious animus and directly targets a religious practice?
Court decision	Yes (unanimous)	Yes (6–3)	Yes (unanimous)
Brief rationale for the decision	The statute made the ability to exercise civil rights conditional on surrendering religious rights and therefore violated the free exercise clause.	The free exercise clause permits the state to prohibit sacramental peyote use and thus to deny unemployment benefits to persons discharged for such use. Neutral laws of general applicability do not violate the free exercise clause of the First Amendment.	The local ordinances violate the free exercise clause because they were specifically designed to persecute or oppress a religion’s practices.

particular religious practice. . . . Neutrality and general applicability are interrelated, and . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied. A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest” (*Smith*, 110 S. Ct. at 531). Because ingesting peyote is banned under a religiously neutral law regulating drug use, the employee’s free exercise of religion was not unduly burdened. But the laws that banned a specific ritual in response to the establishment of a particular church were deemed not neutral and thus hostile to the free exercise of religion. These three cases are summarized in table 2.

To summarize, there are a few characteristics of these cases that the courts found to be important in reaching a decision. These include what the government provided or proscribed, whether government retained plenary control over the allocation of what was provided, and any restrictions concerning who is considered an eligible beneficiary. From *Lutkemeyer*, *Badger Catholic*, and *Mitchell*, one can reach a general conclusion that when government retains plenary control of the allocation of secular goods or services, a distribution to a religious organization on terms equal to similar nonreligious organizations does not offend the establishment clause, and excluding religious organizations on terms equal to similar organizations does not necessarily offend the free exercise clause. From *McDaniel*, *Smith*, and *Hialeah*, a state action that specifically disadvantages the civic rights of an individual or organization based solely on religious status offends the constitution, but a generally applicable law that incidentally disadvantages religion is permissible.

The conclusions from *Locke* are less clear. One could conclude that the state can limit beneficiaries when what is provided is money, rather than goods or services, and the money will be used for patently religious activity. *Locke* may also stand for the idea that a state may refuse to provide direct monetary aid to religious activities (or individuals pursuing religious devotion) without offending the constitution if properly justified.

## The Controversy and Court Opinions

### The Parties’ Arguments

In its petition, Trinity Church summarized the legal question as “[w]hether the exclusion of churches from an otherwise neutral and secular aid program violates the Free Exercise and Equal Protection clauses when the state has no valid Establishment clause concern.” Or, as the American Center for Law and Justice phrased it in an amicus brief, “In the distribution of entirely secular benefits (like playground safety resurfacing), may the government discriminate against otherwise eligible private entities solely on the basis they are owned by a church?”

Trinity argued that the DNR’s action in this case was not neutral but rather hostile to religion—and therefore violated the free exercise clause—because the church was denied a neutral benefit for no reason other than its status as a church. As in *McDaniel*, the church was put in a disadvantaged position that required it to surrender its religion in order to access a civic program. The DNR’s program sent a message that the safety of all children, except the pious, are worthy of state assistance. Trinity clearly believed the interpretation of *Locke* by the Seventh and Tenth Circuits was the correct one.

Trinity further argued that by adopting the interpretation of the lower court, this case presaged the denial of other routine government benefits to religious groups. If a church is constitutionally ineligible to participate in the scrap tire program, then nothing can stop the state from denying any other neutral government service, including police and fire protection, access to municipal water and sewage, the services of building code inspectors, or the use of high-occupancy vehicle lanes by church buses. If the state can require the religious to be equally burdened by laws that are generally applicable (such as the ban on using peyote), a neutral position demands that the state allow the religious to equally compete for generally applicable benefits.

Finally, Trinity argued that because the free exercise of religion is a fundamental right, the DNR’s decision based solely on Trinity’s religious status violated the equal protection clause, and the state’s

actions needed to have passed strict scrutiny. That is, there needed to be a compelling government interest that was met using narrowly tailored means that were the least restrictive to constitutional liberties. Trinity asserted that a wholesale ban on religious applicants is not least restrictive and that the DNR had not advanced a compelling government interest.

On the other side of the dispute, in its reply briefs, the DNR cited the “no aid” clause of its constitution and reframed the legal issue as “whether states are required by the U.S. Constitution to violate their own constitutions and choose a church to receive a grant when that means turning down nonchurch applicants.” The DNR argued that it was not necessary to compel it to fund the church to avoid a free exercise clause violation. Its brief argued that there was no free exercise concern at all because the constitutional text bans actions that “prohibit” the free exercise of religion, and no action by the DNR interfered with the church’s ability to exercise its religion. It clearly agreed with the First Circuit’s interpretation of *Locke*: “the Free Exercise Clause’s protection of religious beliefs and practices from direct government encroachment does not translate into an affirmative requirement that public entities fund religious activity simply because they choose to fund the secular equivalents of such activity” (*Eulitt v. Maine Department of Education*, 386 F.3d 344 [1st Cir. 2004], 354).

The DNR argued that by enshrining the “no aid” provision in its constitution, the state of Missouri had a long history of erecting a taller wall of separation between church and state than is required under the U.S. Constitution. A taller wall is not necessarily an unconstitutional wall (*Luetkemeyer*, 364 F. Supp. at 383), and by funding no churches in any way, directly or indirectly, it is better positioned to uphold the establishment and equal protection clauses. The DNR argued, from the *Locke* decision, that a choice not to subsidize has a minimal impact on religion, compared with state actions that actively impede religion (Hollman 2016). Refusing to fund the playground surface did not impede churchgoers’ ability to freely exercise their religion.

The DNR further argued that what a state chooses to fund is a form of government speech. Just as a contribution by an individual to a political candidate is a form of speech, government support for one entity over another is a form of speech. When government speaks, the First Amendment is not at issue, since the First Amendment only restricts what government can do to individuals. Consider the funding of arts, for example. Government administrators have discretion over what art is funded and what is not; no one can compel government to fund one person’s art over someone else’s. This is so because there is not an unlimited art budget, some discretion is necessary, and some art is acquired by the state to convey a particular message. Similarly, the tire scrap program is not unlimited; many secular playgrounds were denied funding. Here, the DNR is “saying” that it chose to fund only secular playgrounds, just as Missouri chose to bus only public school children in *Luetkemeyer*. The DNR further distinguished the scrap tire program from the *Badger Catholic* case because the DNR retained plenary control of the playground funds and was the speaker, whereas in Wisconsin, the funds went into a general fund (defined as a public forum) and the various student groups were the speakers and therefore had First Amendment protections.

The DNR furthered this line of reasoning by noting that the tire scrap program is not a generally available government benefit but rather a competitive grant. Grants are not available to everyone who applies. The award of a grant requires a degree of discretion by the DNR administrators, and banning churches removes the risk that a grant could be perceived as favoring certain sects over others.

Because the DNR’s position was that there is neither a First nor a Fourteenth Amendment concern, its policies did not need to meet the standard of strict scrutiny, and it merely needed a rational basis for its actions (Howe 2017). It noted that the *Locke* court found no violation of the free exercise clause and, as such, applied a rational basis to Washington’s actions. The DNR stated that establishment clause concerns, and upholding the state constitution, were sufficient rational reasons to exclude the church from the tire scrap program.

### **The Interests of Other States**

Nineteen state attorneys general filed amici curiae briefs with the court. Nevada and 17 others filed together; Colorado filed alone because it had a related case pending in the courts that would be impacted by the *Trinity* decision. All 19 states urged the court to find for the church. Their legal arguments were similar to Trinity’s and have already been addressed, so the focus here is on the impact on the states. The states asserted that the unequal treatment of the *Locke* decision by state and federal courts meant that state and municipal governments found themselves as legal parties on both sides of the issue. The Nevada brief asked the Supreme Court to rule that a state’s “anti-establishment interests must be justified by some reasoning that connects the unequal treatment of the religious to the purpose of the program.” Here, it claimed, the program was motivated by environmental and public safety concerns and had no relationship to religion. The states were concerned that if *Locke* stood for the permission to exclude the religious without justification, states seeking to apply a “no aid” amendment would be sued for differentiating, but if they chose to include the religious, they would be “sued for *failing* to differentiate.”

This concern became evident in an unusual twist to this case. Only six days before oral arguments before the Supreme Court, newly elected Missouri governor Eric Greitens announced that the DNR would no longer exclude religious entities from participation in the scrap tire program. The court asked both sides to provide their views regarding whether the case was moot. Both sides urged the court to hear the case, citing arguments that echoed the amici states’ concerns: Missouri would be vulnerable to lawsuit enjoining it from enacting the new policy (the Missouri attorney general even recused himself because of this conflict), and the state could always change its mind, reigniting a challenge like the present one. Both sides urged the court to hear the case and render a ruling to provide certainty to these disputes (Keller 2017).

### **The Court’s Opinions**

In any case before the Supreme Court, to reach a decision, each justice will independently interpret the facts in light of the law and relevant case precedent. Which facts are germane and which precedents should control are debatable. Were the court entirely rational, the ultimate outcome would be a product of each justice applying his or her individual judicial philosophy to how the facts

should be interpreted through the lens of the law, followed by the ability to persuade his or her colleagues. But we know the justices approach the law with ideological biases (Martin and Quinn 2007; Martin, Quinn, and Epstein 2005). The conservatives on the court tend to take an accommodationist approach to religious cases, treating the establishment clause permissively and the free exercise clause restrictively. One would expect them to find Trinity's arguments compelling. The liberals on the court usually take a more separationist approach, preferring to keep government further away from church affairs, and one would expect them to favor the DNR's arguments (Tagliarina 2017).

Ultimately, the court ruled 7–2 in favor of Trinity. Fears of a potential split were evidently unfounded, but the seven justices in the majority were not unified. In fact, the opinion of the court was delivered by Chief Justice John Roberts, joined only by Anthony Kennedy, Samuel Alito, and Elena Kagan. Clarence Thomas filed a concurring opinion joined by Gorsuch, and Gorsuch filed a separate concurrence joined by Thomas. Stephen Breyer filed an opinion concurring in the judgment only. Only Sonia Sotomayor dissented, joined by Ruth Bader Ginsburg. Since only four justices joined the court's opinion, which is less than a majority, the court rendered what is called a plurality decision. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds'" (*Marks v. United States*, 97 S. Ct. 990 [1977], 995). The various opinions are summarized in turn, and the narrowest grounds are discussed.

The plurality decision held that this case was in the tradition of *Church of Lukumi Babalu Aye, Inc. v. Hialeah* in noting that religious observers are protected against unequal treatment, and of *McDaniel v. Paty* in that a generally available benefit denied solely on account of religious identity imposes a penalty on the free exercise of religion. It further noted that such a penalty must withstand strict scrutiny. The court was careful to note that the discrimination against Trinity was not the denial of a grant but the denial to compete for a grant on equal footing with secular organizations. The opinion emphasized that the case was not controlled by *Locke v. Davey*, observing that "Davey was not denied a scholarship because of who he *was*; he was denied a scholarship because of what he proposed *to do*" (*Trinity*, 137 S. Ct. at 2016). Davey had sought funding to become a minister; Trinity sought funding to resurface a playground. The entire opinion was grounded in First Amendment (free exercise) concerns, and a footnote expressly stated that the court did not need to consider the church's equal protection argument. (Typically, cases involving religion are decided through the application of the religion clauses rather than through other fundamental rights such as equal protection or free speech.) Footnote 3 of the opinion, which was a concern for others on the bench, stated that the court's holding was limited to discrimination based on religious identity with respect to playground resurfacing and did not address other forms of discrimination.

In a concurring opinion, Thomas (joined by Gorsuch) took the opportunity to revisit his dissent in the *Locke* case, emphasizing that discrimination based on religious grounds must be subject to heightened scrutiny, not just a rational basis test.

In another concurring opinion, Gorsuch (joined by Thomas) expressed concern with the stability of the court's distinction between discrimination on the basis of religious status and religious use, analogizing whether there is a legal distinction between a religious man who says grace before dinner and a man who begins dinner in religious manner. He would limit *Locke* to mean that the state cannot fund the training of the clergy, making it irrelevant to the facts in *Trinity*. His concurrence also said that he was unable to join in footnote 3 for fear that some might read the case to apply only to future cases related to playgrounds or children's safety programs rather than standing for a general principle.

Breyer concurred in the judgment but not all of the court's reasoning. He appeared to support footnote 3—although he conspicuously did not mention it—by emphasizing the nature of the public benefit at issue and noted that "public benefits come in many shapes and sizes [and he] would leave the application of the Free Exercise Clause to other kinds of public benefits for another day" (*Trinity*, 137 S. Ct. at 2027).

The court's opinion and three concurrences were a brief 22 pages long. The lone dissent was 27 pages long. Writing passionately, Sotomayor recounted the history of religious clause jurisprudence and made the case that churches must be treated differently by virtue of the competing religion clauses. She charged the court with ignoring precedent, critical facts, and not allowing for establishment clause considerations, stating that antiestablishment concerns are at their peak when public monies are distributed to religious entities. Citing *Locke* and other cases, she noted that when a religious entity is singled out, the reasons are critical. Because Trinity Church used the playground as an instrument of its children's ministry, she argued that the grant would essentially provide public funds to improve church facilities in support of religious exercise, something courts have prohibited since *Everson* (1947). She further argued that since there are two constitutional clauses bounding government's relationship with religion, balancing those concerns is more appropriate than applying a strict scrutiny standard.

In short, the court's majority clearly saw Missouri funding a playground; the dissent saw the state funding a church.

At its narrowest, six of the justices agreed that when a generally available public benefit, awarded on secular criteria, is denied to an otherwise eligible group solely because of its religious identity, that violates the free exercise clause, unless the reason for such a denial meets a strict level of scrutiny. The footnote limiting the applicability of the decision was only explicitly supported by four justices, but a future court may be tempted to interpret Breyer's opinion as offering sufficient support to reach five.

What is new here? If one believes that *Lutkemeyer*, *Badger Catholic*, and *Mitchell* are controlling precedent, some claim that the court has suddenly moved from a separationist position to an accommodationist one (Lupu and Tuttle, forthcoming). That may read too much into the decision, though. The general rule laid out earlier from that line of cases said there is not a free exercise concern if religious entities are excluded on terms equal to similar organizations. In *Trinity*, the terms were not equal; only churches were excluded, simply because they were churches. On the other

hand, those who believe that *McDaniel* and *Hialeah* control see the court's ruling as consistent with precedent, requiring the state to maintain a neutral stance with respect to its dealings with religious entities' participation in secular programs (Hawley 2017; Yarger 2017). The decision did not strike Missouri's "no aid" constitutional amendment; that was never a question before the court. In respect for Missouri's constitution, the decision should be interpreted to mean that Missouri would not be aiding a church; rather, the state would be aiding children's safety and the environment.

## Discussion

This case presented an issue that appears to be unique in the public administration literature on state-church relations. The extant literature has most often dealt with partnerships with faith-based organizations to implement policy and deliver services, a topic that was at the forefront with the charitable choice feature of the Clinton-era welfare reform and the Bush (43) faith-based initiatives (e.g., Bielefeld and Cleveland 2013; Brinkerhoff and Brinkerhoff 2011; Gibelman 2007; Kennedy and Bielefeld 2002; Smith and Sosin 2001; Twombly 2002). Bielefeld and Cleveland (2013) provide a particularly good summary of church-state concerns with respect to partnerships with faith-based organizations.

The literature has also examined the voice of churches and religious groups in setting policy (e.g., Amsler 2016; Carter 2000; Koliba, Meek and Zia 2010; White and Jeter 2002). This literature tends to look at the issue from a political science or public service ethos perspective, but there is comparatively little attention placed on the legal parameters that affect administrators. Amsler (2016) is a noteworthy exception. There is also a body of literature on spirituality in the workplace and employee performance (e.g., Bruce 2000; Garcia-Zamor 2003; King 2007), but that literature focuses on the religiosity or spirituality of government employees rather than government support of religious organizations. Where that literature covers legal issues, it is typically in the domain of balancing individual rights against the state's need for an efficient and orderly workplace (Richards 1998; White and Jeter 2002).

Thus, there is little in the literature regarding a church as the direct beneficiary of government services or grants. In their text *Public Administration and Law*, Rosenbloom, O'Leary, and Chanin's chapter on clients and customers of public agencies discusses equal protection in the areas of race, ethnicity, gender, and nonsuspect classifications, but they are nearly silent on the topic of religion (2010b, 128–33). *Trinity* presents an opportunity to examine this area of the law and its implications for public administration.

What does the *Trinity* decision mean for public administration?<sup>2</sup> First, let us review the parameters of the court's holding: when a generally available public benefit, awarded on secular criteria, is denied to an otherwise eligible group solely because of its religious identity, that violates the free exercise clause, unless the reason for such a denial meets a strict level of scrutiny. The decision means that religious status cannot normally be the only reason to deny a generally available benefit, but it can be if the government has a compelling reason and designs the religious exemption narrowly. Simply having a "no aid" provision in the state's constitution does not suffice.

Thus, the decision should be of comfort to those governments that use public monies to pursue secular goals through, or with, religiously affiliated entities. Examples include the use of faith-based hospitals to treat the underinsured, the use of faith-based organizations to provide social services (e.g., marriage and drug counseling), the Department of Homeland Security's security grant program that has been used to protect synagogues and mosques from terrorist threats, federal grants for asbestos removal in schools, and the Interior Department's "Save our Treasures" program that funded restoration work at Boston's Old North Church and Newport's Touro Synagogue.

Next, there are 37 states in addition to Missouri that have "no aid" provisions in their constitution. There is a good deal of variation in the scope of them (DeForrest 2003). For those that are most restrictive, such as Missouri's, this case is most applicable. Other states may already have constitutional or statutory language that address programmatic limits on state aid to religious entities. Going forward, when designing or modifying grant programs, states with such laws may need to be more inclusive regarding who is eligible for programs that have secular purposes. Overly broad interpretations of what it means to provide "aid to a church" will likely be challenged. A wholesale exclusion like Missouri's now needs to be justified on grounds firmer than simply avoiding an establishment clause concern. The court outlined a specific circumstance in which a strict scrutiny standard should apply, but most religious clause cases are not so clear and will require a balancing approach of the type advocated by the dissent and used in *Locke* and *Mitchell*.

Practitioners should review programs that have secular competitive criteria because the discrimination noted in *Trinity* was the church's inability to compete on equal footing. As Nevada suggested in its amicus brief, disparate treatment of religious entities should be related to the purpose of the government program. The scrap tire program has a secular purpose—an environmental program with the incidental benefit of child safety. The program's primary effect does not advance nor inhibit religion, so religion should not have been a disqualifying criterion.

It was widely reported in the media after the decision was handed down that *Trinity* might open the door for more government support of religious schools. Public school advocates' concern regarding vouchers is that since *Trinity* permits the state to write a check directly to a church for a general public benefit, a state might write a check directly to a parochial school under the guise that education is also a general public benefit. That is unlikely, however, because under current constitutional law (*Zellman v. Simmons-Harris*, et al., 122 S. Ct. 2460 [2002]), such an action would be considered unconstitutional, and *Trinity* does not change that.

Unfortunately, this case did not provide clarity regarding the interpretation of *Locke* and the conflicting interpretations of the lower courts. The court's opinion expressly states that *Locke* did not control the outcome, and the distinction between religious status and religious use was held by only a minority of the justices. Clarifying the boundaries of *Locke* nationwide will need to wait for another case. Locally, practitioners should continue to follow the precedent of rulings in their jurisdiction.

Finally, might states still see themselves on both sides of church-state disputes? Of course they will. As with any policy area, there are multiple valid perspectives and strongly held preferences. There will always be accommodationists and separationists. Because church-state relations is an area of constitutional law that requires interpreting competing language, those multiple perspectives will clash. Did Missouri fund a playground or a church? Seven-ninths of the court said a playground. At other times in history, the proportion might have been different.

## Conclusion

The facts of *Trinity Lutheran Church v. Comer* were quite simple. The questions it raised were not. When the DNR crafted the rules for the tire scrap program, it most likely thought it was providing an innovative and worthwhile public benefit while honoring a historic Missouri constitutional principle of refusing to provide aid to churches. It probably did not expect to be before the Supreme Court arguing one position while the governor attempted to shift policy in the opposite direction. Society looks to constitutions to provide stability, but a change in administration, a change in the membership of a court, or the evolution of societal norms can lead to differing interpretations with concomitant policy change. Government administrators need to adapt to these changes and gain the wisdom to foresee them. Courts, when faced with new facts, need to consistently interpret constitutions in a manner that promotes stability and predictability for both citizen and state. But citizen and state must also submit to the reality that a given set of facts can be validly interpreted in multiple ways.

“[T]here is no doubt the courts have added considerable complexity to public administration. Today the field must go well beyond its traditional managerial base. It must incorporate constitutional law and values into its decision making and operations“ (Rosenbloom, O’Leary, and Chanin 2010b, 146). Policy areas such as public education, public housing, and human resources learned this lesson over the past few decades; now that requirement is extending to departments of natural resources and other areas in which there has not been as much direct client service.

By showing various ways a dispute is framed and the ways in which a court approaches resolution of the dispute, public administrators can better understand the issues in similar cases and hopefully craft policies that are less prone to litigation. Practitioners designing programs that have the potential of aiding religious groups, or discriminating against them, face a set of considerations. The field of public administration should stay abreast of cases such as *Trinity*, anticipate potential disputes, and (re)design policies that will serve their communities, remain within constitutional limits, and reduce the likelihood of litigation.

## Notes

1. *Amicus curiae* (plural *amici*) is Latin for “friend of the court” and is someone who is not a party to the dispute but assists the court by providing relevant information or analysis.
2. Disclaimer: The information contained in this article is for informational and educational purposes only. Nothing in this article is intended, nor should it be construed, as legal advice.

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