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From the beginning of the American republic, federal and state constitutions have recognized the distinctive character of houses of worship.[2] To be sure, this distinctiveness does not put houses of worship outside the reach of the law. If one of their agents injures someone in the course of her duties, the religious employer is responsible in tort law, just like any other entity.[3] But when their distinctively religious activities are in question -- for example, choosing a theological spokesperson,[4] or organizing religious instruction of children within their community – constitutional limits of various kinds kick in.

These limits ordinarily take two distinct and complementary forms. First, the government is constitutionally disabled from dictating who leads worship, or

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[2] *See* Trinity Lutheran Church of Columbia, Inc. v Comer, slip opinion, available here, https://www.supremecourt.gov/opinions/16pdf/15-577_khlp.pdf, Sotomayor, J., dissenting, at 12-16 (discussing prohibitions on public funding of houses of worship).

[3] Ira C. Lupu and Robert W. Tuttle, Sexual Misconduct and Ecclesiastical Immunity, 2004 B.Y.U. L. Rev. 1789, 1797-1800.

[4] Hosanna-Tabor Lutheran Church & School v. EEOC, 565 U.S. 171 (2012).

regulating its content. The state may not establish criteria for ministry,[5] nor may it dictate or outlaw particular prayers or liturgical forms. Second, the government is constitutionally forbidden from subsidizing or financing worship, proselytizing, or other "specifically religious" activities. It may not spend to pay the salaries of privately employed clergy,[6] or the costs of construction of worship space.[7] These propositions have long been deeply settled in American jurisprudence. The opening words of the First Amendment to the U.S. Constitution,[8] and the constitutions of the overwhelming majority of the states,[9] reflect these norms.

With respect to matters of funding and support, proponents of expansive theories of religious privilege have attempted over the past thirty-five years to undermine the paradigm of distinctiveness. A standard move in that effort is the portrayal of that distinctiveness as a form of discrimination. In our discrimination-

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[5] Id.; See generally Ira C. Lupu and Robert W. Tuttle, The Mystery of Unanimity in Hosanna-Tabor Lutheran Church & School v. EEOC, 20 Lewis & Clark L. Rev. 1265 (2017).

[6] The government may pay the salaries of the chaplains it employs. We explore the questions raised by the chaplaincy in Ira C. Lupu & Robert W. Tuttle, Secular Government, Religious People (Wm. B. Eerdmans Pub. Co. 2014), at 251-262, and in more detail in Ira C. Lupu & Robert W. Tuttle, Instruments of Accommodation: The Military Chaplaincy and the Constitution, 110 W. Va. L. Rev. 89 (2007).

[7] See Committee for Public Education v. Nyquist, 413 U.S. 756 (1973); Tilton v. Richardson, 403 U.S. 672 (1971). For deeper discussion of the historical limitations on public funding for construction of houses of worship, see Ira C. Lupu & Robert W. Tuttle, Historic Preservation Grants to Houses of Worship: A Case Study in the Survival of Separationism, 43 Boston College Law Review 1139 (2002). Those who challenge the distinctive constitutional role of religious institutions in the context of rights, see, e.g., Micah Schwartzman & Richard Schragger, Against Institutionalism, 99 Va. L. Rev. 2013, may be inadvertently undermining that distinctive role in the context of limits on public funding of religious experience.

[8] "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . ." U.S. Const., Am. I.

[9] See Justice Sotomayor's dissent in *TLC*, at 19, notes 10-11 (slip. op.)

sensitive culture, this is an understandable and sometimes potent theme, especially in cases involving claims of equal access of religious speakers to public fora.[10]

Before this past Supreme Court Term, however, the paradigm of non-discrimination had not come close to overtaking the longstanding paradigm of separation with respect to issues of financial support for houses of worship. These approaches are diametrically opposed. In a "no funding" legal universe, government financial support for the religious activities of churches is forbidden. Under non-discrimination norms, government financial support for churches is required, not simply permitted, whenever the state supports comparable secular activity.

Viewed against that backdrop, the Supreme Court's decision in *Trinity Lutheran Church v. Comer*[11] (hereafter "*TLC*") represents a stunning and thoroughly unacknowledged move from "no funding" to nondiscrimination. *TLC* involved Missouri's program for grants to subsidize the cost of resurfacing playgrounds with materials from scrap rubber tires. The Church applied for a grant, and the Missouri Department of Public Resources denied the Church's application solely on the basis of a provision in the State Constitution that prohibits public funding of houses of

[10] Rosenberger v. Rector & Visitors of the Univ. of Virginia, 515 U.S. 819 (1995); Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384 (1993); Widmar v. Vincent, 454 U.S. 263 (1981).
[11] https://www.supremecourt.gov/opinions/16pdf/15-577_khlp.pdf (slip op.)

worship.[12] The provision, one of many similar provisions found across state constitutions, deserves quotation in full:[13]

> "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."

In response, the Church sued the responsible state officials. The Church asserted that the denial, which rested on a constitutional provision requiring distinctive treatment for houses of worship, violated the Free Exercise Clause and Equal Protection Clause of the federal constitution. Missouri "conceded" that the grant would not violate the Establishment Clause of the First Amendment, though there are good reasons to doubt the accuracy of that concession. Nevertheless, the state contended that it had lawful discretion to exclude churches from the program without unconstitutionally discriminating against them. The lower rejected the Church's arguments, sustained the state's authority under its constitution to exclude churches from the program, and ordered dismissal of the suit.[14]

As we explain below, the question presented in *TLC* – does the Free Exercise Clause require a state to treat houses of worship identically with other non-profit entities seeking a discretionary grant aimed at enhancing safety – undeniably

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[12] The Church's application ranked 5th of 44 received that year, and the Department made 14 grants. Slip op. at 3. The Church thus would have received a grant but for the state constitutional limitation. We do wonder why the Department bothered to rank the Church's application, unless it knew this lawsuit was coming and it was helping pave the way.

[13] Missouri Const., Art. I, sec. 7.

[14] Trinity Lutheran Church of Columbia, Inc. v. Pauley, 976 F. Supp. 2d 1137, 1151 (WD Mo. 2013), *aff'd* 788 F.3d 779, 784 (2015).

required significant engagement with the constitutional tradition, state and federal, of restriction on government funding of churches. The grant would pay to improve the surface of a playground used at a Church pre-school, and the mission of the pre-school included religious training. That training could occur outdoors as well as indoors.

It was therefore profoundly puzzling when seven Justices[15] supported a ruling in the Church's favor by emphasizing the concern about discrimination, while ignoring the constitutional norms of distinctive treatment for houses of worship. Only the dissenting opinion by Justice Sotomayor, joined by Justice Ginsburg, engaged with the relevant seventy years of Supreme Court precedent and 200 years of constitutional history that constitute that backdrop. The dissenters concluded that, unless the funding agency restricted playground use to secular activity, the grant would have raised serious Establishment Clause questions, and that Missouri was therefore well within its constitutional discretion to deny the grant pursuant to its general no-funding policy.

Despite this forceful and detailed dissent, Chief Justice Roberts' opinion for the Court focused exclusively on discrimination based on "religious identity." The Court's opinion asserted that Missouri's interest in church-state separation – described superficially and dismissively as a "policy preference" -- cannot justify

[15] Six Justices (Roberts, Alito, Kagan, Kennedy, Thomas and Gorsuch) joined the opinion, except for a crucial footnote which Justices Thomas and Gorsuch did not join. The opinion of the Court is thus Roberts' opinion, minus that footnote which reads, "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." Later in this article, we will explore the significance of this note. Justice Breyer concurred separately.

such discrimination. If a state creates a public benefit for secular purposes (here, playground safety and disposal of spare tires), the state may not categorically exclude houses of worship. That the benefit was not universally or even widely available made no difference.[16]

The paradigm of non-discrimination is front and center, and forms the opinion's emotional pivot. Near the end, the opinion uses the line "no churches need apply"[17] to describe the workings of the Missouri scheme. This was factually accurate, but its form is clearly designed to evoke the invidious discrimination associated with exclusion of members of particular races, nationalities, or religions from employment opportunity. The Chief Justice appeals to precisely the same concern about prejudice in the very last section of the opinion, in which he invokes Maryland's long-ago exclusion of Jews from public office.[18] The opinion thus deliberately obscures the constitutional difference between discrimination against individuals because of their religious identity, and generically distinctive treatment of all houses of worship.[19]

True to its tenacious inclinations to avoid the paradigm of distinctive treatment of religious institutions, the Court opinion relies primarily on decisions that involve neither religious institutions, nor discretionary benefits made available

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[16] The relatively scarcity of the benefit makes it quite different from matters of "common right," like police and fire protection, available to all in the community. See Everson v. Bd. of Educ. 330 U.S. 1, 60-61(1947) (Rutledge, J., dissenting).
[17] *TLC*, slip op. at 13-14.
[18] *Id*. at 15.
[19] Six Justices (Roberts, Kagan, Kennedy, Alito, Thomas, Gorsuch) joined the opinion, except for footnote 3 (*id*. at 14), which Justices Gorsuch and Thomas refused to join. We discuss the crucial significance of footnote 3 later in the paper.

to them by the state. *McDaniel v. Paty*[20] held that Tennessee's prohibition on ordained ministers serving in the state legislature violated the Free Exercise Clause. *McDaniel* involved individuals, not religious institutions, and implicated a separate constitutional right to run for and hold state office. *Church of Lukumi Babalu Aye v. Hialeah*[21] involved coercive regulation of a particular faith group's sacramental practice. The case had absolutely nothing to do with denial of discretionary financial support, and everything to do with animus toward a particular, unpopular faith. The other Religion Clause decisions on which the TLC opinion relies all include dicta about sectarian discrimination, not generic exclusion of churches or church schools from public support..[22] Indeed, without a hint of irony, Chief Justice Roberts cites *Everson v. Board of Education of Ewing*,[23] in which all nine Justices emphatically embraced the proposition that a state may not directly assist church schools. The only other non-discrimination decisions mentioned in TLC involve free speech claims of equal access to government created fora;[24] the Free Exercise Clause played no part in any of them. Like *McDaniel v. Paty*, these decisions involved denial of separate constitutional rights to religious persons or groups, not the denial of discretionary funds to religious entities.

Consider the elaborate and longstanding body of constitutional law that these seven Justices wholly ignored. Starting with *Everson* in 1947, and continuing

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[20] 435 U.S. 618 (1978).
[21] 508 U.S. 520 (1993).
[22] Emp. Div. v. Smith, 494 U.S. 872 (1990); Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988); Everson v. Bd. of Educ., 330 U.S. 1 (1947).
[23] 330 U.S. 1 (1947).
[24] Rosenberger v. Rector & Visitors of the Univ. of Virginia, 515 U.S. 819 (1995); Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384 (1993); Widmar v. Vincent, 454 U.S. 263 (1981).

unabated through the Court's most recent encounters with challenges to funding schemes on Establishment Clause grounds,[25] virtually every Justice has subscribed to the idea that the state may not directly finance the religious mission of churches or church schools. Most of the decisions in this fifty-plus year span have involved religiously affiliated schools. None have involved direct grants to houses of worship, because the constitutional barrier to such transfers has been so deeply understood and widely respected, as a matter of both modern Establishment Clause law and the historical tradition of church-state relations in the United States.

From the early 1970's until the late 1990's, the Court adopted a prophylactic rule that barred direct aid from government to "pervasively sectarian" institutions.[26] The Court reasoned that aid to such institutions would inevitably advance religion, and any effort to prevent that advancement would excessively entangle the state and the church.[27] The decisions that generated this rule all involved schools, usually elementary and secondary.

Given that the Court deemed such schools "pervasively sectarian," even though they taught secular subjects, the constitutional status of houses of worship was obvious. Thus, with respect to programs of direct aid, it was constitutionally unquestioned that "no churches need apply," because the Constitution barred the government from responding affirmatively. This was anything but invidious

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[25] Mitchell v. Helms, 530 U.S. 793 (2000); Zelman v. Simmons-Harris, 536 U.S. 639 (2002).
[26] Lemon v. Kurtzman, 403 US. 602, 638 (1971) (Douglas, J., concurring); Tilton v. Richardson, 403 U.S. 672, 685-686 (1971); Hunt v. McNair, 413 U.S. 734, 743 (1973).
[27] Lemon, 403 U.S. at 613-14.

discrimination. As well understood and oft repeated,[28] this barrier to direct aid kept the state from assuming responsibility for religious worship and indoctrination, and kept religious communities free from the state's control.

As recently as 1988, all nine Justices confirmed these longstanding constitutional norms. In *Bowen v. Kendrick*, [29] the Court divided 5-4 on the permissibility of federal grants – some to religiously affiliated providers -- for the purpose of teaching sexual abstinence. The Court's majority upheld the grant scheme on its face, but insisted that on remand the lower courts be sure that the grants not go to "pervasively sectarian" entities or be used to pay for "specifically religious activities" such as religious teaching on the reasons for sexual abstinence outside of marriage.[30]

To be sure, the relevant law of the Establishment Clause has changed in the thirty years since *Bowen v. Kendrick*. Justice O'Connor led the movement away from the prophylactic rule about sectarian entities. Instead, she argued for an approach that focused on whether the aid had a secular purpose and character, and whether the program had adequate safeguards against religious use of the aid.[31] Thus, in *Mitchell v. Helms*,[32] the Court in 2000 upheld a program of aid to schools, public and private (including religiously affiliated schools), of materials useful for instruction, including computers. A plurality of four Justices would have sustained the program based on its secular educational purpose, coupled with its evenhanded treatment of

[28] See, e.g., Justice Sotomayor's *TLC* dissent, slip op. at 11-27.
[29] 487 U.S. 589 (1988).
[30] Id. at 621.
[31] Agostini v. Felton, 521 U.S. 203 (1997), overruling Aguilar v. Felton, 473 U.S. 402 (1985).
[32] 530 U.S. 793 (2000).

secular and religious schools.[33] Justices O'Connor and Breyer joined in a narrower, and legally controlling, concurrence, in which they emphasized that the program included adequate safeguards against diversion of the aid to religious use, and that the transfer involved the transfer of goods in kind, not cash.[34]

Mitchell, which Justice Sotomayor's dissent in *TLC* appropriately emphasized,[35] is the Court's last word on direct financing of religious entities. In *Zelman v. Simmons-Harris*,[36] decided two years after *Mitchell*, a 5-4 majority upheld Ohio's use of publicly financed school vouchers, redeemable at both secular and religious private schools in Cleveland. In *Zelman*, the Court emphasized that state funding flowed to religious schools only through the independent decisions of families, and that students had a meaningful choice between religious schools and others, including the public schools.

Since *Zelman*, the Supreme Court has decided no cases on the merits of Establishment Clause challenges to government funding programs.[37] Its only decisions in the area have involved questions of taxpayer standing to challenge such programs, direct[38] or indirect,[39] and both of those decisions narrowed the standing of taxpayers. As a result of those narrowing moves, cases involving Establishment

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[33] Id. at 801-835 (Thomas, J., joined by Scalia & Kennedy, JJ, and Rehnquist, C.J.)
[34] Id. at (O'Connor, J. , joined by Breyer, J., concurring).
[35] TLC, Sotomayor, J., dissenting, slip op. at 6-7.
[36] 536 U.S. 639 (2002).
[37] Of the current nine Members of the Court, five (Roberts, Alito, Kagan, Sotomayor, and Gorsuch) had never participated in a Supreme Court case involving state funding of religious entities. But the relevant law in these cases is no secret, and Justice Sotomayor had no difficulty in identifying the relevant constitutional law and history. The other four of the five newcomers just ignored all of that.
[38] Hein v. Freedom from Religion Foundation, 551 U.S. 587 (2007).
[39] Arizona Christian School Tuition Org. v. Winn, 563 U.S. 125 (2011).

Clause challenges to government funding programs have been dramatically reduced in frequency. Nevertheless, nothing in *Zelman* or *Mitchell* suggested that the constitutional bar on direct aid to the religious mission of religiously affiliated schools had been eliminated or weakened. Thus, legal developments over the last fifteen years have not altered the rules governing disputes that implicate the no-funding paradigm.

Indeed, a grant to Trinity Lutheran Church to improve a playground used by its pre-school would raise quite serious Establishment Clause issues under those governing norms. Missouri failed to raise those issues, but there is no reason that such a questionable litigation decision should bind the Supreme Court in evaluating the constitutionality of the grant denial.[40] The TLC pre-school has an explicit religious mission, as a ministry fully integrated within the Church. The school "teaches a Christian world view to children of [both members and non-members of the church enrolled in the school]."[41] There is every reason to believe that this Christian teaching would occur on the newly resurfaced playground.

As Justice Sotomayor noted, "the Scrap Tire Program requires an applicant to certify . . . that its mission and activities are secular and that it will put program funds only to secular use."[42] We have no idea whether the Department of Natural Resources will adopt safeguards to ensure that a religious pre-school may not use the playground for specifically religious activities. If such safeguards are put in

[40] TLC, Sotomayor, J., dissenting, slip op. at 3.
[41] Id. at 2.
[42] Id. at 5, note 3.

place, the state might have a hard time avoiding constitutionally fraught entanglements with church officials.

Even if the Missouri grant program could be structured in ways that avoid Establishment Clause concerns – a question on which there is serious reason for doubt – there remains the question of "play in the joints" between the Religion Clauses. At all levels of government, including the federal government, there may be reasons to accommodate religious institutions more than the Free Exercise Clause requires. Similarly, government may have reasons to decline support for religious institutions, even if the Establishment Clause would permit such aid. This is especially important at the state level, because many jurisdictions have strong and longstanding constitutional norms against funding of houses of worship. In cases where states have excluded religious entities from programs of discretionary funding, courts in the not-distant past have regularly declined to intervene in the name of the Free Exercise. Clause.[43]

In light of this consistent constitutional practice, the *TLC* Court's treatment of *Locke v. Davey*[44] seems remarkably dismissive, and perhaps even hostile. In *Locke*,

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[43] After the Supreme Court ruled, in Witters v. Wash. Dept. of Services for the Blind, 474 U.S. 481 (1986), that the Establishment Clause did not forbid Washington State to use its voucher program to pay tuition at a Bible College, the Washington Supreme Court held that the state constitution nevertheless prohibited the payment. Witters v. State Comm'n for the Blind, 771 P.2d 1119, 1122 (1989) (*en banc*). For similar decisions in the context of county tuition payments to private schools, see Strout v. Albanese, 178 F. 3d 57 (1st Cir. 1999), *cert. denied*, 120 S. Ct. 320 (1999); Bagley v. Raymond Sch. Dist., 728 A.2d 127 (Me. 1999), *cert. denied*, 120 S. Ct. 364 (1999); Chittenden Town Sch. Dist. v. Vermont Dept. of Educ., 738 A.2d 539 (Vt. 1999), *cert. denied*, 120 S. Ct. 626 (1999). If states may exclude religious schools from such programs, the case for exclusion of houses of worship is overwhelming.

[44] 540 U.S. 712 (2004). For comprehensive and quite distinct analyses of *Locke* and questions of state discretion to exclude religion from public benefit programs, see

the Court (7-2) upheld the policy of Washington State that its constitution precluded Promise Scholarship recipients from using the grant to pursue a degree in devotional theology. As *Locke* noted, the Establishment Clause was not a barrier to Washington State's allowing the scholarships to be put to that use, because the scholarships involved the private choice of scholarship recipients.[45] Nonetheless, the Court respected the state's decision to adopt a more restrictive policy on government aid for religious experience.[46]

Missouri thus argued in *TLC* that the discretion recognized in *Locke* supported its choice to refuse to fund playground improvements at church schools. The Court's response to this argument in *TLC* is striking in several respects. We note that the first several paragraphs in the analytic section of Justice Roberts' opinion are, to a startling degree, an elaborate paraphrase of the first several paragraphs of Justice Scalia's *dissent* in Locke.[47] Proceeding from such a restrictive attitude toward state discretion in this context, the *TLC* opinion emphasizes that Joshua Davey was denied funding because of what he "proposed to do" (prepare for ministry), while Trinity Lutheran was denied funding "because of what it is – a

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Douglas Laycock, Comment: Theology Scholarships, The Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes But Missing the Liberty, 118 Harv. L. Rev. 155 (2004); Ira C. Lupu & Robert W. Tuttle, Federalism and Faith, 55 Emory L. Rev. 19 (2006); Jesse Merriam, Finding a Ceiling in a Circular Room: Locke v. Davey, Religious Neutrality, and Federalism, 16 Temp. Pol. & Civ. Rts. L. Rev. 103 (2006); Nelson Tebbe, Excluding Religion, 156 U. Pa. L. Rev. 1263 (2008).

[45] *Id*. at 719.

[46] *Id*. at 720-725.

[47] *Compare* id. at 726-731 (2004) (Scalia, J., dissenting) *with TLC* slip op. at 6-9. Both opinions discuss, near identically inboth sequence and emphasis, the decisions in *Lukumi*, *Everson*, *McDaniel*, *Lyng*, and *Smith*. For the Court in *TLC* to do this without attribution to the *Locke* dissent, where this sequence had first appeared, is deeply puzzling, to say the least.

church." The latter, the Court says, effectively demands that the church "renounce its religious character in order to participate in an otherwise generally available public benefit program, for which it is fully qualified."[48]

With all respect, we can say only that the Court's distinction between conduct and identity is accurate, but it misses entirely the reason behind Missouri's constitutional policy. The point of the restriction on playground grants is not to use the state's leverage over applicants to induce them to alter their character. Rather, the restriction furthers the same policies as the prophylactic rule that the Court had followed for years in Establishment Clause cases, and state constitutions have expressly required for more than two centuries.[49] Churches, because of what they *are*, will normally use their assets (including real property assets, like a playground adjacent to the church) for religious uses, such as instruction in the faith. The funding restriction flows from the recognition that aiding churches in this way will make the state a partner with the church in providing religious experience. Chief Justice Roberts' distinction between conduct (Davey's) and identity (a church) is thus just another way for the Court to avoid engagement with centuries of church-state policies in the United States, under which houses of worship would rarely be "fully qualified" for direct government assistance. *TLC* is a case about federalism as

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[48] *TLC*, slip op. at 14.

[49] The full list of state constitutional provisions are in TLC, Sotomayor, J., dissenting, at 19, nn. 10-11. The amicus brief filed on the Missouri's behalf by the Baptist Joint Committee on Religious Liberty and the General Synod of the United Church of Christ, http://www.scotusblog.com/wp-content/uploads/2016/07/15-577-BJC-Amici-Respondent.pdf, very ably stated the case for the longstanding principle of separation in funding matters, *id*. at 6-21, and assembled the material on state constitutions, *id*. at Appendix 1. It is at least curious that Justices who are prominent members of the Federalist Society would be so indifferent to this thick history of state constitutional concern.

well as religion, but a reader of the Court opinion would be forgiven for thinking that federalism played almost no part in the decision.

In separate and brief concurring opinions in *TLC*, Justice Thomas (who dissented in *Locke*) and Justice Gorsuch expressed the view that *Locke* is constitutionally dubious.[50] Most significantly, Gorsuch challenged the Chief Justice's distinction between religious conduct and religious identity. Religious people do religious things, Gorsuch tells us, so the distinction between religious identity and religious exercise cannot be sustained. Thus, he says, the constitution requires the same protection against the denial of funds to religious entities as it does with respect to religiously motivated conduct by individuals. [51]

More than anything else written by the Justices who support the *TLC* result, Justice Gorsuch's claim explicitly repudiates hundreds of years of American constitutional experience. To paraphrase the *Everson* Court, the prohibition on state establishment of religion means "at least" that the state may not finance the people's efforts at religious instruction through houses of worship.[52] If Justice Gorsuch is correct, however, state support of secular instruction without equivalent support of religious teaching is tantamount to unconstitutional discrimination against religious education. Justice Gorsuch thus goes far beyond the Court's willingness to require equal funding of churches, with respect to secular concerns like playground safety.

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[50] Justices Thomas and Gorsuch each joined the other's opinion, both concurring in part.
[51] TLC, slip op., Gorsuch, J., concurring, slip op. 1-2.
[52] 330 U.S. at 15-16.

Gorsuch would extend this obligation of equal funding to include government support of explicitly religious activity when it has a secular counterpart.[53]

Gorsuch makes this exact point in the very next paragraph, which begins: "Second, and for similar reasons, I am unable to join the footnoted observation, ante, at 15 , n. 3 that 'this case involves express discrimination based on religious identity with respect to playground resurfacing.'" That observation involves only undisputed fact, so the only possible object of the refusal by Gorsuch and Thomas to join the footnote is its one additional sentence: "We do not address religious uses of funding or other forms of discrimination." The footnote , which only Roberts, Alito, Kennedy, and Kagan joined, carefully leaves for another day the question of whether government may exclude from funding religious organizations that will use the aid for explicitly religious activities – for example, Bible reading in a literacy class, or religiously themed instruction about sexual abstinence outside of marriage. For Gorsuch and Thomas, any exclusion of those activities from a general funding program would violate the Free Exercise Clause. This stance, quite simply, turns *Everson* and the constitutional tradition it expresses totally on their heads.

We will return in our final section to the questions that *TLC* instantly provoked.[54] What lies ahead for state constitutional restrictions on use of vouchers?

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[53] Justice Sotomayor's dissent, joined by Justice Ginsburg, similarly viewed the religious character of houses of worship as indicative of the likelihood of religious activity, but they drew the precisely opposite and once-traditional conclusion -- that the constitution bars the state from directly subsidizing houses of worship, or at the very least permits the state to refrain from such funding. Slip op., at 21-22.

[54] The day after decision in *TLC*, the Court in four cases granted certiorari, vacated decision, and remanded for reconsideration in light of *TLC*. See orders in Nos. 15-556, 15-557, 15-558, and 15-1409, at

Beyond vouchers, what are the prospects for similar restrictions on the direct grant of state funds to religious organizations, in circumstances where religious uses are likely?

Before moving to that analysis, we think it is especially important to note that in this concurring opinion, Justice Gorsuch ignores his own recent and strenuous claims about the proper role of judges. Writing in the spring of 2016 (after Justice Scalia's death and well before the 2016 election), Justice Gorsuch said this:[55]

> ". . . the great project of Justice Scalia's career was to remind us of the differences between judges and legislators. To remind us that legislators may appeal to their own moral convictions and to claims about social utility to reshape the law as they think it should be in the future. But that judges should do none of these things in a democratic society. That judges should instead strive (if humanly and so imperfectly) to apply the law as it is, focusing backward, not forward, and looking to text, structure, and history to decide what a reasonable reader at the time of the events in question would have understood the law to be— not to decide cases based on their own moral convictions or the policy consequences they believe might serve society best."

This is a committed statement of judicial methodology, and we are entitled to measure Justice Gorsuch's work, including his concurring opinion in *TLC*, against it. Let's start with the text of the relevant constitutional provision: "Congress shall

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https://www.supremecourt.gov/orders/courtorders/062717zr_6537.pdf . Three of the four involve a voucher scheme in Douglas County, Colorado. Below, we analyze the questions to be reconsidered in these cases.

[55] Neil Gorsuch, Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia, 66 Case Western L. Rev. 905, 906 (2016). At his Supreme Court confirmation hearings, he repeated this judicial philosophy. See Seven Highlights from the Gorsuch Confirmation Hearings, N.Y. Times, March 21, 2017 https://www.nytimes.com/2017/03/21/us/politics/neil-gorsuch-confirmation-hearings.html (quoting Goruch as saying "The Constitution doesn't change. The world around us changes."); see also http://www.pbs.org/newshour/updates/learned-neil-gorsuchs-marathon-confirmation-hearing/ (at Supreme Court confirmation hearing, then-Judge Gorsuch espoused "selective originalism").

make no law respecting an establishment of religion or prohibiting the free exercise thereof." In *TLC*, Missouri had argued, quite plausibly, that its restriction on funding churches did not violate the Clause because it was not "prohibiting" religious exercise in any way. Here is Gorsuch in *TLC*, analyzing the words of the Clause:[56]

"First, the Court leaves open the possibility a useful distinction might be drawn between laws that discriminate on the basis of religious status and religious use. . . .
. . .
. . . I [do not] see why the First Amendment's Free Exercise Clause should care [about that distinction]. After all, that Clause guarantees the free exercise of religion, not just the right to inward belief (or status).

We were initially puzzled by the odd locution of whether "the Free Exercise should care." But the Justice's next sentence, focused on the words "free exercise," hints at an answer. This paragraph represents Gorsuch's nod to textualism, but he focuses only on the question of whether both the status and conduct of churches reflect the "exercise" of religion. No one disputes that in this case. What the parties dispute is whether a refusal to fund a church, an act consistent with longstanding norms of church-state separation in financial matters, can plausibly be viewed as "prohibiting" that exercise. On that potentially dispositive textual question, Justice Gorsuch had nothing to say.

Gorsuch's claim to adhere to constitutional originalism offers only deeper embarrassment in his *TLC* concurrence. Recall his counsel to look "to text, structure, and history to decide what a reasonable reader at the time of the events in question would have understood the law to be." His opinion completely avoided any mention of history, and it's not difficult to see why. The Free Exercise Clause, made

[56] *TLC*, Gorsuch, J., concurring, slip op. at 1-2.

applicable to the states by ratification of the 14th Amendment in 1868,[57] must be read in light of the then-widespread constitutional norm against direct aid to houses of worship. Justice Gorsuch's separate opinion never mentions the detailed history, offered by Justice Sotomayor,[58] showing that bans on state aid to houses of worship were common at the founding, and nearly uniform by the time of the adoption of the 14th Amendment. *TLC* was not a case in which the history is thin or obscure; on the contrary, the history is thick and available to all. Justice Gorsuch apparently did not like what it demonstrated.

If Justice Gorsuch disregarded these many state constitutional provisions as marks of anti-Catholic discrimination – a popular trope in commentary on *TLC* immediately before and after the decision[59] – his concerns are both unvoiced and deeply misplaced. A true originalist does not keep secret his interpretation of the relevant history. Moreover, many of these state provisions, including Missouri's,

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[57] The Supreme Court first acknowledged the incorporation of the Free Exercise Clause in Cantwell v. Connecticut, 310 U.S. 296 (1940). A theory of incorporation that built on originalism would treat the relevant meaning of the Clause as determined by the way ratifiers of the 14th Amendment understood it. Such a theory would have to give considerable attention to the many, then-extant state constitutional provisions that barred funding of religious entities. Professor Lash's detailed and able study of free exercise norms at the time of Reconstruction gives no hint that the drafters and ratifiers of the 14th Amendent saw these "no funding" provisions as inconsistent with the free exercise of religion. See generally Kurt Lash, The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment, 88 Nw. U. L. Rev. 1106 (1994).

[58] *TLC*, Sotomayor, J., dissenting, slip op. at 11-21.

[59] See, e.g., Philip Hamburger, Prejudice and the Blaine Amendments, *First Things*, June 20, 2017, available here: https://www.firstthings.com/web-exclusives/2017/06/prejudice-and-the-blaine-amendments; Marc DeGirolami, "Where are the Blaine Amendments? Where is the Animus?, Mirror of Justice, June 26, 2017, available here: http://mirrorofjustice.blogs.com/mirrorofjustice/2017/06/where-are-the-blaine-amendments-where-is-the-animus-inquiry.html.

adopted language from late 18th and early 19th century state constitutions. The major disagreements during that era were entirely among Protestants.[60]

TLC thus offered newly confirmed Justice Gorsuch a test of fidelity to his professed methodology of originalism, and he failed miserably.[61] Once he abandoned text and history, all he had left was his own forbidden territory "[of decid[ing] [the] case based on [his] own moral convictions or the policy consequences [he] believe might serve society best." How disappointing – and revealing – that this failure came so starkly, dramatically, and quickly in his tenure on the Supreme Court.

The Future of Church-State Funding Principles in Light of TLC

[60] *See, e.g.,* The Virginia Act for Religious Freedom (1786) ("…no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever…"); Georgia Constitution of 1789, Article IV, §5 ("All persons shall have the free exercise of religion, without being obliged to contribute to the support of any religious profession but their own."); Pennsylvania Constitution of 1790, Article IX, §3 ("…no man can, of right, be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent…"; Connecticut Constitution of 1818, Article VII, §1 ("…no person shall by law be compelled to join or support, nor be classed with, or associated to, any congregation, church or religious association.) The near-unanimous ban in state constitutions on government-imposed support for houses of worship reflects a fundamental shift in Protestantism from the mid-18th century to the late 18th and 19th centuries. This shift reflects the growing centrality of voluntarism – the core of evangelicalism – in Protestant thought and belief. The believer demonstrates authentic faith only by free acceptance of salvation, free consent to join a particular denomination, and free support of that body. James H. Hutson, Church and State in America: The First Two Centuries 165-166 (2008); Jon Butler, Awash in a Sea of Faith: Christianizing the American People 262-268 (1992).

[61] Nor did Justice Gorsuch make a case for following precedent as a justification for ignoring text and history. Note that, in *TLC*, he joins Justice Thomas in a concurring opinion that does its best to minimize the scope of *Locke v. Davey*, the most relevant precedent.

Within hours of the decision in *TLC*, journalists began to speculate on its consequences.[62] The Court encouraged this line of inquiry the next day when, in four cases, it granted certiorari, vacated lower court decisions, and remanded for reconsideration in light of *TLC*.[63] Three of the four had been decided by the Colorado Supreme Court,[64] and these all involved the use of school vouchers in one Colorado county. The fourth, from the New Mexico Supreme Court, involved loans of schoolbooks to public and private schools.[65] In all four, the state courts had struck down the aid as violations of the state constitution. This remand provoked the obvious question of whether *TLC* was going to further the school choice movement, which has long been hampered by various state constitutional restrictions.

Eventually, the resolution of the split among the seven Justices who agreed with the Court's result will determine the impact of *TLC* on future controversies about equal funding. For now, we can confidently say that the votes of these Justices mask very deep divisions among them about Religion Clause and federalism principles. Instead of viewing TLC as a 7-2 decision, we think it is more appropriate to break the seven down into groups of four (Roberts, Alito, Kennedy, Kagan), two

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[62] See, e.g., Emma Green, The Supreme Court Strikes Down a Major Church-State Barrier, The Atlantic, June 26, 2017, https://www.theatlantic.com/politics/archive/2017/06/trinity-lutheran/531399/

[63] https://www.supremecourt.gov/orders/courtorders/062717zr_6537.pdf.

[64] Doyle v. Taxpayers for Public Ed. (decided with Douglas Cty. Sch. Dist. v. Taxpayers for Public Ed., and Colo. State Bd. of Ed. v. Taxpayers for Public Ed.) available here: http://cases.justia.com/colorado/supreme-court/2015-13sc233.pdf?ts=1435593634 (slip op.).

[65] New Mexico Ass'n of Non-Public Schools v. Moses, available here: http://cases.justia.com/new-mexico/supreme-court/2015-34-974.pdf?ts=1447351802 (slip op.)

(Gorsuch, Thomas), and one (Breyer). Justice Breyer's opinion, which focuses exclusively on the idea of "public benefit," offers lower courts no guidance on how to distinguish among the various benefits that would or would not be appropriate subjects of state support, and will likely be ignored.

The struggle going forward will be among the other six Justices in the *TLC* majority. The crucial question will be those reserved in footnote 3 of the Roberts' opinion: "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." As noted above, Gorsuch and Thomas did not join that footnote, and their opinions would require funding of religious activities on terms equal to that provided to their secular counterparts.

What remains unknown is how many of the four Justices who joined the footnote will ultimately side with Justices Gorsuch and Thomas. If it were three or more, the footnote (and the Gorsuch concurrence) would likely have not appeared. Thus, in extracting guidance from *TLC*, lower courts will face substantial uncertainty in discerning the correct principles to decide cases that involve funding of religious activities.[66]

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[66] As noted above, Chief Justice Roberts, Justice Alito, and Justice Kagan have not participated in any Supreme Court decision that reached the merits of Establishment Clause questions about funding religious activities. Justice Kennedy joined the *Mitchell* plurality, 530 U.S. at 801-835, but the in-kind aid in that case had been restricted to secular use. Moreover, the plurality in *Mitchell* characterized the case as involving private, intermediary choice, because aid was distributed to schools on a per capita basis. Id. at 830-831. So even Justice Kennedy has not expressed a view about the constitutionality of religious use of direct aid, other than in *Bowen*, where he joined an opinion that precluded such use. 487 U.S. at 621. See text at notes 29-30, *supra*.

TLC should make no difference in the reconsideration of *New Mexico Association of Non-Public Schools v. Moses*.[67] The case involves a state program of book loans to schools, public and private (including religious schools). The program was structured as a loan to students and their families, similar to the program upheld against federal Establishment Clause challenge in *Board of Education v. Allen*.[68]

Article XII, section 3 of the New Mexico Constitution, however, which outlaws use of state funds "for the support of any sectarian, denominational or private school, college or university," is much broader and more specific than the Establishment Clause. The state Supreme Court focused on the sweeping exclusion of "any sectarian, denominational or private school," and concluded that the provision was designed to protect resources for the public schools. Accordingly, the book loan program violated the state constitution by aiding all private schools. Thus, the state Supreme Court decision – like the state constitution itself -- did not single out religious schools for disfavored treatment.

We strongly suspect that the language in *TLC's* footnote 3 with respect to "other forms of discrimination" is a reference to New Mexico's distinction between public schools and private schools. New Mexico's constitutional policy does not especially burden religious education. Instead, it is an affirmative policy of protecting public education against rivals for public support. Nothing in the Gorsuch-Thomas view or the Court opinion in TLC addresses this kind of distinction,

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[67] The New Mexico Supreme Court's opinion, now vacated, is available here: http://www.scotusblog.com/wp-content/uploads/2016/05/15-1409-opinion-below-NM.pdf.

[68] Board of Educ. v. Allen, 392 U.S. 236 (1968).

one which tends to appear in the education law of virtually every state. We are deeply confident that the outcome in New Mexico will remain the same.[69]

The Colorado decisions, on remand, could present a closer question. Douglas County created a scholarship program, which paid approximately $4500 per year for each recipient toward tuition at participating private schools.[70] The trial court found that, in the initial program year of 2011-12, 271 students received a scholarship. Of 23 participating schools, 16 were religious in character. Over 90% of scholarship recipients attended religious schools. At the high school level, 119 of 120 students were enrolled in religious schools, and the only non-religious participating schools were limited to "gifted" or "special needs" students.

The state Supreme Court held that the program was inconsistent with Art. IX, section 7 of the Colorado Constitution, which bars state or local governmental

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[69] In a comparable case in Michigan, a state court recently rejected the argument that *TLC* should have any bearing on application of a state constitutional provision denying public aid to all private schools. Council of Organizations and Others for Education about Parochiaid v. State of Michigan, available here: http://www.aclumich.org/sites/default/files/2017-07-25_Opinion__Prelim_Injunction.pdf. The Michigan decision is discussed at Howard Friedman's Religion Clause blogspot for July 28, 2017: http://religionclause.blogspot.com/2017/07/trinity-lutheran-decision-does-not.html.

The defenders of the New Mexico book loan program apparently attempted to litigate the case as an attack, on grounds of anti-Catholic animus, on the constitutionality of the state's constitutional restriction on aiding private schools. But the New Mexico Supreme Court was unreceptive to that attack, and nothing in *TLC* invites any different response.

[70] Taxpayers for Public Education v, Douglas County Sch. Dist., available here https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Opinions/2013/13SC233.pdf, (slip op.), at 8-9. Under the County's funding scheme for the vouchers, the County's public school district received from the state 100% of the state's allocated per pupil expenditure. The district kept 25%, and paid 75% to the private school where the student was enrolled.

assistance to religious schools.[71] Because the program involved intermediary choice, it did not violate the federal Establishment Clause. But, as is the case under most state constitutions, the relevant limitation prohibits any state or local "aid [to] any church or sectarian society, or for any sectarian purpose, or to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church or sectarian denomination whatsoever . . . .." The Colorado Supreme Court ruled, 4-3, that the provision covered all religious schools, and that the program unconstitutionally aided such schools by contributing to tuition payments.[72]

What should the Colorado Supreme Court do on remand in light of *TLC*? Unlike the Missouri program at issue in *TLC*, in which at least four Justices in the majority treated the case as not involving "religious uses," the Douglas County scholarship program involves subsidy of such uses for all students that attend a school with a religious character.[73] Because of footnote 3, *TLC* leaves entirely open

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[71] The portion quoted by the Colorado Supreme Court is as follows: "Aid to private schools, churches, sectarian purpose, forbidden": Neither the general assembly, nor any county, city, town, township, school district or other public corporation, shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian society, or for any sectarian purpose, or to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church or sectarian denomination whatsoever . . . .. *Id*. at 20. The Court construed "sectarian" to mean "religious," so all religiously affiliated private schools were equally precluded from receiving public funds. *Id*.

[72] Schools were free to reduce their own financial aid to students who received a scholarship from the County, and to take applicants' religious beliefs into account in admissions. Slip op. at 8-9.

[73] That the subsidy may be "indirect" because it involves an intermediary choice of a school, is wholly immaterial. *Locke v. Davey*, which involved college scholarships, was identical in that respect, and the U.S. Supreme Court quite properly treated the

the question of whether a state violates the Free Exercise Clause when it bars indirect support for religious education.

Despite the utter failure of guidance from *TLC*, the Colorado Supreme Court should be guided by the crucial difference between the facts of that case and the Douglas County litigation. Plainly and simply, the Colorado case does not involve discrimination against religious schools. The trial court enjoined the Douglas County program in its entirety, not just as applied to religious schools, and the state Supreme Court affirmed that grant of relief.[74] Unlike in Missouri, where secular schools could obtain playground resurfacing grants but church schools could not, the Colorado courts barred Douglas County from paying scholarships to *any* private school. Equal treatment mandates may be satisfied by equalizing down as well as by equalizing up, and that is what the Colorado Supreme Court did in its initial decision. So, just as in New Mexico, we expect no different outcome on remand, and we expect the U.S. Supreme Court to leave the case undisturbed thereafter.[75]

The school choice movement may be disappointed with the outcome of the remands in these cases, but *TLC* will inevitably invite litigation in related circumstances, far more conducive to applying its equal treatment norms. When government financially supports the provision of services and imposes a restriction

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case as involving a refusal to subsidize a religious use – in that case, study for the ministry. 540 U.S. at 721-723.

[74] Slip op. at 10, 31.

[75] The Colorado Supreme Court gave short shrift to the argument that its constitutional limitation on aid to religious schools was a product of anti-Catholic animus, and therefore a violation of the federal Constitution. Slip op. at 22. Nothing in TLC gives the slightest encouragement to that theory of the case on remand. No Justice in TLC even mentioned it.

on religious content of those services, potential grantees that provide religious service are likely to claim unconstitutional discrimination.

For example, religiously affiliated schools may obtain public charters and therefore receive full state financial support for each pupil, but under longstanding federal constitutional law these schools may not engage in religious worship or teaching. Around the United States, these restrictions on "religious uses" of the curriculum have led to significant conflicts with charter schools over a variety of religious practices, including use of the Bible;[76] engaging in Islamic worship;[77] and teaching Judaism as part of the Hebrew curriculum.[78]

Armed with *TLC*, lawyers for schools that want to pursue religious education will argue that secular charter schools may freely choose their value orientations and curricula – for example, on civil rights, environmental concerns, or Afro-centrism. Exclusion of religious counterparts to these orientations can be viewed as discriminations, subject to challenge under the Free Exercise Clause.

If *TLC* is read, as Justices Gorsuch and Thomas would have it, to presumptively preclude restrictions on religious use when secular analogues are not similarly restricted, religious charter schools would suddenly have a very good case

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[76] The Nampa Classical Academy in Idaho has been at the center of the conflict over permissible reading materials in a charter school. http://religionclause.blogspot.com/2010/05/in-nampa-classical-academy-v.html; religionclause.blogspot.com/2011/08/9th-circuit-idaho-charter-school.html

[77] See http://religionclause.blogspot.com/2008/05/cultural-identity-charter-school.html

[78] See religionclause.blogspot.com/2007/09/hebrew-curriculum-finally-okd-for.html. See also http://religionclause.blogspot.com/2012/04/dc-board-approves-hebrew-language.html. For other examples of controversy over religion in charter schools, see items collected at http://religionclause.blogspot.com/search?q=charter+school.

to be free to engage in worship and religious instruction. Whether any of the four Justices who joined note 3 in *TLC* would follow this path is unknowable. What is immediately obvious, however, is that this move, if successful, would turn the relevant Religion Clause law upside down. Rather than religious teaching and practice being *barred* in state supported schools, religiously affiliated charter schools would have constitutional rights to engage in such teaching and practice. Equalizing down is not a realistic option in this context, because it would require the complete elimination of charter schools.

For another example, consider state supported social services, such as programs for rehabilitation from drug or alcohol addiction. The Faith Based and Community Initiative under President George W. Bush,[79] later renamed Faith Based and Neighborhood Partnerships under President Barack Obama, invites participation by organizations with a religious character in federally funded social service programs. From the beginning of the Bush Administration through today, however, federal regulations preclude grantees from engaging in explicitly religious activities in government-funded programs.[80] The federal government imposed this restriction because the Establishment Clause required it.

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[79] We describe and analyze the Initiative in detail in Ira C. Lupu & Robert W. Tuttle, The Faith-Based Initiative and the Constitution, 55 DePaul L. Rev. 1 (2005). See also Ira C. Lupu & Robert W. Tuttle, Secular Government, Religious People (Wm. B. Eerdmans & Co., 2014) at 106-109.

[80] Id. at 10-11. These policies were embodied in an Executive Order from President George W. Bush, Exec. Order No. 13,279, 3 C.F.R. 258 (2003), reprinted in 5 U.S.C.A. § 601 (1996 & Supp. 2005) (federal funds may not be used to support "inherently religious activities."). President Obama later amended the Order to clarify that federal funds may not be used to directly support "explicitly religious activities." See https://obamawhitehouse.archives.gov/the-press-office/2010/11/17/executive-order-fundamental-principles-and-policymaking-criteria-partner (section 2(f)).

Enter *TLC*. Religious social service providers, and states that want to aid them in their religious missions, may mount Free Exercise challenges to this restriction. After all, they will argue, secular providers are free to use their own methods of help or therapy. Why should those who prefer religious methods be subject to discrimination in their choice of methodology?

Our analysis here is identical to our appraisal of the charter school problem. If the Gorsuch-Thomas view eventually earns five votes, a constitutional prohibition[81] will be transformed into a constitutional mandate of equal treatment. Equalizing down, and eliminating privately operated programs, hardly seems an attractive option in this context. If all this were to transpire, the law of the Religion Clauses would be radically transformed. And no one in *TLC* was hinting at anything close to this, except for Justice Sotomayor as she opened her dissent: "This is not a simple case about recycling tires to resurface a playground. The stakes are higher."[82]

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[81] See, e.g., Freedom from Religion Foundation, Inc. v. McCallum, 179 F. Supp. 2d 950 (WD Wisc. 2002) (direct grant from Wisconsin to faith-based program for substance abuse treatment violates the Establishment Clause). Note that grants from Wisconsin involving beneficiary choice, used at the same provider, are constitutionally permitted. Freedom from Religion Foundation, Inc. v. McCallum, 324 F.3d 880 (7th Cir. 2003). We comprehensively analyze the constitutional treatment of direct and indirect financing of religious activities in Ira C. Lupu & Robert W. Tuttle, The Faith-Based Initiative and the Constitution, 55 DePaul L. Rev. 1 (2005).

[82] TLC, Sotomayor, J. dissenting, slip op. at 1. In the aftermath of *TLC*, a large question lurking is whether laws that treat religious organizations more favorably than their secular counterparts are constitutionally troublesome. If so, a great many statutory accommodations of religion and religious organizations – including the Religious Freedom Restoration Act, 42 U.S.C. secs. 2000bb – 2000bb-4, and the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. secs. 2000cc et seq. – are constitutionally questionable, and would have to be either struck down or extended to comparable secular concerns. We believe that not a single sitting Justice

CONCLUSION

As this essay demonstrates, the changes that *TLC* will bring about, in principles of church-state relations and federalism, are quite unpredictable. But the tone of the Court opinion does not inspire confidence that those who joined, including Justice Kagan, embrace any commitment to church-state separation in funding matters, or to federalism principles that will permit states to follow their own longstanding policies in this regard.

Not long ago, the one rock solid element in Establishment Clause law seemed to be that government could not make direct grants to houses of worship, especially in circumstances where the funds would support religious activity. *TLC* has thrown that paradigm of church-state relations into deep question. What's more, *TLC* threatens a leap beyond state discretion to engage in such spending to a strenuous new paradigm of mandatory equality for religion, in which spending for secular experience must be accompanied by comparable spending for religious experience. Only two Justices, however, have signaled a willingness to go that far, while four others have reserved judgment. We wonder whether the old paradigm will endure, or whether a radically different one – false to our constitutional history – is on the verge of triumph.

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would support a sweeping norm of equality between religious and secular organizations, but nothing in *TLC* explains why its equality principle should not be fully symmetrical. Justice Stevens would have confronted his judicial colleagues on this. See City of Boerne v. Archbishop Flores, 521 U.S. 507, 536-537 (1997) (Stevens, J., concurring) (arguing that because RFRA prefers religion to irreligion, it is an unconstitutional establishment).