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SEPARATION OF CHURCH AND STATE OR DISPARATE
TREATMENT? AN ANALYSIS OF THE RELIGIOUS FREEDOM AND
DISCRIMINATION CONCERNS IN TRINITY LUTHERAN CHURCH
OF COLUMBIA, INC. V. PAULEY

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**SEPARATION OF CHURCH AND STATE OR DISPARATE
TREATMENT?
AN ANALYSIS OF THE RELIGIOUS FREEDOM AND
DISCRIMINATION CONCERNS IN *TRINITY LUTHERAN CHURCH OF
COLUMBIA, INC. V. PAULEY***

Michael Petherick

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I. INTRODUCTION

Freedom of religion and the separation of church and state constitute ongoing policy concerns in the United States.¹ Although the reach of the First Amendment’s Establishment Clause is limited in scope,² stricter establishment clauses in state constitutions sometimes raise concerns regarding religious discrimination.³ *Trinity Lutheran Church of Columbia, Inc. v. Pauley* provides an excellent example of the tension between establishment policy and discrimination.⁴ In *Trinity*, the plaintiff asserted that the denial of a state grant to the Learning Center at Trinity Church because of its status as a religious organization constituted a violation of the Equal Protection Clause, the Free Exercise Clause, the Establishment Clause, the right to free speech under the First Amendment, and Article I, Section 7 of the Missouri Constitution.⁵ The United States Court of Appeals for the Eighth Circuit held that the denial of the grant by a Missouri state agency violated neither the United States Constitution nor the

¹ See generally U.S. CONST. amend. 1.

² Compare U.S. CONST. amend. 1 (stating that “Congress shall make no law respecting an establishment of religion”), with MO. CONST. art. I, § 7 (mandating that “no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion”).

³ See *Locke v. Davey*, 540 U.S. 712, 725 (2004) (upholding Washington state law that barred public aid to a college student seeking a theology degree); *Lutkemeyer v. Kaufmann*, 364 F. Supp. 376, 387 (W.D. Mo. 1973), *aff’d*, 419 U.S. 888 (1974) (holding that Missouri’s constitutional provisions regarding religion are not facially invalid).

⁴ *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 788 F.3d 779 (8th Cir. 2015), *cert. granted*, 2016 U.S. LEXIS 633 (U.S. Jan. 15, 2016) (No. 15-577).

⁵ *Id.* at 782.

Missouri Constitution,⁶ and that the district court properly refused to grant permission for the plaintiff to amend its complaint.⁷ Although the Eighth Circuit's ruling reflects the Supreme Court's current First Amendment jurisprudence, *Trinity Church* raises social justice concerns because of its potential effects on religious freedom in the United States.

II. FACTUAL BACKGROUND

Trinity Lutheran Church of Columbia, Inc. ("Trinity Church") in Columbia, Missouri, operates a preschool and day care center known as the Learning Center.⁸ Although the Learning Center uses an open admissions policy, religious instruction constitutes a daily part of the school's curriculum.⁹ In 2012, Trinity Church applied to the Missouri Department of Natural Resources ("DNR") for a grant to provide funding to repair the Learning Center's playground.¹⁰ In May 2012, a state official denied the grant to Trinity Church and stated that providing grant money for use by Trinity Church would violate Article I, Section 7 of the Missouri Constitution.¹¹ The DNR denied the application despite the fact that Trinity Church's application ranked fifth out of forty applications and even though the DNR previously provided grants to fourteen other religiously-affiliated institutions.¹²

Subsequently, Trinity Church filed suit against Sara Pauley, acting as the Director of the DNR, in the United States District Court for the Western District of Missouri.¹³ Trinity Church asserted federal question jurisdiction over its claims that the denial of the grant by the DNR violated (1) the Fourteenth Amendment's Equal Protection Clause, (2) the Free Exercise Clause, (3) the Establishment Clause, and (4) Trinity Church's right to free speech under the First Amendment.¹⁴ Trinity Church also asserted a state law claim under the court's supplemental jurisdiction by alleging that the DNR's denial of the grant violated Article I, Section 7 of the Missouri Constitution.¹⁵

Director Pauley moved to dismiss Trinity Church's complaint for failure to state a claim.¹⁶ The district court granted Director Pauley's motion and held that the DNR violated neither the United States Constitution nor the Missouri

⁶ *Id.* at 783-88.

⁷ *Id.* at 788-90.

⁸ *Id.* at 781.

⁹ *Id.* at 782.

¹⁰ *Trinity*, 788 F.3d at 782.

¹¹ *Id.* The program for which Trinity Church applied provides money to qualifying organizations to resurface playgrounds with recycled tires. *Id.* (citing MO. REV. STAT. §§ 260.335.1, 260.273.6(2) (2015)).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Trinity*, 788 F.3d at 782.

Constitution.¹⁷ Trinity Church subsequently moved for reconsideration and for leave to amend its complaint to allege additional facts.¹⁸ Specifically, Trinity Church wanted to allege that the DNR previously provided grants to other religious institutions.¹⁹ The court denied the motions because Trinity Church waited until after dismissal to make its request.²⁰ Moreover, the court explicitly stated that Trinity Church's proposed amendment lacked merit because, although Trinity Church stated that the amendment attacked "Missouri's purported interest," Trinity Church failed to allege any law that required a showing of the existence of a compelling state interest.²¹

Trinity Church appealed the district court's decision to the United States Court of Appeals for the Eighth Circuit.²² Specifically, Trinity Church appealed all determinations made by the district court other than its dismissal of the freedom of speech claim.²³ On appeal to the Eighth Circuit Court of Appeals, the court affirmed the judgment of the United States District Court for the Western District of Missouri.²⁴

III. ANALYSIS

A. *Trinity Church's Federal Constitutional Claims*

On appeal, the Eighth Circuit Court of Appeals first examined Trinity Church's federal constitutional claims. Because Trinity Church asserted its First Amendment and Fourteenth Amendment claims based upon alleged disparate treatment based on religion, the court concluded that Trinity Church lodged a facial attack on the validity of Article I, Section 7 of the Missouri Constitution.²⁵ Specifically, Trinity Church argued that Missouri's Establishment Clause violated the First Amendment and the Equal Protection Clause of the Fourteenth Amendment by barring the grant of public funds to churches.²⁶

To determine whether the Missouri Constitution violated the First and Fourteenth Amendments, the court examined past precedent.²⁷ In *Luetkemeyer v. Kauffmann*, the United States Supreme Court affirmed the judgment of the United States District Court for the Western District of Missouri²⁸ and concluded that

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Trinity*, 788 F.3d at 782.

²³ *Id.*

²⁴ *Id.* at 781.

²⁵ *Id.* at 783.

²⁶ *Id.*

²⁷ *Id.* at 784-85.

²⁸ *Trinity*, 788 F.3d. at 784 (quoting *Luetkemeyer*, 419 U.S. at 888). Although the Supreme Court in *Luetkemeyer* summarily affirmed the judgment of the lower court, the Eighth Circuit Court of Appeals concluded that the Supreme Court decided in that case that Article I, Section 7 of the Missouri Constitution was not facially invalid. *Id.*

Missouri's stricter Establishment Clause served a compelling state interest and was therefore constitutionally permissible.²⁹ Because of the Court's ruling in *Luetkemeyer*, the court concluded that past precedent already established the constitutional validity of Article I, Section 7 of the Missouri Constitution.³⁰

After establishing the permissibility of Missouri's Establishment Clause, the court reviewed Trinity Church's request for injunctive relief to compel the State of Missouri to provide public grants to churches in direct opposition to the Missouri Constitution.³¹ The court looked to *Locke v. Davey* for guidance, in which the Court upheld Washington's constitutional provisions and laws that barred public scholarship funds to students pursuing theology degrees.³² In *Locke*, government funds from the State of Washington did not directly fund religious instruction, but were instead "broken by the independent and private choice of recipients."³³ The court noted that Trinity Church, in contrast to the facts in *Locke*, sought to compel the State of Missouri to provide the public grant money directly to the church.³⁴ Accordingly, the court concluded that *Locke* reinforced the Court's decision in *Luetkemeyer* and therefore provided further precedent demonstrating the validity of Article I, Section 7 of the Missouri Constitution.³⁵

Moreover, the Court declined to adopt the views expressed in the dissenting opinion in *Locke*.³⁶ In regard to the facts in *Locke*, Justice Scalia wrote that if a "[s]tate makes a public benefit generally available . . . and . . . the State withholds that benefit from some individuals solely on the basis of religion, it violates the Free Exercise Clause no less than if it had imposed a special tax."³⁷ Although the Eighth Circuit noted that the dissent's views mirror some recent constitutional jurisprudence, the court ultimately concluded that the Supreme Court must determine itself whether to overrule precedent established under *Luetkemeyer* and *Locke*.³⁸

B. Trinity Church's Missouri Constitutional Claims

After examining the federal constitutional claims, the Eighth Circuit Court of Appeals reviewed Trinity Church's claims under the Missouri Constitution.³⁹ Specifically, the court examined whether the DNR's denial of Trinity Church's grant violated the second clause of Article I, Section 7, which forbids discrimination against any church.⁴⁰ Because of past precedent in Missouri, the

²⁹ *Id.* (quoting *Luetkemeyer*, 364 F. Supp. at 386).

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 785 (citing *Locke*, 540 U.S. at 722).

³³ *Id.* (quoting *Locke*, 540 U.S. at 719, 722).

³⁴ *Trinity*, 788 F.3d at 785.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Locke*, 540 U.S. at 726-27 (Scalia, J., dissenting).

³⁸ *Trinity*, 788 F.3d at 785.

³⁹ *Id.* at 786-88.

⁴⁰ *Id.* at 786.

court first noted that the two clauses of Article I, Section 7 must be interpreted in harmony.⁴¹

After noting that Missouri's law requires interpreting constitutional clauses harmoniously, the court determined that the primary state constitutional issue on review was whether granting Trinity Church's application would constitute the "aid" barred under the first clause of Article I, Section 7.⁴² As the court reasoned, if the grant constituted aid under clause one of Article I, Section 7, denying the grant could not constitute religious discrimination under the second clause if the two provisions of the Missouri Constitution were construed in harmony.⁴³ Thus, denying a grant that constituted aid did not violate Trinity Church's rights.⁴⁴ Although Trinity Church also argued that Missouri court precedent established a "quid pro quo" exception to Article I, Section 7's definition of "aid," the Eighth Circuit Court of Appeals upheld the district court's determination that Trinity Church "grossly misinterpreted" decisions of the Missouri Supreme Court.⁴⁵ Instead, the court noted that the Missouri Supreme Court consistently interpreted the provisions of Article I, Section 7 of the Missouri Constitution strictly to generally forbid the use of state money by religious institutions.⁴⁶

C. *Trinity Church's Motion to Amend*

Finally, after reviewing the district court's constitutional determinations, the court then examined whether the district court abused its discretion by denying Trinity Church's motion to amend its complaint to add an additional disparate treatment claim and a factual allegation that other religious institutions received similar grants.⁴⁷ The court first noted that the Eighth Circuit consistently holds that delay when moving to amend complaints, without justification, is generally disfavored.⁴⁸ Because Trinity Church could obtain information regarding the DNR's distribution of grants to other religious institutions from an easily accessible government website, the court stated that Trinity Church could have included that information in its initial complaint.⁴⁹ Accordingly, the Eighth Circuit held that the district court did not err by concluding that Trinity Church lacked a justifiable reason for failing to amend its complaint before dismissal.⁵⁰

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 787 (citing *Americans United v. Rogers*, 538 S.W.2d 711 (Mo. 1976) (declining to adopt the quid pro quo exception), *cert. denied*, 429 U.S. 1029 (1976)).

⁴⁶ *Id.* (quoting *Rogers*, 538 S.W.2d at 720).

⁴⁷ *Id.* at 788-90.

⁴⁸ *Id.* at 788 (citing *United States v. Mask of Ka-Nefer-Nefer*, 752 F.3d 737, 743-44 (8th Cir. 2014), *In re Medtronic, Inc.*, 623 F.3d 1200 (8th Cir. 2010), *U.S. ex rel Roop v. Hypoguard USA, Inc.*, 559 F.3d 818, 823 (8th Cir. 2009)).

⁴⁹ *Id.*

⁵⁰ *Trinity*, 788 F.3d at 788.

The court then reviewed the district court's alternative ruling that Trinity Church's proposed amendment was "futile."⁵¹ Because Trinity Church did not attempt to alter its First Amendment causes of action, the court noted that the proposed amendment instead alleged a new, distinct disparate treatment claim.⁵² Although the additional facts that Trinity Church sought to allege lacked merit for some of its causes of action, the allegation that the DNR denied grant money to Trinity Church while giving money to other religious organizations, if intentional, would violate the United States Constitution and the Missouri Constitution.⁵³ Thus, Trinity Church's proposed amendment, far from being futile, actually enhanced the overall status of Trinity Church's lawsuit.⁵⁴

The court concluded, however, that the district court did not abuse its discretion by denying leave for two reasons. First, the court noted that district courts generally do not abuse their discretion by denying motions to amend after summary judgment if litigants do not present compelling excuses.⁵⁵ Second, allowing Trinity Church to amend its complaint would change the "procedural landscape" of the case.⁵⁶ Specifically, the proposed amendments would add an additional disparate treatment theory that would require the district court to determine issues of state law—an addition that would trigger the need for *Pullman* abstention by the court.⁵⁷ Moreover, the new theory would raise significant venue and jurisdiction issues under Missouri law.⁵⁸

IV. CONCLUSION

Trinity demonstrates that, under current federal constitutional jurisprudence, state governments can legally deny benefits to religious organizations because of religious affiliation, even if the state grants money to other religiously-affiliated institutions. In other words, the holding by the Eighth Circuit Court of Appeals in *Trinity* allows for disparate treatment of religious organizations and their members based upon state constitutional provisions. Unless the Supreme Court intervenes and overturns past precedent, religious organizations in states with strict establishment clauses may continue to experience disparate treatment simply because of religious affiliation—a result that differs radically from commonly held notions of social justice.

⁵¹ *Id.*

⁵² *Id.* at 788-89.

⁵³ *Id.* at 789 (citing *Larson v. Valente*, 456 U.S. 228, 246 (1982)).

⁵⁴ *Id.*

⁵⁵ *Id.* (quoting *Littlefield v. City of Afton*, 785 F.2d 596, 610 (8th Cir. 1986)).

⁵⁶ *Trinity*, 788 F.3d at 789.

⁵⁷ *Id.* (quoting *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 236 (1984)).

⁵⁸ *Id.* at 790 (citing MO. REV. STAT. §§ 536.010 *et seq.*).