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Awakening the Law: Unmasking Free Exercise Exceptionalism

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AWAKENING THE LAW: UNMASKING FREE EXERCISE EXCEPTIONALISM

Berta Esperanza Hernández-Truyol[*]

ABSTRACT

The U.S. Constitution protects myriad, often intertwined, individual rights. Sometimes, protected fundamental rights collide, yet the Constitution lacks a methodology to resolve such clashes. Indeed, an internal tension exists even within the rights included in the First Amendment, as whenever the government acts to protect Free Exercise it advances religion. Rather than adopt a methodology that respects and considers all constitutional rights at issue in instances when constitutional rights are in collision, the Court has embraced Free Exercise Exceptionalism ("FEE"), a doctrine pursuant to which the Court elevates Free Exercise above all rights, including the prohibition expressed in the Establishment Clause. This FEE is evident in recent rulings.

In the 2020 Espinoza v. Montana Department of Revenue *case, the Court ruled that the no-aid provision of tuition assistance programs for parents who enroll children in religious schools discriminated based on religious status rather than religious use. The Court, using a strict scrutiny standard, changed the question from whether a state may choose to fund religious activity to whether it must. A forceful dissent decried the majority opinion for holding, for the first time, that the Constitution requires the government to provide funds directly to a church. Two years later,* Carson *expanded* Espinoza*'s holding by mandating the funding of religious activities and institutions where such funding is available to nonsectarian institutions. Another forceful dissent emphasized that prohibiting a state from excluding religious schools from participating in a state tuition program made available to secular schools effects a violation of the*

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Free Exercise Clause of the First Amendment and the breakdown of the separation of church and state. As evidenced in Carson*, the consequence is hugely problematic in that the now-state-funded religious institutions, rather than be bound by general nondiscrimination laws, will be free to openly discriminate against students, staff, teachers, and parents alike.*

This Article proposes a new paradigm to resolve tensions and conflicts in constitutional rights that takes account of and seeks to preserve all constitutional values. Awakening the law is a multilayered process that seeks to find justice in complex legal conflicts; it is an ongoing process that requires buy-in from all affected constituencies. The resolution of constitutional tensions requires consideration of all interests involved in a constitutional conflict. The embrace of the proposed awakened paradigm, informed by established human rights norms and the First Amendment's own history, allows for the recognition, exposure, deliberation, and resolution of the injustices effected by FEE.

"I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between Church & State."[**]

"The challenge for those who want to protect religious liberty in the United States, Europe and other similar places is to convince people who are not religious that religious liberty is worth special protection."[***]

[**] Jefferson's Letter to the Danbury Baptists, LIBRARY OF CONG., https://www.loc.gov/loc/lcib/9806/danpre.html (last visited Mar. 18, 2023).

[***] Samuel Alito, Assoc. Just., U.S. Sup. Ct., Keynote Address to Religious Liberty Initiative of Notre Dame University (July 2022), https://www.youtube.com/watch?v=uci4uni608E; *see also* Linda Greenhouse, *Alito's Call to Arms to Secure Religious Liberty*, N.Y. TIMES (Aug. 11, 2022), https://www.nytimes.com/2022/08/11/opinion/religion-supreme-court-alito.html.

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INTRODUCTION

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . or the right of the people peaceably to assemble."[1] While each clause is ostensibly clear standing alone, tensions arise because the clauses interact. The Amendment itself creates no hierarchy. Yet the last three terms, the Supreme Court of the United States, through myriad decisions, including religious assembly cases, has embraced Free Exercise Exceptionalism ("FEE"): primacy to the Free Exercise Clause over all other rights and evisceration of the Establishment Clause.[2] The expansion of the Free Exercise and the consequent supremacy of religion over all rights is problematic[3] as one of the most salient and pressing civil and human

1 U.S. CONST. amend. I.

2 The Roberts Court, which has been in place since 2005,

> has ruled in favor of religious organizations, including mainstream Christian organizations, more frequently than its predecessors. With the replacement of Ruth Bader Ginsburg with Amy Coney Barrett, this trend will not end soon and may accelerate. The quantitative results dovetail with doctrinal analysis that suggests that the Court has weakened the Establishment clause and strengthened the Free Exercise clause.

Lee Epstein & Eric A. Posner, *The Roberts Court and the Transformation of Constitutional Protections for Religion: A Statistical Portrait*, 2021 SUP. CT. REV. 315, 337 (2021).

3 According to a Gallup Poll, the percentage of Americans who perceive religion to be very important has drastically reduced from approximately 70% in 1965 to around 49% in 2020. Jeffrey M. Jones, *How Religious Are Americans?*, GALLUP (Dec. 23, 2021), https://news.gallup.com/poll/358364/religious-americans.aspx. Nonetheless, SCOTUS has been continuously adjudicating matters in favor of religion despite the fact that a majority of the population does not perceive religion to be very important. *See* Epstein & Posner, *supra* note 2, at 342 fig.8.

rights concerns of the twenty-first century is the collision of religious rights with liberty[4] and equality/nondiscrimination rights.[5]

Tensions in civil society based on religion are nothing new. Throughout the world's history, examples abound of religious conflicts.[6] Various religions promote peace, harmony, and coexistence, yet religion often becomes a deep and delicate source of conflict, fueled by every religion's contention that its tenets contain the one and only truth.[7] Based on the one truth, religiously-charged violence in the twentieth century included the Troubles,[8] the Holocaust,[9] the Six-Day War,[10] and the war on terror that emerged after 9/11,[11] to name a few.

In the twenty-first century, Christian Nationalism,[12] a political ideological movement that deploys a "conservative interpretation of Christianity,"[13] has embraced and promoted FEE; it has sought, with some success,[14] to

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[4] In the balance of this Article, I will juxtapose the rights to privacy, intimacy, and equality/nondiscrimination with Free Exercise as the rights in collision.

[5] *See* Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2520 (2015) (referring to the religion-based conflicts as "asserted by growing numbers of Americans about some of the most contentious 'culture war' issues of our day").

[6] *See id.* at 2520 & n.12 (describing personal conflicts).

[7] *See The Wars of Religion*, BRITANNICA, https://www.britannica.com/topic/history-of-Europe/The-Wars-of-Religion (last visited Mar. 18, 2021) (detailing the century of war based on religion between Catholic and Protestant European nations).

[8] *See, e.g.*, Jeff Wallenfeldt, *The Troubles*, BRITANNICA, https://www.britannica.com/event/The-Troubles-Northern-Ireland-history (last visited Mar. 18, 2021) (writing about The Troubles, the ethno-nationalist conflict in Northern Ireland that lasted three decades).

[9] Michael Berenbaum, *Holocaust*, BRITANNICA, https://www.britannica.com/event/Holocaust (last visited Mar. 18, 2021).

[10] *Six-Day War*, BRITANNICA, https://www.britannica.com/event/Six-Day-War (last visited Mar. 18, 2021).

[11] Ivo H. Daalder & James M. Lindsay, *Nasty, Brutish and Long: America's War on Terrorism*, BROOKINGS (Dec. 1, 2001), https://www.brookings.edu/articles/nasty-brutish-and-long-americas-war-on-terrorism/.

[12] Thomas B. Edsall, *The Capitol Insurrection Was as Christian Nationalist as It Gets*, N.Y. TIMES (Jan. 28, 2021), https://www.nytimes.com/2021/01/28/opinion/christian-nationalists-capitol-attack.html?action=click&module=Opinion&pgtype=Homepage; *see also* Andrew Whitehead, *The Growing Anti-Democratic Threat of Christian Nationalism in the U.S.*, TIME (May 27, 2021), https://time.com/6052051/anti-democratic-threat-christian-nationalism/.

[13] Michelle Goldberg, *What Is Christian Nationalism?*, HUFFPOST: THE BLOG (May 25, 2011), https://www.huffpost.com/entry/what-is-christian-nationa_b_20989 (explaining the coining of the term in her book *Kingdom Coming: The Rise of Christian Nationalism*). Goldberg explains that it is "a *political ideology* that posits a Christian right to rule." *Id.* (emphasis added).

[14] *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (showing some success in transmogrifying the law to reflect its principles and beliefs); *see also* Linda Greenhouse, *Religious Doctrine, Not the Constitution, Drove the* Dobbs *Decision*, N.Y. TIMES (July 22, 2022), https://www.nytimes.com/2022/07/22/opinion/abortion-religion-supreme-court.html; *see also* Nate Hochman,

transmogrify the law to reflect its religious principles and beliefs including "nativism, white supremacy, patriarchy, and heteronormativity."[15] Religious desire to define the law has been at work for some time and has fueled many of the challenges to liberty on the grounds of religious beliefs. For example, citing the Free Exercise Clause of the First Amendment, actors in the public square, including photographers,[16] doctors,[17] printers,[18] flower shop owners,[19] adoption

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What Comes After the Religious Right?, N.Y. TIMES (June 5, 2022), https://www.nytimes.com/2022/06/01/opinion/republicans-religion-conservatism.html (noting that President Donald Trump delivered on a number of religious conservative priorities—most notably appointing conservative justices to the Supreme Court to cobble together a likely majority of anti-Roe votes).

[15] *See* Edsall, *supra* note 12 (describing Christian Nationalism as a political movement that "is as ethnic and political as it is religious. Understood in this light, Christian nationalism contends that America has been and should always be distinctively 'Christian,'" including its "public policies" (quoting ANDREW L. WHITEHEAD & SAMUEL PERRY, TAKING AMERICA BACK FOR GOD: CHRISTIAN NATIONALISM IN THE UNITED STATES 10 (2020))).

[16] Elane Photography, LLC v. Willock, 309 P.3d 53, 59 (N.M. 2013) (concluding there is no right to discriminate based on religious beliefs); Chelsey Nelson Photography, LLC v. Louisville/Jefferson Cnty. Metro Gov't, 479 F. Supp. 3d 543, 550, 552 (W.D. Ky. 2020) (granting preliminary injunction in a Memphis claim against enforcement of nondiscrimination ordinance against photographer who refused services to same-sex couples based on religious belief); *see also* Elizabeth Dias & Ruth Graham, *The Growing Religious Fervor in the American Right: "This Is a Jesus Movement,"* N.Y. TIMES (Apr. 6 2022), https://www.nytimes.com/2022/04/06/us/christian-right-wing-politics.html (noting that in a worship protest against COVID restrictions, the Christian organizers urged people "to not believe 'the lie' of the separation of church and state").

[17] Kimberlee Roth, *Pharmacists, Doctors Refuse to Dispense Pill on Moral Grounds*, CHI. TRIB. (Nov. 17, 2004), https://www.chicagotribune.com/news/ct-xpm-2004-11-17-0411170051-story.html (doctor refusing to write a prescription for birth control medication); Mark Joseph Stern, *Anti-Gay Doctor Refuses to Treat Lesbian Parents' 6-Day-Old Baby*, SLATE (Feb. 19, 2015, 1:04 PM), https://slate.com/human-interest/2015/02/doctor-refuses-to-treat-baby-of-lesbian-parents-because-theyre-gay.html (pediatrician refusing to treat a 6-day old baby girl because her mothers are lesbians).

[18] *See* Lexington-Fayette Urban Cnty. Hum. Rts. Comm'n v. Hands on Originals, 592 S.W.3d 291, 297 (Ky. 2019) (concluding that t-shirt company does not have to print t-shirts for Pride Festival because nondiscrimination ordinance only protected individuals, not groups).

[19] State v. Arlene's Flowers, Inc., 441 P.3d 1203, 1210, 1224–36 (Wash. 2019) (holding that refusal to sell flowers on the basis of sexual orientation violated Washington State antidiscrimination law and that the law did not violate First Amendment rights).

agencies,[20] inns,[21] wedding venues,[22] child welfare providers,[23] pharmacists,[24] and hospitals,[25] have refused to provide services to some that they otherwise offer to the general public.[26] Schools[27] have refused to abide by nondiscrimination norms and individual teachers are increasingly claiming religion as a reason to discriminate against particular students.[28] Dissimilar as these entities and the services they offer are, the shared motive for their rejection is that offering the services offends their sincerely held religious beliefs.[29] It

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20 *Buck v. Gordon*, ACLU, https://www.aclu.org/cases/buck-v-gordon (Nov. 29, 2022) (agreeing to require agencies with state contracts to comply with nondiscrimination requirements).

21 *Baker & Linsley v. Wildflower Inn*, ACLU, https://www.aclu.org/cases/baker-and-linsley-v-wildflower-inn (Aug. 23, 2012) (settling with Vermont Human Rights Commission for refusing to hold reception for same-sex couples).

22 Marissa Higgins, *Grooms Turned Away from Wedding Venue in North Carolina for Precisely the Reason You Might Expect*, DAILY KOS, https://www.dailykos.com/stories/2021/4/13/2025693/-Wedding-venue-turns-away-same-sex-couple-in-yet-another-state-lacking-LGBTQ-protections (noting that a North Carolina wedding venue turned away a same-sex couple due to the wedding venue's owners' religious beliefs against homosexuality).

23 Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1881–82 (2021) (holding that because the contract allows for exemption, a religious exemption cannot be denied to Catholic Social Services).

24 Stephen Montemayor, *Woman Sues After Being Denied Emergency Contraception at Two Pharmacies in Central Minnesota*, STAR TRIB. (Dec. 10, 2019, 9:25 PM), https://www.startribune.com/woman-sues-after-being-denied-emergency-contraceptives-at-two-pharmacies-in-central-minnesota/566048441/ (describing a pharmacist that refused to fill an emergency contraception prescription because of his "discomfort").

25 Minton v. Dignity Health, 39 Cal. App. 5th 1155 (2019) (holding that religiously affiliated hospital's failure to provide services is basis for discrimination claim). The case is still moving through the courts but now faces the Department of Health and Human Services' issuance of a Refusal of Care Rule that would allow religious providers to refuse services on the basis of their religious beliefs. Evan Minton, *A Hospital Refused to Provide Medically Necessary Surgery Because I Am Transgender*, ACLU (Feb. 27, 2020), https://www.aclu.org/news/lgbt-rights/a-hospital-refused-to-provide-medically-necessary-surgery-because-i-am-transgender.

26 The list is not exhaustive. *See, e.g.*, Brief of Amici Curiae Lambda Legal Defense and Education Fund, Inc., Family Equality Council, in Support of Respondents at 9, Masterpiece Cakeshop v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111); Masterpiece Cakeshop v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1730 (2018) (noting wide range of service denials).

27 John Beauge, *Unwed Pa. Teacher Fired for Being Pregnant Loses Second Bid to Get Her Job Back*, PENN. REAL-TIME NEWS (Jan. 29, 2020), https://www.pennlive.com/news/2020/01/unwed-pa-teacher-fired-for-being-pregnant-loses-second-bid-to-get-her-job-back.html (pregnant unwed teacher fired).

28 Meriwether v. Hartop, 992 F.3d 492, 517–18 (6th Cir. 2021) (upholding teacher's right to refuse to address students by their correct pronouns because it would go against his religious beliefs); *see also* Marissa Higgins, *Elementary School Teacher on Leave After Rallying Against Trans-Inclusive Pronoun Policy for Kids*, DAILY KOS (June 2, 2021, 11:05 AM), https://www.dailykos.com/stories/2021/6/2/2033262/-Elementary-school-teacher-on-leave-after-rallying-against-trans-inclusive-pronoun-policy-for-kids.

29 *See* James M. Oleske Jr., *The "Mere Civility" of Equality Law and Compelled-Speech Quandaries*, 9 OXFORD J. L. & RELIG. 288, 292 n.30 (2020), https://academic.oup.com/ojlr/article-abstract/9/2/288 /5863671 (quoting *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. at 1727–28, which recognizes that equality laws are meant to ensure that members of protected classes can acquire "whatever products and services they choose on the same terms and conditions as are offered to other members of the public").

could be the identity of the person that is offensive; it could be the services or products—albeit fully legal, and in some instances medically necessary—that are objectionable. The religious—*political*—objectors insist that if they provide services, or engage in certain employment relationships, they are accepting and, thus, being complicit in, behavior that Christian Nationalism finds sinful.[30] However, as a political movement, religious nationalism's[31] "ultimate goal is power. It . . . seek[s] . . . to replace our foundational democratic principles and institutions with a state grounded on a particular version of Christianity . . . ."[32]

While many of the examples cited involve same-sex couples or LGBTQ+ individuals, the rebuffs are by no means limited to homosexuality or LGBTQ+ persons. In one case, a pastor refused to baptize a baby because the mother and father, being unwed, were "living in sin."[33] The denials of contraceptives[34] and the pregnancy firing[35] involved heterosexual women. In one instance, a doctor refused to treat an infant because her *mothers* were lesbians.[36] An embrace of Christian Nationalist orthodoxy as sufficient reason to deny services in the public sphere threatens liberty.

On the heels of a tense beginning to the third decade of the twenty-first century, rife and raw with the underscoring of racial disparities as well as significant religious divides,[37] "we the people" have experienced much

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[30] NeJaime & Siegel, *supra* note 5, at 2519 (describing "complicity-based conscience claims" as "religious objections to being made complicit in the assertedly sinful conduct of others"); *see also* Eric J. Segall, *Putting the "Exercise" Back in Free Exercise*, 106 KY. L.J. 635, 637 (2018) (suggesting distinction between religious exercise and religious conscience). Critics maintain that the complicity argument lacks scriptural foundation. Robyn J. Whitaker, *To Christians Arguing 'No' on Marriage Equality: The Bible Is Not Decisive*, CONVERSATION (Aug. 22, 2017, 3:26 PM), https://theconversation.com/to-christians-arguing-no-on-marriage-equality-the-bible-is-not-decisive-82498; *see, e.g.*, Pidgeon v. Turner, 538 S.W.3d 73, 85, 89 (Tex. 2017) (holding that in case brought by "devout Christians who have been compelled by the mayor's unlawful edict to subsidize homosexual relationships that they regard as immoral and sinful," Texas does not have to grant same-sex couples any marital benefits that flow from employment even if it continues to offer opposite-sex couples such benefits).

[31] *See, e.g.*, Edsall, *supra* note 12 (noting Christian Nationalist symbols).

[32] *See id.* (quoting KATHERINE STEWART, THE POWER WORSHIPPERS: INSIDE THE DANGEROUS RISE OF RELIGIOUS NATIONALISM 3 (2019)); *see also* John Blake, *An "Imposter Christianity" Is Threatening American Democracy*, CNN, https://www.cnn.com/2022/07/24/us/white-christian-nationalism-blake-cec/index.html (July 24, 2022, 12:46 PM).

[33] Andrew McMunn & WLBT Staff, *Reverend Refuses to Baptize Baby, Says Unwed Parents Are "Living in Sin,"* WLBT NEWS (Oct. 6, 2022, 2:54 PM), https://www.wwnytv.com/2022/10/06/reverend-refuses-baptize-baby-says-unwed-parents-are-living-sin/.

[34] Roth, *supra* note 17; Montemayor, *supra* note 24.

[35] Beauge, *supra* note 27.

[36] Stern, *supra* note 17.

[37] *See generally* Berta Esperanza Hernández-Truyol, *Awakening the Law: A LatCritical Perspective*, 20 SEATTLE J. SOC. JUST. 927 (2022). For a collection of coverage on George Floyd's murder at the hands of

awakening[38] about deeply seeded social realities and persistent inequalities.[39] Reliance upon religious liberty as a justification for discrimination against anyone creates an ostensibly intractable tension between rights of the highest value in the international and national spheres: the right to religious freedom on the one hand, and the right to liberty, including equality/nondiscrimination, on the other. Significantly, the Constitution, state and national laws, as well as international, regional, and foreign law, protect religious liberty, as well as other liberties, equality, and nondiscrimination rights.[40]

In the 2020–2022 Terms, in embracing FEE—First Amendment decisions in cases presenting tension with liberty—the Court myopically considered only religion. The Court failed to contemplate the myriad other liberty interests involved in the cases. The Court's adopted approach erases the discriminatory consequences of the decisions on other affected persons whose constitutional rights the cases at best ignored or at worst wholly negated. This work argues that FEE must cede to an awakened analysis. The religion/equality tensions can be resolved by deploying a more holistic approach, an awakened paradigm, that gives voice not only to First Amendment rights but also to the correspondingly significant liberty and equality/nondiscrimination constitutional interests that the single-focus analysis utilized by the Court obscures.[41] In cases in which the tension lies between one person's First Amendment rights and another person's constitutionally protected liberty rights, the proper approach is to utilize an

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Minneapolis police officers, see *Death of George Floyd*, AP NEWS, https://apnews.com/hub/death-of-george-floyd (last visited Apr. 2, 2021). For a collection of coverage on Breonna Taylor's murder at the hands of Louisville police officers, see *Breonna Taylor*, AP NEWS, https://apnews.com/hub/breonna-taylor (last visited Apr. 2, 2021). *See also Health Equity Considerations and Racial and Ethnic Minority Groups*, CTRS. FOR DISEASE CONTROL & PREVENTION (July 24, 2022), https://stacks.cdc.gov/view/cdc/91049 (highlighting COVID-19's disparate and inferior economic and health outcomes by race).

[38] "Awakening the Law" is a term I have coined to describe a process of unearthing skewed origins, interpretations, presumptions, and law and legal principles to unveil their consequent subordinating effects. See *infra* note 152, for an in-depth explanation of Awakening.

[39] *See* Gentrix Shanga, *How Black Lives Matter Became a Multicultural Awakening*, ABC NEWS (July 9, 2020, 3:57 PM), https://abcnews.go.com/US/black-lives-matter-multicultural-awakening/story?id=71635471.

[40] *See, e.g.*, International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, 173 [hereinafter ICCPR] (mandating nondiscrimination on the basis of "colour, sex, language, religion, political or other opinion, national or social origin, property, [and] birth or other status"); Toonen v. Australia, U.N. Doc. CCPR/C/WG/44//D/488/1992 (1994) (interpreting discrimination on the basis of sex under the ICCPR to include discrimination on the basis of sexuality); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (prohibiting discrimination in employment practices because of "race, color, religion, sex, or national origin"); Bostock v. Clayton County, 140 S. Ct. 1731, 1743, 1754 (2020) (interpreting discrimination because of sex within the meaning of Title VII also to include discrimination because of gender identity or sexuality).

[41] This proposed paradigm dovetails with the third-party harm literature. *See generally Reframing the Harm: Religious Exceptions and Third-Party Harm After* Little Sisters, 134 HARV. L. REV. 2186 (2021) [hereinafter *Reframing the Harm*].

analytical framework that maximizes an outcome in which *all* rights affected enjoy protection. This Article proposes such a novel paradigm. In developing the framework, this work takes a comparative approach utilizing international, regional, and foreign law to inform the legal landscape in which the conflicts develop.

The author fully embraces the First Amendment role as a shield for important rights—freedom of expression, assembly, and religious beliefs, but rejects its recent evolution into a sword wielded to eviscerate not only separation of church and state, but also other high value constitutional rights.[42] In Part II, this Article discusses the legal development of First Amendment jurisprudence that has culminated in FEE. Part III presents how other jurisdictions have resolved rites vs. rights tensions and provides comparative signposts to analyze cases in which fundamental rights collide. These pathmarkers are the foundation for the articulation of four principles that provide useful insights and guidance for the development of an analytical framework to resolve conflicts in which religion collides with other fundamental rights. Taking lessons from abroad, and in search of a solution to rights conflicts that promotes justice, in Part IV, this Article proposes a novel paradigm to awaken First Amendment law and in Part V applies the paradigm to the 2022 decision in *Carson v. Makin* to elucidate how application of the paradigm recognizes, respects, and resolves constitutional rights in collision. This Article concludes that, contrary to national and international standards, FEE effects the erosion of other fundamental rights that must be recognized, exposed, and resolved.

I. COLLISIONS: FREE EXERCISE EXCEPTIONALISM

The First Amendment protects against government interference with or imposition of religious values.[43] When competing constitutional rights collide, however, recent Supreme Court jurisprudence has embraced FEE. By giving

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[42] *See* Ira C. Lupu & Robert W. Tuttle, *The Radical Uncertainty of Free Exercise Principles: A Comment on* Fulton v. City of Philadelphia, 5 AM. CONST. SOC'Y SUP. CT. REV. 221, 252–53 (2021) (noting that judges find cases that seem sympathetic on the side of free exercise claimants and search for ways to make use of such devices and rule in favor of religion; many these cases will likely involve clashes between conservative religious groups or individuals and LGBT rights); *see also* Rebekah Sager, *Judge Rules in Favor of Company's 'Religious Freedom' Claim over ACA-Mandated Coverage of HIV Drugs*, DAILY KOS (Sept. 8, 2022), https://www.dailykos.com/stories/2022/9/8/2121592/-Federal-judge-in-Texas-rules-in-favor-of-a-company-that-denies-coverage-of-life-saving-HIV-drugs?detail=emaildkre&pm_source=DKRE&pm_medium=email (detailing a U.S. District Judge ruling in favor of a company challenging the Affordable Care Act's mandate for coverage of PrEp, prescribed to prevent HIV/AIDS, as a violation of the Religious Freedom Restoration Act, even though such a ruling would cause patients to lose access to vital preventive healthcare services).

[43] *See* U.S. CONST. amend. I.

primacy to religion over other high-value constitutional rights, the Court has rendered the First Amendment a tool to subordinate other fundamental liberties.[44]

Religious discrimination is part of U.S. history. Catholics were banned from the colonies.[45] Quakers were hanged for their beliefs.[46] In Massachusetts, only Christians could hold public office, and Catholics could only do so if they first rejected the authority of the pope.[47] From 1777–1806, the Constitution of New York banned Catholics from public office.[48] While Catholics fared well in Maryland, Jewish persons did not have full civil rights.[49] Indeed, some states even had official churches that were supported by the state.[50] Thus, as a matter of history, the First Amendment is hugely important to protect religious freedom.

In this third decade of the twenty-first century, however, FEE has transmogrified the right to religious liberty from a shield from state interference with personal religious choices, to a sword that eviscerates the rights to liberty, equality, and nondiscrimination of individuals whose interest are subordinated to and marginalized by (mostly Christian) religious beliefs.[51] Persons whose interests have been subordinated to religious orthodoxy include LGBTQ+ individuals and couples, sexually active unmarried persons, single parents who

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[44] Cases establish that liberty embraces a panoply of rights, including contraception, non-marital intimacy, marriage rights, and parental rights to educate children. *See* Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) (holding state regulation of contraception unconstitutional); Loving v. Virginia, 388 U.S. 1, 12 (1967) (holding Fourteenth Amendment protects marital choices from racial discrimination, making prohibitions of interracial marriage unconstitutional); Obergefell v. Hodges, 576 U.S. 644, 681 (2015) (providing constitutional protection to same-sex marriage); Eisenstadt v. Baird, 405 U.S. 438, 545–55 (1972) (providing constitutional protection for non-marital intimacy); Lawrence v. Texas, 539 U.S. 558, 574 (2003) (providing constitutional protection for non-marital intimacy, particularly for individuals of the same sex); Meyer v. Nebraska, 262 U.S. 390, 402–03 (1923) (providing constitutional protections to parent's rights to educate their children).

[45] Kenneth C. Davis, *America's True History of Religious Tolerance*, SMITHSONIAN MAG. (Oct. 2010), https://www.smithsonianmag.com/history/americas-true-history-of-religious-toleran ce-61312684/.

[46] Carla Gardina Pestana, *The Quaker Executions as Myth and History*, 80 J. AM. HIST. 441, 441 (1993).

[47] Derek H. Davis, *Religious Oaths*, FREE SPEECH CTR.: FIRST AMEND. ENCYCLOPEDIA, https://mtsu.edu/first-amendment/article/927/religious-oaths (last visited Mar. 18, 2021); Davis, *supra* note 45.

[48] *See* Davis, *supra* note 47.

[49] *See* Benjamin H. Hartogensis, *Unequal Religious Rights in Maryland Since 1776*, 25 PUBL'N AM. JEWISH HIST. SOC'Y 93, 93 (1917).

[50] Davis, *supra* note 47.

[51] Justice Scalia stated that there is "nothing unconstitutional in a State's favoring religion generally." Van Orden v. Perry, 545 U.S. 677, 692 (2005) (Scalia, J., concurring); *see also* Epstein & Posner, *supra* note 2, at 325 fig.2, 337 (noting the Court's new approach to religion jurisprudence by indicating that statistics show that "[t]he Roberts Court has ruled in favor of religious organizations . . . far more frequently than its predecessors" in religious freedom cases, jumping to over 81% of the time, from the 50% range for all previous eras since 1953).

are sexually active outside of marriage, and even contraceptive users.[52] This tendency is nothing new, as religious liberty has historically been a location of tension *vis-à-vis* the rights to nondiscrimination and equality. For example, religion, sometimes under the guise of constitutional protection, has historically been used to justify (and to oppose) the inhumane institution of slavery,[53] to justify sex discrimination,[54] racial segregation,[55] and denial of marriage equality.[56]

The reality, to which the law has not awakened, is that when rights are in collision, constitutionally protected rights are intertwined, and all rights affected by the conflict should be considered in the factual and legal analysis. The refusal of services or products, because doing so is contrary to one person's sincerely held religious beliefs and thus allegedly violates their right to Free Exercise, does not occur in isolation. Any decision about refusal of services or products

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[52] *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2301 (2022) (Thomas, J., concurring) (calling into question the viability of *Obergefell v. Hodges*, *Griswold v. Connecticut*, and *Eisenstadt v. Baird* by urging for the reconsideration of all substantive due process precedents); *see also supra* text accompanying notes 12–27.

[53] John Blake, *How the Bible Was Used to Justify Slavery, Abolitionism*, CNN: BELIEF BLOG (Apr. 12, 2011, 6:00 AM ET), http://religion.blogs.cnn.com/2011/04/12/how-the-bible-was-used-to-justify-slavery-abolitionism/; *see, e.g.*, *Ephesians* 6:5 ("Slaves, obey your earthly masters with fear and trembling . . . ."); *Titus* 2:9 ("[T]ell slaves to be submissive to their masters and to give satisfaction in every respect . . . ."). 1 *Peter* 2:18 is another biblical passage used to justify slavery, stating: "[S]laves, submit to your masters with all reverence not only to the good and gentle ones but also to the cruel." Slavery included the prohibition of marriage. *See* Dred Scott v. Sandford, 60 U.S. 393, 408, 413 (1857); *see* Whitehead, *supra* note 12 ("[A]fter the Civil War and throughout the years of Jim Crow, Christian leaders routinely provided the theological arguments needed to rationalize limiting Black Americans' access to participation in the democratic process[,] . . . explicitly tying these efforts to their desire to protect the purity of a 'Christian' nation."); Edsall, *supra* note 15 (quoting ANDREW L. WHITEHEAD & SAMUEL PERRY, TAKING AMERICA BACK FOR GOD: CHRISTIAN NATIONALISM IN THE UNITED STATES 10 (2020)).

[54] *See, e.g.*, 1 *Timothy* 2:12 ("I do not permit a woman to teach or to have authority over a man. She must be quiet."); *see also Ephesians* 5:22 ("Wives, submit to your husbands as to the Lord."); Bradwell v. Illinois, 83 U.S. 130, 141 (1873) ("the law of the Creator").

[55] Bob Jones Univ. v. United States, 461 U.S. 574, 603 (1983) (finding "certain governmental interests so compelling as to allow even regulations prohibiting religiously based conduct" and upholding IRS revocation of tax-exempt status although college sought to justify racial segregation on religious grounds).

[56] FREDERICK DOUGLASS, MY BONDAGE AND MY FREEDOM 409 (1855) (noting denial of marriage to slaves by a country "boasting of its [C]hristianity"); *see* Loving v. Virginia, 388 U.S. 1, 3 (1967) (describing trial judge's use of religion as a justification for anti-miscegenation laws). Judge Bazile's opinion for the lower court stated that "[t]he fact that [God] separated the races shows that he did not intend for the races to mix." *Loving*, 388 U.S. at 3. More recently, the tension was regarding marriage between persons of the same sex. *See* Obergefell v. Hodges, 576 U.S. 644 (2015) (holding same-sex marriage receives constitutional protection). In a collision case, *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1731–32 (2018), the Supreme Court overturned a finding of discrimination in a baker's refusal to bake a cake for a gay couple because a commission had been hostile to religion by stating that "[f]reedom of religion and religion has been used to justify all kinds of discrimination throughout history." *Id*. at 1729.

affects another's rights to equality/nondiscrimination in their access to available products and services. Thus, the resolution of these conflicts necessitates analysis that evaluates alternative outcomes and their impact on two or more highly protected interacting constitutional rights.

The First Amendment Establishment Clause and Free Exercise Clause are in tension because whenever the government acts to *protect* free exercise, it inevitably *advances* religion.[57] With such an internal contradiction, it is not surprising that the history of the religion clauses' jurisprudence is messy and far from linear. In fact, the Framers themselves were not uniform in their view of religion and its relationship to government.[58] This inescapable tension *within* the First Amendment led to a "play in the joints" concept concerning "what the Establishment Clause permits and the Free Exercise Clause compels."[59] Over time, the interpretation concerning the "play in the joints" between the Establishment Clause and the Free Exercise Clause has evolved.[60] Recent First Amendment decisions have all but demolished the wall between separation of church and state.[61]

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57 *See also* Douglas Laycock & Thomas C. Berg, *Protecting Free Exercise Under* Smith *and After* Smith, CATO SUP. CT. REV. 33, 37 (2022) (highlighting the underlying tensions between the Free Exercise Clause and the Establishment Clause in the clash between nondiscrimination and religious liberty through *Fulton v. City of Philadelphia* and *Masterpiece Cakeshop*). *See generally* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 1294–96 (6th ed. 2019).

58 *See generally* Steven K. Green, *The Legal Ramifications of Christian Nationalism*, 26 ROGER WILLIAMS U. L. REV. 430 (2021). Scholarly debate regarding the constitutionality of exemptions is rich. *See, e.g.*, *Reframing the Harm*, *supra* note 41, at 2186; Douglas Laycock, *The Broader Implications of Masterpiece Cakeshop*, 2019 BYU L. REV. 167, 168 (2019); Adana K. Hirsch, *Daniel in the Lion's Den: A Structural Reconsideration of Religious Exemptions from Nondiscrimination Law Since* Obergefell, 70 STAN. L. REV. 265, 271 (2018); Nancy J. Knauer, *Religious Exemptions, Marriage, Equality, and the Establishment of Religion*, 84 UMKC L. REV. 749, 749–50, 755 (2016); Douglas NeJaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination*, 100 CALIF. L. REV. 1169, 1171–80 (2012); Michael W. McConnell, *Freedom from Persecution or Protection of the Rights of Conscience?: A Critique of Justice Scalia's Historical Arguments in* City of Boerne v. Flores, 39 WM. & MARY L. REV. 819, 822 (1998); Philip A. Hamburger, *A Constitutional Right of Religious Exemption: A Historical Perspective*, 60 GEO. WASH. L. REV. 915, 916–17 (1992).

59 Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2019 (2017) (quoting Locke v. Davey, 540 U.S. 712, 718 (2004)).

60 Lupu & Tuttle, *supra* note 42, at 18 ("[Contradictory] evidence shows that the constitutional understanding of religious exercise, at the Founding, is far removed from the religiously motivated moral conduct of [Catholic Social Services ("CSS")]. Justice Alito's stipulation that CSS's policies are religious exercise, within the original meaning of the Free Exercise Clause, is wrong."); *see also* Epstein & Posner, *supra* note 2, at 316 (indicating that under the current Supreme Court bench, "the religion clauses have increasingly been used to protect mainstream Christian values or organizations that are restricted by secular laws or liberal constitutional protections").

61 *See generally* NICHOLAS PATRICK MILLER, THE RELIGIOUS ROOTS OF THE FIRST AMENDMENT: DISSENTING PROTESTANTISM AND THE SEPARATION OF CHURCH AND STATE 170 (2012) (arguing that a

The school funding cases provide the most robust examples of the evolution of how the Court has grappled with balancing free exercise and establishment concerns; the evolution of the jurisprudence has resulted in today's FEE. The contours of the "room for play" between the Free Exercise and Establishment Clauses, which has now come full circle, began taking shape in the context of funding for parochial schools in the early twentieth century. In 1925, the Court recognized the right of parents to direct the educations of their children,[62] a right now deemed fundamental.[63] Following that decision, in three cases that spanned almost forty years, the Court, in reviewing whether state aid in the form of books or bus transportation to children in sectarian school was consistent with the First Amendment,[64] reiterated that the clause against establishment of religion was intended to erect a "wall of separation between Church and State."[65] However, the Court developed the "child-benefit" theory that allowed the state, without violating the Establishment Clause,[66] to make appropriations directly to children, whether they attended a sectarian or secular school, so long as the institutions received no benefit and were not relieved of any obligations.[67]

In 1971, the Court created the three-pronged *Lemon* test to provide guidance on balancing Free Exercise rights with the Establishment Clause constraints.[68] This *Lemon* test required that a statute "must have a secular legislative purpose; . . . its principal or primary effect must be one that neither advances nor inhibits religion; [and] [it] must not foster 'an excessive government entanglement with religion.'"[69] The test incorporated the patent strain between the clauses and was

reacquaintance with the commitment to a balanced separation of church and state will help revitalize "a broader sense of the sanctity of other basic human rights and freedoms").

[62] *See* Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925) ("The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.").

[63] *See* Wisconsin v. Yoder, 406 U.S. 205, 214 (1972) (recognizing a state's interest in universal education is balanced against such "fundamental rights" as the interest parents have in "the religious upbringing of their children").

[64] *See* Cochran v. La. State Bd. of Educ., 281 U.S. 370, 370 (1930); Everson v. Bd. of Educ., 330 U.S. 1, 3 (1947); Bd. of Educ. v. Allen, 392 U.S. 236, 238 (1968).

[65] *Everson*, 330 U.S. at 16 (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878)).

[66] *Id.* at 17–18.

[67] *Cochran*, 281 U.S. at 375.

[68] Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

[69] *Id.* at 612–14 (citation omitted) (quoting Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 674 (1970)) (holding that both challenged statutes failed the "excessive entanglement").

never consistently applied.[70] Nonetheless, a secular purpose alone could not save a law that advanced religion or enabled "excessive entanglement."[71]

Further erosion of the wall of separation occurred in 1983 with the Court's conclusion that a tax deduction for tuition, textbooks, and transportation expenses of children was constitutional, notwithstanding that the primary beneficiaries were the parents of children attending private parochial schools.[72] Not even fifteen years later, the Court adopted the neutrality principle—the concept that states *may* provide funding to religious schools, so long as that aid is allocated neutrally and the "primary effect" of the aid is not to advance a religious cause.[73]

The neutrality principle guided Establishment Clause inquiries in school funding cases until the year 2000.[74] In 2004, the Court took the next step, considering whether a state *must* provide as much funding to religious education as it provides for secular education. The Court held that a state did not have to award scholarships for religious instruction on an equal basis to those awarded for secular instruction.[75] Thirteen years later, the Court refocused on just how

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[70] For example, the Court, applying *Lemon*, struck down a New York law that allowed "direct money grants from the State to 'qualifying' nonpublic schools to be used for the 'maintenance and repair of . . . school facilities and equipment,'" "tuition reimbursements to parents of children attending elementary or secondary nonpublic schools," and "tax relief to those who fail to qualify for tuition reimbursement." Comm. for Pub. Educ. v. Nyquist, 413 U.S. 756, 762, 764–65, 794 (1973). The building maintenance provision was deemed unconstitutional on the basis that they made no attempt to restrict payments to the upkeep of buildings devoted to secular purposes and thus had a primary effect of advancing religion. *Id.* at 780. The tuition reimbursement and tax deduction programs were considered defective because they advanced religion by encouraging parents to send their children to nonpublic, religious schools. *Id.* at 792.

[71] *Lemon*, 403 U.S. at 613–14.

[72] Mueller v. Allen, 463 U.S. 388, 400 (1983) (holding that "the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit" satisfied all three prongs of the *Lemon* test).

[73] *See* Agostini v. Felton, 521 U.S. 203, 218–19, 222–23, 234 (1997) (reconsidering the Court's earlier decisions which invalidated Shared Time and Community Education programs and "abandon[ing] the presumption . . . that the placement of public employees on parochial school grounds" advances religion or effects an excessive entanglement).

[74] Mitchell v. Helms, 530 U.S. 793, 821–24 (2000) (applying the neutrality principle to uphold statute pursuant to which some resources went to religious schools).

[75] Locke v. Davey, 540 U.S. 712, 715 (2004) (holding that the State of Washington could not be forced to allow a student to participate in a scholarship program that prohibited the use of scholarship funds "at an institution where they are pursuing a degree in devotional theology"); *see also* Zelman v. Simmons-Harris, 536 U.S. 639, 662–63 (2002) (ruling that while publicly funded vouchers could be used to send children to religious schools, there was no requirement in the Constitution that the state must provide the vouchers to sectarian schools if it chose not to).

much "play" was "in the joints" between the Free Exercise and Establishment Clauses.[76]

The most recent funding cases have closed the circle and all but obliterated the Establishment Clause. In the 2020 case *Espinoza v. Montana Department of Revenue*, the Court ruled that the no-aid provision of tuition assistance programs for parents who enroll children in religious schools discriminated based on religious status rather than religious use.[77] Holding that "a State 'cannot hamper its citizens in the free exercise of their own religion,'"[78] the Court ruled that a state cannot exclude any individual because of their religion from public benefits.[79] The majority utilized a strict scrutiny standard for evaluating cases about religious funding, and changed the question from whether a state may choose to fund religious activity to whether it must.[80] Justice Sotomayor's

[76] Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2019, 2261 (2017) (quoting Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1, 16 (1947)).

[77] Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2254 (2020) (finding that Montana was obligated to revive a program that it invalidated as unconstitutional under the no-aid clause in the state constitution concluding that application of no-aid provision of tuition assistance program to parents who enroll children in private schools unconstitutionally discriminate against religious schools).

[78] *Trinity Lutheran*, 137 S. Ct. at 2020 (quoting *Everson*, 330 U.S. at 16) (addressing the constitutionality of denying material aid to qualifying organizations for resurfacing playgrounds).

[79] *Id.* ("[A state] cannot exclude *individual* Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation." (first emphasis added) (citing *Everson*, 330 U.S. at 16)). Further, the Court held that "[t]his case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination." *Id.* at 2024 n.3.

[80] *Id*. at 2021. Beyond funding cases, the Court has adopted a strict scrutiny analysis for religion. *See* Sherbert v. Verner, 374 U.S. 398, 402–03 (1963) (holding unconstitutional denial of unemployment benefits to worker whose employment was terminated because she would not work on her sabbath). In *Sherbert*, the Court ruled that laws burdening the free exercise of religion were subject to a strict scrutiny analysis, rendering it more difficult for the government to sustain legislation challenged on free exercise grounds. *Id.* at 403; *see also* CHEMERINSKY, *supra* note 57, at 1370 (noting the "obvious tension between *Braunfeld* and *Sherbert*" in which "economic burdens on religion" were treated very differently). In *Sherbert*, the concerns resulted in a successful challenge; in *Braunfeld v. Brown*, they did not. *Sherbert*, 374 U.S. at 402 (holding unconstitutional denial of unemployment benefits to worker whose employment was terminated because she would not work on her sabbath); Braunfeld v. Brown, 366 U.S. 599 (1961) (upholding statute that made it unlawful to work on Sunday despite economic inury to Orthodox Jewish storekeeper who observed the sabbath on Saturday). Almost thirty years after *Sherbert*, the *Employment Division, Department of Human Resources of Oregon v. Smith* Court redesigned the analytical framework for free exercise challenges, explaining:

> [I]f prohibiting the exercise of religion . . . is not the object of the [law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended. . . . We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.

Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 878–79 (1990). Congress viewed *Smith* as expanding a state's ability to infringe on religious exercise and immediately passed the Religious Freedom

forceful dissent decried the majority opinion as one that "profoundly changes [the] relationship [between religious institutions and the government] by holding, for the first time, that the Constitution requires the government to provide public funds directly to a church."[81]

Then, in 2022, in perhaps the most troubling of the First Amendment school funding decisions, the Court in *Carson v. Makin* crowned FEE and expanded *Espinoza* to include religious use of public funds as constitutionally protected religious exercise.[82] In *Carson*, under the rubric of the protection against discrimination based on religion, the Court *mandated* the funding, *for religious use*, of religious activities and institutions where such funding is made available to nonsectarian institutions.[83] Vehemently disagreeing with the majority, Justice Breyer reminded the Court that States cannot "aid one religion, aid all religions, or prefer one religion over another."[84] Justice Sotomayor added that "[t]oday, the court leads us to a place where separation of church and state becomes a constitutional violation."[85] Hugely problematic in *Carson* is the consequence that the now-state-funded religious institutions, rather than be bound by general nondiscrimination laws, will be free to openly discriminate against students, staff, teachers, and parents alike.[86]

The 2020 and 2021 Terms' First Amendment jurisprudence that addressed matters other than school funding also embraced FEE and continued the elevation of religion at the expense of other rights. Of the 2020 decisions, one confirms the prohibition against discrimination because of religion.[87] This case

Restoration Act of 1993 ("RFRA"), expressly reversing *Smith* and codifying strict scrutiny as the analytical framework for religion claims. Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (codifying the test from *Sherbert*); *Sherbert*, 374 U.S. at 403 (holding RFRA requires that any burden on the free exercise of religion may only be justified by a "compelling state interest in the regulation of a subject within the State's constitutional power to regulate" (quoting NAACP v. Button, 371 U.S. 415, 438 (1963))). Prior to the passage of RFRA, the Court's rulings favored neutrality toward religion. *See, e.g.*, *Smith*, 494 U.S. at 878–80 (holding First Amendment not violated when "prohibiting the exercise of religion" is not the goal).

[81] *Trinity Lutheran*, 137 S. Ct. at 2027 (Sotomayor, J., dissenting).

[82] 142 S. Ct. 1987, 2002 (2022).

[83] *Id.* (expanding *Espinoza* and holding that Maine violated the Free Exercise Clause in adopting a tuition assistance program in which the state required that to receive assistance, a school must be nonsectarian).

[84] *Id.* at 2003 (Breyer, J., dissenting) (quoting *Everson*, 330 U.S. at 15).

[85] *Id.* at 2014 (Sotomayor, J., dissenting).

[86] *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2069 (2020) (holding that the First Amendment prohibits the Court from intervening in the employment relationship between a religious school and its teachers).

[87] Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2262–63 (2020).

raises concerns that the religion/nondiscrimination tension is intractable, and the only resolution is for nondiscrimination principles to cede to religion.[88]

The other significant 2020 decision is the *Our Lady of Guadalupe School v. Morrissey-Berru* case, in which the Court held that a lay teacher (not ordained), whose only responsibility that touched on religion was teaching the subject as part of her assignment to teach a particular grade, and who was required to teach without deviation from a workbook prepared by the religious institution, was a minister.[89] Because of ministerial status, she could not challenge her dismissal on employment discrimination (age) grounds.[90] Justice Thomas concurred, positing that "the Religion Clauses *require* civil courts to defer to religious organizations' good-faith claims that a certain employee's position is 'ministerial.'"[91]

In the 2021 Term, in *Fulton v. City of Philadelphia*, the Court ruled that Philadelphia's refusal to contract with Catholic Social Services ("CSS") to provide foster care unless CSS ceased to discriminate against couples of the same sex violated the Free Exercise Clause.[92] And, in 2022, the Court confirmed

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[88] Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2386 (2020) (holding, at a procedural stage, that the rule-promulgating procedures creating religious exemptions conformed with all procedural requirements); *id.* at 2400, 2403–04 (Ginsburg, J., dissenting) (focusing on the rights in collision, noting that the decision "jettison[s] an arrangement that promotes women workers' well-being while accommodating employers' religious tenets and, instead, defer[s] entirely to employers' religious beliefs, although that course harms women who do not share those beliefs," and urging that the balanced approach of the past "does not allow the religious beliefs of some to overwhelm the rights and interests of others who do not share those beliefs"); *see* David R. Dow, *The Establishment Clause Argument for Choice*, 20 GOLDEN GATE U. L. REV. 479, 479 (1990) ("Both courts and commentators have treated the abortion issue primarily as a right to privacy question."); *see also* Burwell v. Hobby Lobby Stores, 573 U.S. 682, 707–08, 736 (2014) (holding that for-profit corporations are persons entitled, based on religious belief, to refuse to provide contraception coverage required by the Patient Protection and Affordable Care Act ("ACA"), and disregarding the rights of the woman affected, whose own religious beliefs, different from the corporations' were not considered and thus her First Amendment rights were excised from consideration); Sophia Martin Schechner, Note, *Religion's Power Over Reproductive Care: State Religious Freedom Restoration Laws and Abortion*, 22 CARDOZO J.L. & GENDER 395, 396 (2016) (noting that previously, the Court had addressed these issues primarily in terms of privacy rights, "avoiding 'the pervasive religious aura that suffuses the abortion debate'" and also recognizing that "the Court in *Hobby Lobby* explicitly considered the religious objections to providing women with contraceptives" (quoting Dow, *supra*, at 479)). *But see Little Sisters*, 140 S. Ct. at 2397 (Kagan, J., concurring) (questioning "whether the exemptions can survive administrative law's demand for reasoned decisionmaking").

[89] *Morrissey-Berru*, 140 S. Ct. at 2055–56.

[90] *Id.* at 2063–67.

[91] *Id.* at 2069–70 (Thomas, J., concurring) (emphasis added). *But see* Laycock, *supra* note 57, at 53 (asserting that the religion clauses "require government to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice" (quoting Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1001 (1990))).

[92] 141 S. Ct. 1868, 1882 (2021) (noting that the contract allowed for exceptions). *But see* Andrew Koppelman, *The Increasingly Dangerous Variants of the "Most-Favored-Nation" Theory of Religious Liberty*,

the primacy of religious rights over all other liberties in its holdings that to refuse to fly a Christian flag at city hall[93] and to fire a coach for leading Christian prayer on a public school's football field after a game[94] amount to prohibited discrimination on the basis of religion.[95]

Two recent Supreme Court religious assembly rulings, decided contrary to established precedent,[96] are informative of the Court's FEE approach. In both *Roman Catholic Diocese of Brooklyn v. Cuomo*[97] and *Tandon v. Newsom*,[98] cases using religion to challenge gathering guidelines issued to fight COVID-19's spread during the global pandemic, the majority made it clear that its interpretation of free exercise required governments to provide *greater* latitude

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SSRN 32 n.152 (2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4049209 ("It is impossible to infer discriminatory intent from the never-used boilerplate provision of Philadelphia's contract, and even if such an inference could be made, that is a question of fact that should have been remanded to the district court, not decided for the first time by an appellate tribunal."). For an awakened analaysis of *Fulton*, see Hernández-Truyol, *supra* note 37.

[93] Shurtleff v. Boston, 596 U.S. 142 S. Ct. 1583, 1593 (2022) (extending religious protections by declaring a religious flag on the City Hall flagpole of Boston to be private speech rather than government speech); *id.* at 1590–92 (using the *Summum/Walker* three-pronged test and analyzing the forum in terms of which prongs it felt were most dispositive on the ultimate outcome).

[94] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2422, 2427–28, 2433 (2022) (dismissing the *Lemon* test and holding that the Free Exercise Clause protects a school official engaging in a personal religious observance on school grounds—leading the football team in prayer in the locker room and praying on the football field accompanied by his student athletes—after every game, often, from government reprisal); *see also* BURNADETTE BARTON, PRAY THE GAY AWAY: THE EXTRAORDINARY LIVES OF BIBLE BELT GAYS 31 (2012) (discussing that when in the presence of Christian fundamentalist attitudes, people who may not share the same ideas "may hesitate to say so because of . . . 'personalism,'" the idea that "[w]e will go to great lengths to keep from offending others, even sometimes appearing to agree with them when in fact we do not").

[95] Amy Howe, *Court Will Take Up Five New Cases, Including Lawsuit from Football Coach Who Wanted to Pray on the Field*, SCOTUSBLOG (Jan. 14, 2022), https://www.scotusblog.com/2022/01/court-will-take-up-five-new-cases-including-lawsuit-from-football-coach-who-wanted-to-pray-on-the-field/ (emphasizing that the school district in *Kennedy* warned that a ruling in favor of the coach would require the Court to overturn "decades of settled law under both the Free Speech and Establishment Clauses"); *see also* Epstein & Posner, *supra* note 2, at 321 (asserting that there has been a "sharp break from earlier Supreme Court religion jurisprudence" due to "the appointment by Republican presidents of Supreme Court Justices who favor religious rights and liberties").

[96] Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603 (2020) (mem.) (denying a petition for injunctive relief, suggesting that religious institutions are not being unconstitutionally discriminated against if they are being treated the same as comparable secular institutions); Roberts v. U.S. Jaycees, 468 U.S. 609, 618, 623 (1984) (holding that the freedom of association is a fundamental right, but the freedom of association is not absolute and "[i]nfringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms").

[97] Consolidated with two cases brought by synagogues. Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020) (per curiam).

[98] 141 S. Ct. 1294 (2021) (per curiam).

to religious assemblies over secular ones solely because of their religious nature.[99]

In *Tandon v. Newsom*, the Court adopted the Most-Favored-Nation ("MFN") theory of religious exemptions in the context of California's COVID-19 regulations on at-home religious exercise.[100] MFN provides that "any secular exemption to a law automatically creates a claim for religious exemption, vastly expanding the government's obligation to provide religious accommodations to countless regulations."[101] In *Tandon*, the Court held that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise."[102] To be sure, there is ongoing debate about whether the secular activities the Court used for comparison were comparable at all. As Justice Kagan's dissent in *Tandon* artfully put it, such a position disregards both "law and facts alike": both the long-standing principle of law of treating religion equally and not preferably, and the facts regarding what is required of society during a health emergency.[103]

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[99] *Tandon* is one of a growing number of cases decided in the so-called shadow docket. The Court rules on particular issues using the shadow docket, a mechanism which allows it to rule on cases without oral argument, minimal briefing, and no explanation for its decisions. *See* Alexi Denny, Comment, *Clarity in Light: Rejecting the Opacity of the Supreme Court's Shadow Docket*, 90 UMKC L. REV. 675, 676 (2022). The shadow docket is only meant to apply where the petitioner is appealing a lower court decision, and where "exceptional circumstances warranting emergency aid exist, . . . show[ing] why relief cannot be found in any other form or from any other court." *Id.* at 678. Further, the applicant must show that they would suffer "irreparable harm" if the Court does not grant certiorari. *See* Lawrence Hurley, Andrew Chung & Jonathan Allen, *The 'Shadow Docket': How the U.S. Supreme Court Quietly Dispatches Key Rulings*, U.S. NEWS & WORLD REP. (Mar. 23, 2021), https://www.usnews.com/news/top-news/articles/2021-03-23/the-shadow-docket-how-the-us-supreme-court-quietly-dispatches-key-rulings. As of late, however, the Court has been using the shadow docket liberally, granting emergency relief for issues which neither warrant any particular emergency nor create the possibility of irreparable harm, and accordingly have provided little to no explanation for such expansive and unconstitutional decisions. *See Tandon*, 141 S. Ct. at 1298–99 (Kagan, J., dissenting) (noting the majority was without basis because religious gatherings were treated the same as secular gatherings and there was sound reasoning for treating at-home gatherings more stringently than public activities); *see also* Louisiana v. Am. Rivers, 142 S. Ct. 1347, 1348–49 (2022) (mem.) (Kagan, J., dissenting) (blasting the conservative majority for its willingness to apply the shadow docket in situations which do not warrant such emergency relief); S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 717 (mem.) (2021) (statement of Gorsuch, J.) (stating that the State had targeted religion for differential treatment).

[100] *Tandon*, 141 S. Ct. at 1296 ("[G]overnment regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise.").

[101] Mark Joseph Stern, *The Supreme Court Broke Its Own Rules to Radically Redefine Religious Liberty*, SLATE MAG. (Apr. 12, 2021), https://slate.com/news-and-politics/2021/04/ supreme-court-religious-liberty-covid-california.html.

[102] *Tandon*, 141 S. Ct. at 1296.

[103] *Id.* at 1298–99 (Kagan, J., dissenting).

Roman Catholic Diocese further illustrates the Court's willingness to favor religion by treating unlike facilities and activities equivalently.[104] The Court's *Roman Catholic Diocese* decision concluded that the gathering regulations imposed on religious institutions to stem the spread of COVID-19 were unconstitutional because certain designated essential businesses were treated more leniently.[105] Dissenting, Justice Sotomayor noted that the state applied similar or more severe restrictions to comparable secular gatherings, and the state only treated dissimilar activities more leniently.[106]

Precedent would have dictated a different outcome in both *Roman Catholic Diocese* and *Tandon*.[107] Rather than focusing solely on the claimed encroachment on the right of religious assembly, the Court could have considered the States' compelling interest in health and safety of its citizens to curtail the spread of a rampant and deadly disease.[108] Unsurprisingly, the Court myopically fixated on the alleged burden placed on the right to religious assembly and erased all other rights, including the rights to health and to nondiscrimination.

As of the end of the 2022 Term, the "play in the joints" has transmogrified to Free Exercise supremacy. However, this FEE is unmoored. Like the First Amendment guarantees, the constitutional Equal Protection mandate in the Fourteenth Amendment is due consideration and respect. In fact, the Equal Protection Clause is deemed the most important "[o]f all the amendments since the Bill of Rights,"[109] because it broke the United States' silence on equality and

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[104] Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 66, 69 (2020) (per curiam).

[105] *Id.*

[106] *Id.* at 79 (Sotomayor, J., dissenting)

[107] S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 717 (2021) (mem.) (statement of Gorsuch, J.) (granting partial injunctive relief to a religious house of worship and declaring that States cannot place restrictions on religious institutions where such restrictions are not placed on secular institutions); *id.* at 721 (Kagan, J., dissenting) ("The 'Constitution does not require things which are different in fact . . . to be treated in law as though they were the same." (alteration in original) (quoting Plyler v. Doe, 457 U.S. 202, 216 (1982))); *see also id.* at 720 ("Under the Court's injunction, the State must instead treat worship services like secular activities that pose a much lesser danger. That mandate defies our caselaw, exceeds our judicial role, and risks worsening the pandemic."); *id.* at 716–17 (Roberts, C.J., concurring) (noting the importance of ensuring that the Court defers to political officials for matters regarding public health policy).

[108] *See* Valerie C. Brannon, *UPDATE: Banning Religious Assemblies to Stop the Spread of COVID-19*, CONG. RSCH. SERV. (Apr. 26, 2020), https://crsreports.congress.gov/product/pdf/ LSB/LSB10450 (stating that a Kentucky church prevailed in its legal challenge during COVID-19, and that "on April 11, 2020, a federal district court entered a temporary restraining order preventing the Louisville mayor from prohibiting 'drive-in church services'").

[109] CHEMERINSKY, *supra* note 80, at 16.

explicitly prohibits states from "deny[ing] to any person within its jurisdiction the equal protection of the laws."[110]

Although the adoption of the Fourteenth Amendment dates to 1868, it was not until 1954 in *Brown v. Board of Education* that the Amendment began to realize the promise of equality.[111] Since that time, however, the Court has embraced the Fifth and Fourteenth Amendments' reach beyond race to include sex/gender,[112] national origin,[113] alienage,[114] and sexuality,[115] although all the protected categories do not receive the same level of constitutional scrutiny. Significantly, the Equality mandate applies to religion, holding a state responsible if it denies a religious person the same opportunity to compete for or enjoy an otherwise generally available benefit.[116]

FEE elevates religion over all other constitutional rights. Recovering from FEE requires the Court to recognize other intertwined liberty interests rather than deny the discriminatory consequences of decisions on other persons whose constitutional rights the cases, at best, ignore. The Court's recent jurisprudence obscures and negates myriad high-level constitutional rights based on someone else's religious beliefs.

To reverse such a myopic analytical framework, this Article proposes a paradigm that recognizes the multidimensional competing rights and seeks to

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[110] U.S. CONST. amend. XIV, § 1.

[111] 347 U.S. 483 (1954); *see also* Bolling v. Sharpe, 347 U.S. 497, 500 (1954) (holding in a companion case to *Brown* that the Due Process Clause of the Fifth Amendment includes a mandate of equal protection to the federal government).

[112] Frontiero v. Richardson, 411 U.S. 677, 688 (1973) (plurality) (applying to classifications based on sex under the Fourteenth Amendment); Craig v. Boren, 429 U.S. 190, 197, 199–200 (1976) (applying intermediate scrutiny to a classification based on sex); United States v. Virginia, 518 U.S. 515, 531 (1996) ("Parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action.").

[113] *See* Hernández v. Texas, 347 U.S. 475, 479 (1954) (holding that discrimination in jury service selection on the basis of national origin "is discrimination prohibited by the Fourteenth Amendment").

[114] *See* Graham v. Richardson, 403 U.S. 365, 372 (1971) ("[C]lassifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny." (footnotes omitted)).

[115] *See* Romer v. Evans, 517 U.S. 620, 635 (1996) (invalidating a Colorado state law that prohibited municipalities from protecting LGBTQ+ citizens from discrimination); Lawrence v. Texas, 539 U.S. 558, 578 (2003) (invalidating a Texas state law that criminalized sexual acts with another person of the same sex); United States v. Windsor, 570 U.S. 744, 775 (2013) (declaring as unconstitutional the part of the federal Defense of Marriage Act ("DOMA") that defined marriage as the union between a man and a woman); Obergefell v. Hodges, 576 U.S. 644, 681 (2015) (ruling that laws prohibiting marriage between people of the same sex are unconstitutional); V.L. v. E.L., 577 U.S. 404, 405 (2016) (overturning a ruling by the Alabama Supreme Court in which the state court refused to recognize an adoption of a child by a same-sex couple that took place in another state, and thus Alabama had to recognize the adoption decree issued in the State of Georgia).

[116] *See generally* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017).

ensure that government neither unnecessarily subordinates one right to another nor marginalizes the rights holders when rights collide. The awakened paradigm rejects a hierarchical ordering of liberties and proposes that the religion/equality tensions be resolved by adopting such an approach. Awakening the law resolves the rights tensions by applying a methodology that gives voice not only to the First Amendment rights and rights holders, but also to the correspondingly significant liberty and equality/nondiscrimination constitutional interests and its stakeholders obscured by the Court's single-focus analysis.[117] Because of its erasure of other fundamental rights, FEE is not, and should not be, the analytical model when constitutional rights collide.

II. LEARNING FROM ABROAD

International and foreign law provide insight[118] as to how other countries have struck a balance between individuals' rights and others' religious beliefs. A comparative analysis is useful for three reasons. First, the United States played a central role in the creation of the international legal system generally, the human rights system specifically, and the InterAmerican regional system.[119] As a leader in the conception and construction of these systems, and as a principal author of the documents that designed them, the values expressed in the documents reflect and embrace U.S. norms, policies, and values.[120] Thus, it is not surprising that international documents afford similar—indeed parallel—protection to the religious rights afforded by the First Amendment as well as to

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[117] This proposed paradigm dovetails with the third-party harm literature. *See generally Reframing the Harm*, *supra* note 41.

[118] International law is U.S. law as a matter of constitutional law. Under Article VI of the U.S. Constitution, treaties are the supreme law of the land. U.S. CONST. art. VI. And the law of nations, also known as customary law which is the other primary source of international law, is mentioned in Article 1 Section 8. U.S. CONST. art. 1, § 8. In a 1900 case, the *Paquete Habana*, the Court held that "[i]nternational law is part of our law." The Paquete Habana, 175 U.S. 677, 700 (1900). The Court further stated:

> For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators who by years of labor, research and experience have made themselves peculiarly well acquainted with the subjects of which they treat.

Id.

[119] *See generally* Berta Esperanza Hernández-Truyol, *Human Rights Through a Gendered Lens: Emergence, Evolution, Revolution*, *in* WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW (Kelly Askin & Dorean Koenig eds., 1999); *see also The Role of the U.S. in Human Rights*, HUM. RTS. LEARNING MODULE, http://www.columbia.edu/itc/hs/pubhealth/modules/humanRights/role.html ("The US has been influential in the shaping of international human rights standards.") (last visited Mar. 20, 2023).

[120] The international framework protects persons against discrimination including on the grounds of sex (which, as in the United States, includes sexuality), race, and religion.

the equality/non-discrimination rights afforded by the Fifth and Fourteenth Amendments. Specifically, the U.N. Charter,[121] the International Covenant on Civil and Political Rights ("ICCPR"),[122] and the International Covenant on Economic, Social and Cultural Rights ("ICESR")[123]—all core human rights documents—require equality and prohibit discrimination based on myriad grounds, including religion.[124]

The second reason to focus on international law is that international and regional norms articulated in treaties to which the United States is a signatory, as well as established custom, are binding on the United States.[125] Last, even if the normative standards were not binding and were not deemed already to reflect U.S. standards, international, regional, and foreign law can serve as comparative pathmarkers on possible ways to resolve the tensions between religion and equality/nondiscrimination rights.

Focusing on religion, Article 18 of the ICCPR, against which the United States did not interpose a reservation, much like the letter and spirit of the First

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[121] U.N. Charter ch. XIV [hereinafter U.N. Charter], https://www.un.org/en/about-us/un-charter/full-text (last visited Jan. 18, 2023).

[122] ICCPR, *supra* note 40.

[123] International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 14532.

[124] In addition to protections afforded by international instruments, regional instruments also contain protections against discrimination based on sex and religion. In the European system, Article 1 of Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms establishes a general prohibition against discrimination that includes sex and religion. EUROPEAN COURT OF HUMAN RIGHTS, EUROPEAN CONVENTION ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS 51 (1950), http://www.echr.coe.int/Documents/Convention_ENG.pdf (last visited Mar. 20, 2023) (detailing Protocol 12, article 1). Similarly, in the Charter of the Organization of American States, the prohibition of discrimination on the basis of these protected classes is a key principle. Charter of the Organization of American States arts. 3, 45 https://www.oas.org/en/sla/dil/docs/inter_american_treaties_A-41_charter_OAS.pdf (last visited Mar. 20, 2023). The American Convention on Human Rights ("ACHR"), and the Protocol of San Salvador to the ACHR, establish the norms barring discrimination based on sex or religion. Org. of American States [OAS], *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador*,*"* O.A.S.T.S. No. 52 (Nov. 17, 1988), https://www.oas.org/dil/1988%20Additional%20Protocol%20to%20the%20American%20Convention%20on%20Human%20Rights%20in%20the%20Area%20of%20Economic,%20Social%20and%20Cultural%20Rights%20(Protocol%20of%20San%20Salvador).pdf (elaborating on social, economic and cultural rights, work, social security, health, food, education, healthy environment, culture, family, children, the elderly, the disabled). The African system offers broad nondiscrimination protections with respect to sex and religion; the Charter promises equality and free practice of religion. Org. of African Unity [OAU], *African Charter on Human and Peoples' Rights*, arts. 3, 8, 19, 21 I.L.M. 58 (1982) (art. 3 equality; art. 8 free practice of religion; art. 19 anti-domination).

[125] The Paquete Habana, 175 U.S. 677, 700 (1900) ("International law is part of our law, and . . . where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations." (citing Hilton v. Guyot, 159 U.S. 113, 163–64, 214–15 (1895)).

Amendment to the U.S. Constitution, expressly protects religion.[126] It clarifies, however, that "[f]reedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or *the fundamental rights and freedoms of others*."[127] Given the similarities between the international protections and the U.S. Constitution's protections, Article 18, much like the third-party harm doctrine in the United States, provides a foundation for a comparative approach to resolve conflicts that may emerge between the right to manifest one's religion and the fundamental rights to equality/nondiscrimination of others.[128]

The 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief,[129] although not binding, articulates the nature and extent of religious liberties. Significantly, mirroring Article 18 of the ICCPR, it provides that freedom to manifest one's religion stops when it interferes with the fundamental rights of others.[130] Thus, the law, while protecting religion, rejects the deployment of culture, including religious culture, as the basis for the denial of equality rights.[131]

Beyond international law, regional courts' approaches to resolving the rights conflict are instructive. One case in the European system directly raised the issue of religious exemptions from nondiscrimination norms.[132] The U.K. Court of Appeal rejected the claim of discrimination of a fired public servant who refused to register civil partnerships for couples of the same sex ruling that as a public servant she had to comply with the tasks of her employment.[133] The U.K. Court noted that it was the public servant who discriminated against LGBTQ+ persons

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[126] ICCPR, *supra* note 40, art. 18; *see also* U.S. CONST. amend. I.

[127] ICCPR, *supra* note 40 (emphasis added).

[128] *See* United Nations Hum. Rts. Comm., General Comment No. 22 (48), U.N. Doc. CCPR/C/21/Rev.1/Add.1 (1993); HEINER BIELFELDT & MICHAEL WIENER, FREEDOM OF RELIGION OR BELIEF: AN INTERNATIONAL LAW COMMENTARY 41–51 (2016).

[129] G.A. Res. 36/55, Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (Nov. 25, 1981).

[130] *Id*. art. 1 § 3.

[131] *U.N. General Assembly: Rights Groups Welcome Condemnation of Killing of LGBT Persons*, INT'L SERV. FOR HUM. RTS. (Nov. 20, 2014), http://www.ishr.ch/news/un-general-assembly-rights-groups-welcome-condemnation-killing-lgbt-persons.

[132] Ladele v. London Borough of Islington [2009] EWCA (Civ) 1357, ¶¶ 1, 73.

[133] *Id.* ¶ 73.

in contravention of government policy.[134] The European Court upheld the U.K. Court's decision.[135]

Foreign law decisions are also an interesting source of analytical possibilities. For example, in the context of public service, courts in Canada (a state with no official religion),[136] France (a state observing the separation of church and state),[137] Hungary (an officially Christian state), and the United Kingdom[138] (a state with an established church),[139] all have rejected claims of religious exemptions from observing laws of general application by civil servants whose work relates to issuing licenses or registering marriages and whose religious beliefs include objections to marriage between same-sex couples.[140] National courts in these states have concluded that public employees must apply laws neutrally, their religious beliefs notwithstanding.

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134 *Id.*

135 *See* Eweida v. United Kingdom, 2013-I Eur. Ct. H.R. 215 (2013) (holding the United Kingdom had a wide margin, especially in light of the still-evolving normative standards concerning the protection of same-sex relationships, and upholding the finding that the state did not discriminate based on religious beliefs).

136 *In re* Marriage Commissioners Appointed Under the Marriage Act, [2011] 366 Sask. R. 48, ¶¶ 2–3, 22, 32–33 (Can.) (holding that amendment that would grant commissioners, the only persons allowed to perform non-religious marriage ceremonies, a religious exemption from conducting marriages between persons of the same sex violated the Canadian Charter of Rights and Freedoms and concluding that commissioners could make the choice to follow the law and marry same-sex couples or find another job). Under this holding, refusal to perform their jobs constituted an act of legally sanctioned discrimination and caused harm by perpetuating prejudice and inequality. *Id.* Further, the availability of an alternative source of the services, such as another commissioner who could perform the marriage, was of no moment; the denial of the services effected the proscribed discrimination. *Id.*

137 Conseil constitutionnel [CC] [Constitutional Court] decision No. 2013-353QPC, Oct. 18, 2013, Rec. 1000, ¶¶ 1, 6, 10 (Fr.) (rejecting argument for religious exemptions in light of seven mayors' argument that the French Constitution's freedom of conscience provision mandated religious exemptions from the performance of marriages between people of the same sex by public servants who opposed such unions for religious reasons, because of the need for a state to provide services in a neutral fashion).

138 Ladele v. London Borough of Islington [2009] EWCA (Civ.) 1357, ¶¶ 73–75.

139 INTL. NETWORK OF C.L. ORG. DRAWING THE LINE, TACKLING TENSIONS BETWEEN RELIGIOUS FREEDOM AND EQUALITY 10 (2015) [hereinafter DRAWING THE LINE], https://www.aclu.org/report/drawing-line (noting Hungarian Constitutional Court's rejection of exemptions based on the necessity for a neutral application of the law, when civil registrars, who are state officers, challenged the country's partnership law).

140 *Id.* at 8–10.

With respect to private entities offering public accommodations, courts in the United Kingdom[141] and Canada[142] have concluded that once private entities, such as innkeepers, enter the marketplace, they cannot discriminate. Private entities cannot rely on religious beliefs to refuse service (to LGBTQ+ persons). Such actions are discriminatory and cause harm to people's dignity.

Conflicts also arise when religious and religiously affiliated institutions provide services to the public but seek religious exemptions from having to provide service to LGBTQ+ persons. Courts in Australia[143] and Israel[144] have concluded that if a religiously affiliated entity functions as a commercial institution and offers public accommodations, it cannot discriminate. In the context of employment, two cases, one from Canada[145] and another from South

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[141] *See* Bull v. Hall [2013] UKSC 73 [51]–[55] (appeal taken from Eng.) (holding that a bed and breakfast that refused to rent a room to a same-sex couple because of the owner's religious beliefs could not discriminate, and concluding that the right to one's religious beliefs reaches its limit when such beliefs conflict with others' legally protected rights, and thus the owner's actions were discriminatory and caused dignitary harms). *But see* Lee v. Ashers Bakery Co. [2018] UKSC 49 [55] (appeal taken from N. Ir.) (ruling there was no discrimination by Ashers Bakery, whose owners, based on their religious beliefs, refused to bake a "gay cake" with the message "Support Gay Marriage"). In a postscript, the court draws a clear distinction with the U.S. *Masterpiece Cakeshop* case which was being heard contemporaneously with Ashers Bakers. The court makes it clear that whereas *Masterpiece Cakeshop* was about producing any cake for a "particular customer," this case was about producing a "particular message" for any customer. In Ashers, there is no discrimination on the basis of sexual orientation. *Id.* at [62].

[142] Eadie v. Riverbend Bed & Breakfast, 2012 BCHRT 247, ¶ 169 (Can.) (finding that although the innkeepers had a sincerely held religious belief that marriage is between a man and a woman, once they chose to enter into the business of offering accommodations to the public, they could not claim a religious exemption and cancel a reservation because they learned the couple was gay; they must comply with general laws and cannot discriminate based on religious beliefs).

[143] *Christian Youth Camps v. Cobaw Cmty. Health Servs.* [2014] VSCA 75, ¶¶ 11, 216, 246, 437, 439 (Austl.) (holding that because the church-owned camp functioned as a commercial institution, it was not entitled to the religious exemption; the camp had to obey the nondiscrimination law and neither private entities, nor religiously affiliated institutions that open their doors to the public, can discriminate based on religious beliefs).

[144] DRAWING THE LINE, *supra* note 138, at 18 (describing a holding that a religious cooperative cannot refuse to allow use of their reception hall to hold a wedding by a same-sex couple because "[a]s soon as the defendants opened their doors to all, they cannot close them to those whom they believe do not meet their interpretation of the requirements found in the Old and New Testaments, while offending their dignity and sensitivities" (alteration in original) (quoting CS 5901/09 Tal Ya'akovovich v. Yad Hashmona Guest House ¶ 34, [2012] (Isr.)). However, this is not a universal point of view. *See* St. Margaret's Child. & Fam. Care Soc'y v. Off. of the Scottish Charity Regulator, [2014] SC 02/13, 68–71 (Scot.) (holding that a policy at St. Margaret's, a Catholic charity, that refused to place children up for adoption with same-sex couples, constituted discrimination, but allowing St. Margaret's to deny services because there were alternative locations at which same-sex couples would be able to adopt and that requiring a policy change would be disproportionate to the harm of discrimination because without church support the agency would not be able to continue providing adoption services).

[145] DRAWING THE LINE, *supra* note 138, at 20 (describing a Canadian case that held that in religiously affiliated group home, employer's religious beliefs do not justify creating a poisoned work environment; employer must comply with nondiscrimination laws).

Africa,[146] have concluded that religiously affiliated institutions cannot discriminate in employment based on sexual orientation.

Finally, state laws generally recognize so-called ministerial exemptions—exemptions from laws of general applicability to decisions made by religious institutions with respect to those who perform religious (ministerial) functions.[147] To be sure, most if not all states recognize and accept a narrow ministerial exemption that goes to religious actors within the confines of their religious institutions. This hugely contrasts with the trend in the United States that is moving toward a complete insulation of religiously affiliated institutions from employment laws, as well as from other laws of general application.[148]

Given the increase in tensions between religion and persons asserting privacy, intimacy, and equality ("PIE") rights, these pathmarkers, together with the principle that one's religious rights stop when exercising those rights harms others' fundamental rights, are the foundation to articulate four principles concerning resolving rites versus rights conflicts.

(1) Discrimination by public servants should be strictly prohibited as it is tantamount to discrimination by the state itself. (2) Private service providers offering public accommodations or doing business in the marketplace must abide by general laws that forbid discrimination.[149] Once a business is open to the public, it cannot deny the product or service based on religion; the availability of other providers is irrelevant. (3) Except in exceptional

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[146] *Strydom v. Nederduitse Gereformeerde Gemeente Moreleta Park* 2009 (4) SA 510 (EqC) at ¶¶ 25, 41 (S. Afr.) (holding that dismissal of gay music teacher was discriminatory and that religious institutions are bound by nondiscrimination in employment laws, particularly when the employee is not in a position that was required to teach religion or religious tenets); *see also* DRAWING THE LINE, *supra* note 138, at 21. *But see* LUCY VICKERS, RELIGION AND BELIEF DISCRIMINATION IN EMPLOYMENT—THE EU LAW 43 (2006), https://op.europa.eu/en/publication-detail/-/publication/e4285a0c-d43a-4cf8-81aa-ceac422e1b7b (describing how the Supreme Court of Hungary rejecting case on dismissal of theology student who came out to one of his professors and finding that a religious university is exempted from the obligation not to discriminate because students of theology may become pastors).

[147] DRAWING THE LINE, *supra* note 138, at 21–23.

[148] *See generally* Our Lady of Guadalupe Sch. v. Morrisey-Berru, 140 S. Ct. 2049, 2069 (2020) (applying the ministerial exception to insulate religious employers writ large—indeed not limited to places of worship but extended to affiliated institutions providing services in the public space, in this instance education—from anti-discrimination laws). Title VII of the Civil Rights Act has a religious exception that permits religious organizations (i.e., those whose "purpose and character are primarily religious") to give preference in employment to members of their own religion. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(b).

[149] Newman v. Piggie Park Enters., Inc., 256 F. Supp. 941, 945 (D.S.C. 1966), *rev'd*, 377 F.2d 433 (4th Cir. 1967), *aff'd*, 390 U.S. 400 (1968) (per curiam) (disallowing commercial entity religious exemption to justify racial discrimination).

circumstances—such as a Catholic seminary not having to accept women since they cannot be priests—even religiously affiliated institutions, once open to the public, must obey general laws and cannot deny services.[150] (4) Lastly, religious institutions, in performance of their ministry are free to discriminate based on their religious tenets such as a Catholic church not having to ordain women.[151] These principles eschew approaches such as FEE, that give primacy to religion and negate other fundamental rights as well as provide helpful guideposts for the analysis of rights in collision, especially collisions between religion and other rights.

III. AWAKENING THE LAW: A NEW PARADIGM[152]

Religion, on the one hand, and privacy, intimacy, and equality rights on the other, are high order constitutional and human rights. Learning from the

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[150] Bob Jones Univ. v. United States, 461 U.S. 574, 602–04 (1982) (disagreeing with the university's argument that it could engage in racial discrimination "on the basis of sincerely held religious beliefs" and concluding that "this Court has found certain governmental interests so compelling as to allow even regulations prohibiting religiously based conduct").

[151] The third principle rejects the use of religion as a justification to discriminate outside the realm of the religious institution in furthering its religious mission. *End the Use of Religion to Discriminate*, AM. C.L. UNION (ACLU), https://www.aclu.org/issues/religious-liberty/using-religion-discriminate/end-use-religion-discriminate.

[152] "Awakening the Law" is a term I have coined to describe a process of unearthing skewed origins, interpretations, and presumptions in the law, legal principles, and legal structures to unveil their consequent subordinating and marginabilizing effects. *See* Hernández-Truyol, *supra* note 37, at 931–32. Awakening embraces reaching intentional consciousness, dovetailing with the idea of attaining a critical consciousness, a model originally developed by Paolo Freire to foster literacy among the oppressed. Myriad disciplines such as political science, religion, psychology, education, economics, and sociology, embrace and advance the concept of awakening. In these fields, awakening represents attaining increasing consciousness of the world outside of oneself. To be "awakened" is to be aware—aware of issues that may be overlooked by others in society, in the family, in relational experiences. Awakening experiences expand and intensify awareness to one's surroundings and allow relating to the world and the problems suffered by others in a deeper way. Thus, although Awakening the Law is a larger project, this Article utilizes the concept to awaken the First Amendment, particularly recent decisions that myopically elevate religion above all other fundamental rights. A significant component of awakening is the acknowledgment that every person is guided by what I label our perceptual playbook—the collection of systems of beliefs, cognitive scripts, created and passed down by families, religious traditions, cultures, the societies in which we live as well as by the law, the legal system, and its developed jurisprudence. Each of our perceptual playbooks is imbued with ideas, theories, and tropes that not only define us as individuals but guide how we perceive human interactions and delineate how we comprehend society and the world. Recognition and awareness of our perceptual playbooks expose our own biases. Awakening reveals that our perceptual playbooks, ingrained in us and imbued with inherent biases, constitute the foundation for our viewpoints. To shed prejudices, we must perform a critically conscious analysis to unearth, name, and molt the foundations of the perceptual playbooks. Awakening the law necessitates that lawmakers, judges, and lawyers become aware of learned cognitive biases in order not to embed them in the law, legal system, and legal structures. Awakening is a life-long process of critical deconstruction of our thoughts grounded upon our learned perceptual playbooks. Through awakening, we expose a false self, based on inherited tropes. In awakening, we

signposts, when two significant rights clash, the answer is not to elevate religion above all rights. This effects an erasure and denial of the fundamental rights of others. Rather, to protect all rights, it is appropriate to embrace the principles derived from the international, regional, and foreign jurisprudence which, consistent with the "play in the joints" of the First Amendment, provide that freedom to manifest one's religion or beliefs can be limited when needed to protect *the fundamental rights and freedoms of others.*

This Article proposes a novel awakened paradigm that can achieve these ends. The proposed framework is both methodological and substantive. Methodologically the process applies the awakening formula that exposes biases in the law and, with respect to FEE, will unearth the injustices effected by ignoring the interplay of religion with other rights. Awakening the law requires four steps:

> (1) *Recognition* of the legal quandary—what is the problem or concern; (2) *Exposure*—investigating and unveiling whether and, if so, how the legal quandary is biased; (3) *Deliberation* on the predicament—consideration of the bias and listening to narratives and counternarratives to ascertain the gravamen of the concern; and (4) proposal of a *Solution* that eliminates the unearthed injustice.[153]

This methodology recognizes and exposes the bias ingrained in perceptual playbook tropes, and with deliberation leads to the consideration of alternatives that do not embed bias into law.

Substantively, the methodology is applied to a justice-centered framework that, consistent with both the First Amendment's "play in the joints" and the pathmarkers, considers the impact on all rights-holders when constitutional rights collide. The framework consists of a foundation of dignity,[154] which is central to humanity,[155] and three essential pillars that together create an analytical checklist for an awakened law. While the U.S. Constitution does not include a single mention of dignity, case law, notably on LGBTQ+ rights,

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give birth to an authentic self who becomes cognizant of existing patterns, interrogates those patterns and their sources, systemically challenges and dismantles the playbooks, and creates new narratives/counternarratives. Awakening will facilitate the just analysis and resolution of conflicts arising from constitutional rights collisions. *See* Hernández-Truyol, *supra* note 37, at 931–32.

[153] Hernández-Truyol, *supra* note 37, at 955.

[154] *See generally* Berta Esperanza Hernández-Truyol, *Hope, Dignity, and the Limits of Democracy*, 10 NE. U. L. REV. 654 (2018).

[155] *See generally* Jeremy Waldron, *Human Dignity: A Pervasive Value*, SSRN (Oct. 15, 2019), https://ssrn.com/abstract=3463973. Over 150 countries have included principles of dignity in their Constitutions or bodies of law. *Id.* at 2.

embraces rights of dignity.[156] Moreover, international human rights law, which is part of U.S. law,[157] and serves to develop, expand, and transform rights concepts,[158] centers dignity.[159]

Beyond the foundational value of human dignity,[160] the substantive framework's three pillars—anti-subordination, multidimensionality, and marginability[161]—ensure the protections of all rights in collision. These four factors provide the substantive structure for the framework that guides in the resolution of conflicts while respecting significant constitutional and human rights values. The awakened paradigm enables the consideration of the legal

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[156] *See also* Obergefell v. Hodges, 576 U.S. 644, 672 (2015) (recognizing dignitarian interests and holding that the Due Process Clause of the Fourteenth Amendment guarantees the right to marry as one of the fundamental liberties it protects, and that analysis applies to same-sex couples as well as oppositive-sex couples); Hernández-Truyol, *supra* note 154, at 671. *See generally* Lawrence v. Texas, 539 U.S. 558 (2003) (recognizing dignitarian interests and holding that the Texas statue making it a crime for two persons of the same sex to engage in certain intimate sexual conduct violates the Due Process Clause).

[157] *See generally* The Paquete Habana, 175 U.S. 677, 679, 700 (1900) (holding that the capture of fishing vessels as prizes of war violates international law and is binding when integrated with U.S. law).

[158] *See generally* Berta Esperanza Hernández-Truyol, *Borders (En)Gendered: Normativities, Latinas, and a LatCrit Paradigm*, 72 N.Y.U. L. REV 882 (1997) (pushing for the incorporation of a more international human rights regime) [hereinafter Hernández-Truyol, *Borders (En)Gendered*]; Berta Esperanza Hernández-Truyol, *The Gender Bend: Culture, Sex and Sexuality—A LatCritical Human Rights Map of Latina/o Border Crossings*, 81 IND. L.J. 1283 (2008) [hereinafter Hernández-Truyol, *The Gender Bend*] (emphasizing that while cultural expression is protected as a human right, it is typically not considered in the U.S. legal system); Berta Esperanza Hernández-Truyol, *Globally Speaking—Honoring the Victims' Stories: Matsuda's Human Rights Praxis*, 112 MICH. L. REV. FIRST IMPRESSIONS 99 (2014) [hereinafter Hernández-Truyol, *Globally Speaking*] (discussing the protection of freedom of expression through international law and how the extent of the protection depends upon the state).

[159] Hernández-Truyol, *supra* note 154, at 669; *see also, e.g.*, Berta Esperanza Hernández-Truyol, *Latina Multidimensionality and LatCrit Possibilities: Culture, Gender, and Sex*, 53 U. MIAMI L. REV. 811, 828 (1999) [hereinafter Hernández-Truyol, *Latina Multidimensionality*]; Hernández-Truyol, *Borders (En)Gendered*, *supra* note 158, at 1288; Hernández-Truyol, *Awakening the Law*, *supra* note 37, at 956; *cf.* Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1152 (2008) (arguing in favor of identity-specific standards).

[160] Dignity is how every human should be treated simply because of their humanity. A law that does not respect dignity is asleep. Although dignity is absent from our Constitution, some cases, notably cases on queer rights, embrace dignitarian rights. That textual void notwithstanding, international human rights ("IHR") law, which I have often utilized to develop, expand, and transform LatCritical ideas and concepts, centers dignity and that IHR law is also part of U.S. law. If a law is a blind affront to dignitarian rights, it is asleep. The other three pillars are (1) anti-subordination—analysis that interrogates and identifies hierarchies or hierarchical assumptions involved in the conflict and deconstructs them, (2) multidimensionality—a layer of analysis that allows the identification of locations of bias considering all the aspects of a person's identity or all rights involved in a collision, and (3) anti-marginability—a holistic analysis that contextualizes the conflict and identifies counternarratives that vary depending on the marginalization and vulnerabilities of the persons or rights involved.

[161] "Marginable" is a word coined by the author to encompass marginalized and vulnerable people. Berta Esperanza Hernández-Truyol, *Globalizing Women's Health and Safety: Migration, Work and Labor*, 15 SANTA CLARA J. INT'L L. 48, 51 (2017).

concerns in the context of the factors and features of each conflict; the contextualization allows for a just deliberation about all the rights affected by the decision-making in any one case in which constitutional rights collide. Following is a detailed explanation of these pillars.

A. Anti-Subordination

An anti-subordination analysis exposes the existence and nature of hierarchies and hierarchical ideologies and assumptions that affect subordination.[162] An anti-subordination inquiry unveils the myriad hierarchical systems of beliefs embedded in both individual and structural perceptual playbooks that enable the unconscious privilege of some to result in a preference for the privileged over others. Such hierarchy is eschewed by an awakened law.

Significantly, consciousness is not synonymous with intentionality. "[L]aws and large swaths of our legal system were intentionally crafted to exclude, marginalize, and disempower those considered less important,[163] and even less human," by those who controlled the systems of law and governance and placed themselves at the top.[164] Awakenedness is awareness—consciousness—that the law, even as intentionally crafted, can be unjust.

An anti-subordination analysis requires that no dominance[165] be ascribed to a constitutional value over another.[166] Comporting with the ideal of equality, the anti-subordination pillar rejects legally- and socially-entrenched hierarchies. Such an approach is appropriate especially when two rights protected in the constitution are on a collision course. In the context of equality/nondiscrimination and religion, neither right should be subordinated to

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[162] *See* Whitehead, *supra* note 12 (pointing out that numerous studies have shown that Christian nationalism is strongly associated with "attitudes concerning proper social hierarchies by religion, race, and nativity").

[163] In recent years, there has been an alarming rise in the Court's use of the "shadow docket" to push an ultraconservative agenda while simultaneously attacking constitutional rights. *See* Denny, *supra* note 99, at 687. These decisions can come out in the dead of night and without appropriate briefing or explanation. *See id.* at 691. In 2019, for example, the Court allowed President Trump's ban on transgender military members to go into effect. ALL. FOR JUST., IN THE DEAD OF NIGHT: THE SUPREME COURT'S USE OF THE SHADOW DOCKET TO ENACT A RADICAL AND HYPER-PARTISAN AGENDA 17 (Oct. 5, 2021), https://www.afj.org/wp-content/uploads/2021/10/21-AFJ-Shadow-Docket-Report.pdf.

[164] Hernández-Truyol, *supra* note 37, at 957.

[165] Anti-dominance safeguards people not just as individuals but also as part of a protected class. *See id.*

[166] *See* Meg Penrose, *Equal Justice Under Law: Navigating the Delicate Balance Between Religious Liberty and Marriage Equality*, 61 WASHBURN L.J. 191, 220 (2021) ("An ultimate solution—lifting one right above the other—will be messy. And it is avoidable.").

the other.[167] Hierarchies among protected classes or between protected rights are constitutionally infirm as they perpetuate inequality.[168]

B. Multidimensionality[169]

Following the exposure of inherently biased, legally, and socially fabricated hierarchies, a multidimensionality analysis provides a multilayered assessment, with respect to the clashing rights, of the possible locations of bias in the perceptual playbooks.[170] Multidimensionality acknowledges that persons are complex; personhood is the aggregate of human identities. Thus, a legal approach that considers only one identitarian factor is myopic and distorts the circumstances of the conflict. The proposed framework centers the person in all their complexity including the reality that some of their identitarian characteristics may be privileged and some subordinated. These axes of privilege/subordination exist along the lines of race, sex, ability, sexuality, gender identity, economics, education, and religion. The embrace of humans' multidimensionality transforms legal analysis to allow an inquiry that can fully and fairly evaluate the context of any conflict by unveiling biases in the perceptual playbooks that weigh against a just outcome.[171] The process of unveiling bias enables finding an awakened solution to any conflict.

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[167] *See* Koppelman, s*upra* note 92, at 55 ("Because [religion] is so important for many people, it is an appropriate category of protection. But at the most fundamental level of analysis, religion is not superior to other ends and aspirations."); *see also* James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), *reprinted in* 2 THE WRITINGS OF JAMES MADISON 184–85 (1901) (referenced by Koppelman in the aforementioned article).

[168] The anti-subordination literature suggests that there is a core principle of "a contextual effort to analyze power dynamics, systems, attitudes, and practices that operate explicitly or implicitly to maintain social, economic, and political dominance by one group over another." Lucinda M. Finley, *Sex-Blind, Separate but Equal, or Anti-Subordination? The Uneasy Legacy of* Plessy v. Ferguson *for Sex and Gender Discrimination*, 12 GA. ST. U. L. REV. 1089, 1122 (1996). Anti-subordination not only takes into account the differences among groups, but also places importance on the "cultural constructions and hierarchies of power" that force the differences to be interpreted as "inherent and as better or worse on a hierarchy of social value and domination." *Id.*

[169] The author coined the term "multidimensionality" in 1994. *See* Berta Esperanza Hernández-Truyol, *Building Bridges—Latinas and Latinos at the Crossroads: Realities, Rhetoric and Replacement*, 25 COLUM. HUM. RTS. L. REV. 369, 433 (1994); Hernández-Truyol, *supra* note 37, at 957. *See generally supra* text accompanying notes 25, 53 & 154.

[170] Hernández-Truyol, *supra* note 37, at 957.

[171] This concept is not foreign to legal analysis. In *District of Columbia v. Heller*, Justice Breyer dissented, stating that he would have adopted an interest-balancing inquiry, and furthered this point by noting that "'where a law significantly implicates competing constitutionally protected interests in complex ways,' the Court generally asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests." 55 U.S. 570, 689–90 (2008) (Breyer, J., dissenting) (quoting Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 402 (2000) (Breyer, J., concurring)).

Multidimensionality is related to anti-subordination as it exposes the insufficiency, inefficacy, and injustice from which a single-lens probe suffers.[172] It is beyond peradventure that U.S. courts consider only one constitutionally protected trait or right at a time. This legal approach at best obscures, and at worst denies, justice as decision-making occurs in a factual vacuum.[173] The fatal imperfection in such an approach is that it negates the whole person whose rights are at risk.

An individual is the sum of their identities, not simply the isolated trait on which a court may concentrate in litigation, such as race, sex, ethnicity, sexuality, or religion.[174] For example, antidiscrimination law does not recognize a Black-woman category, notwithstanding the reality that Black women experience life and discrimination in a way different from Black men or white

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> Any answer would take account both of the statute's effects upon the competing interests and the existence of any clearly superior less restrictive alternative. . . . Contrary to the majority's unsupported suggestion that this sort of "proportionality" approach is unprecedented, the Court has applied it in various constitutional contexts, including election-law cases, speech cases, and due process cases.

Id. at 690 (citation omitted); *see, e.g.*, Frisby v. Schultz, 487 U.S. 474, 485–88 (1988) (balancing rights of privacy and expression); Rowan v. Post Off. Dep't, 397 U.S. 728, 736 (1970) (same). There are also cases involving First Amendment interests of listeners or viewers. *See, e.g.*, Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 192–94 (1997) (recognizing the speech interests of both viewers and cable operators); Colum. Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 102–03 (1973) ("Balancing the various First Amendment interests involved in the broadcast media . . . is a task of great delicacy and difficulty."); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 389–90 (1969) (holding that the First Amendment permits the Federal Communications Commission to restrict the speech of some to enable the speech of others). The integrity of the electoral process has also been discussed. *See, e.g.*, *Burson*, 504 U.S. at 198–211 (weighing First Amendment rights against electoral integrity necessary for right to vote); Anderson v. Celebrezze, 460 U.S. 780, 788–90 (1983) (same); Storer v. Brown, 415 U.S. 724, 730 (1974) ("[T]here must be a substantial regulation of elections if they are to be fair and honest . . . ."). *Nixon*, 528 U.S. at 403 (citing precedent applying the law in such a manner).

[172] For example, for Latinas/os to attain equality, there is a need to develop a paradigm that understands multidimensionality, including Latinas/os' differential treatment on the basis of any of a number of traits or a combination of the traits such as "surname, language (including accent), national origin, sex, alienage, and race and color." Hernández-Truyol, *supra* note 169, at 376–77. The same is true in considering any classification as every individual is comprised of multiple classifications that together construe the self.

[173] *See id.* at 405 (discussing the consequences on Latinas/os of the myopic legal classification scheme because it "collapses and simultaneously excises [L]atina/o ethnicity from the [B]lack or white races and places [L]atinas/os as separate from both"); *see also id.* (noting that a single-trait analytical framework "proscribes [L]atinas/os from claiming their racial identification, be it [B]lack or white, but also, by virtue of listing only [B]lack and white as 'not of hispanic origin,' renders invisible [L]atinas/os of other racial and ethnic backgrounds such as Asian, Indios, Mestizos and so on"); *id.* at 430 (suggesting that Latina/o multidimensionality serves to "reveal and lay claim to their multiple selves and fit corrective lenses on the myopic view of difference as a deviation from the 'norm'").

[174] *See, e.g.*, Hernández-Truyol, *supra* note 154, at 661; Hernández-Truyol, *Latina Multidimensionality*, *supra* note 159, at 813; Hernández-Truyol, *Borders (En)Gendered*, *supra* note 158, at 883–84.

women.[175] Latinas experience discrimination differently from Latinos, white men, and white women,[176] but face the same legal blocks as Black women because the antidiscrimination laws that should protect them fail to recognize that race, ethnicity, religion, language, ability, class, education, and sex are integrated, and may merge in different ways that when combined, result in subordination and exclusion. For the attainment of justice and to deploy the true and constitutional equality, the law needs to awaken and replace the legal "monocle [with] a prism that allows a multidimensional perspective that will result in an analytical framework that can accommodate the complexities of our society."[177]

Every person has a race, a sexual orientation, a sexuality, a gender identity, a religion, an economic class, an ethnicity, and a nationality. These factors exist in varied combinations of dominant and subordinated identity traits that can result in unjust treatment. What defines the person, and subjects them to different forms of treatment, is their multidimensionality.[178] This analytical pillar effects a paradigmatic shift "that recognizes that each one of us is the collective of our many dimensions."[179] Multidimensionality's replacement of the single-trait approach ensures that the law views all persons as worthy of justice.

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[175] *See* Kimberlé W. Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 146 (1989).

[176] *See* Hernández-Truyol, *Borders (En)Gendered*, *supra* note 158, at 895.

[177] Hernández-Truyol, *supra* note 169, at 382.

[178] For other writing on multidimensionality, see Athena D. Mutua, *Multidimensionality Is to Masculinities What Intersectionality Is to Feminism*, 13 NEV. L.J. 341, 367 (2013) (noting that multidimensionality "better captures the complexity of identities and the multiplicity of hierarchical structures"); ATHENA D. MUTUA, THE MULTIDIMENSIONAL TURN: REVISITING PROGRESSIVE BLACK MASCULINITIES IN MULTIDIMENSIONAL MASCULINITIES AND LAW: FEMINIST THEORY MEETS CRITICAL RACE THEORY 78–79 (2012) (explaining that multidimensionality results in individuals and groups not being seen as one social identity but as their combined social identities that are "materially relevant and mutually interacting and reinforcing" as well as revealing that interactions of diverse groups or individuals needs to be contextualized to see how they operate within the hierarchies); Darren Lenard Hutchinson, *Identity Crisis: "Intersectionality," "Multidimensionality," and the Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE & L. 285, 301–02 (2001) (noting that multidimensionality is important because courts have "failed to recognize that the cumulative effect of multiple forms of discrimination may create a unique type of victimization [that is different from] the sum of individual acts of discrimination"); Francisco Valdes, *Beyond Sexual Orientation in Queer Legal Theory: Majoritarianism, Multidimensionality, and Responsibility in Social Justice Scholarship or Legal Scholars as Cultural Warriors*, 75 DENV. U. L. REV. 1409, 1414–15, 1449–50 (1998) (asserting that multidimensionality "reminds all outgroups that *all* forms of identity hierarchy [rely] on social and legal interests of their members" and thus provides an "interconnected way" to address the subordination across multiple groups; and describing how multidimensionality maps and explains the "interconnected structuring of subordination").

[179] Hernández-Truyol, *supra* note 169, at 433.

This Article advocates for the embrace of an awakened multidimensional approach as an analytical framework because it unveils the locations of the hierarchies of law and power and thus opens the door to justice. A multidimensional analysis allows the identification of myriad possible locations of dominance that are barriers to a balanced outcome when rights collide. These dimensions—and their attendant privileging or subordinating consequences—all need to be considered in every conflict. Indeed, this paradigm is especially prevalent when high-level rights collide such as when, for example, one person, based on sincerely held religious beliefs, claims a right to deny a right or service in the marketplace, which, in turn, results in the denial to another of their right to be free from discrimination. A multidimensional lens deployed with anti-subordination policy allows the consideration of all existing factors affecting the rights in collision and permits a resolution that considers all dimensions of the conflict.

Constitutional tensions are multidimensional; claimed violations of rights do not exist in a vacuum. Rather, when the claimed right is resolved without regard to other affected rights, any solution can effect a rights deprivation.[180]

Thus, a multidimensional approach invites a rights impact analysis that accounts for all the rights at stake. It considers the impact the resolution of one right, such as the claimed denial of free exercise, has on another right, such as the claimed denial of equality/nondiscrimination. By considering involved persons' multiple dimensions, as well as all of the rights involved, the possibility arises of identifying the potentially discriminatory (and subordinating) consequences created by a solution that scrutinizes the conflict through a single lens. Thus, such an approach ensures more just outcomes.

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[180] *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania* provides a good example of how a myopic approach obscures the negative impact on rights of engaging only on one right when other rights are affected by the decision. *Little Sisters* considered only the employer's claim to free exercise, eclipsing the impact on the equality/nondiscrimination interests. Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2375–76 (2020). The monocular approach "jettison[s] an arrangement that promotes women workers' well-being while accommodating employers' religious tenets." *Little Sisters*, 140 S. Ct. at 2403–04 (Ginsburg, J., dissenting). Similarly, in *Fulton*, the Court focused solely on CSS's loss of a contract. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1881–82 (2021). The Court failed to consider the legal and dignitary harms effected to those the CSS shuns as foster parent based on religious beliefs. *See id.* The Court did not consider the children who will not be placed in loving homes because of its decision to elevate religion over discrimination. *See id.* The monocular approach negates rights of potential parents and ignores the needs and the best interests of foster children.

C. Marginability

Marginability is the effect of the perceptual playbooks' establishment of hierarchies.[181] A marginability analysis exposes the vulnerability and marginalization produced by the ingrained biases embedded in the individual and structural playbooks. The proposed paradigm evaluates and designs corrective measures by centering the interests and listening to the narratives of the out-groups whom the perceptual playbooks have excluded, ignored, and even erased from a place at the legal table. Such recentering results in awakening the law. It also reveals whether the legal concepts and structures embedded in perceptual playbooks are unjustly burdening some rights, interests, or identities.[182]

The marginability inquiry refines legal analysis in the context of the other two pillars. Specifically in the context of the First Amendment, the awakened inquiry requires two steps to ascertain not only whether the regulation is awakened with respect to its impact on the exercise of religion, but also if the court's proposed solution denies equality/nondiscrimination rights of the individual(s) affected by the decision. The first inquiry is whether the government regulation burdens free exercise. The second step asks whether the proposed solution denies the enjoyment of equality/nondiscrimination; whether it places an undue encumbrance on the rights of others affected by the solution. This approach allows for a holistic analysis of all the rights affected in any scenario in which a rights collision exists and allows for a resolution that not only protects all rights but also avoids the subordination of some rights to others.

In sum, this proposed new approach explores two essential inquiries: (1) what rights are involved in the conflict, and (2) whether proposed solutions favor one constitutionally protected right, liberty, or identity over another constitutionally protected right, liberty, or identity. The dignity foundation and the three pillars provide a framework for evaluating claims when constitutional rights collide.[183] The methodology awakens the law to avoid a myopic approach that, by failing to account for all the rights involved in any particular conflict, results in constitutional harms. The proposed model ensures that all rights affected as well as all individuals involved are included in the context in which

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[181] *See supra* note 161.

[182] *But cf.* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022). The Court is essentially doing away with the holistic burden analysis by failing to take into account liberty, autonomy, privacy, and nondiscrimination rights of those who can bear children. *See id.*

[183] Although this test has been developed in the context of a First Amendment claim conflict, it can apply to any two constitutional rights in collision.

the law is analyzed and applied; it provides consistency in evaluating claimed violations and safeguards all affected and, likely, interrelated rights.

The proposed paradigm provides a framework to enable a radical deconstruction of the structural and individual biases forming the foundation of the perceptual playbooks that have rendered the law asleep. The analysis at a structural level allows the recognition and exposure of the bias of laws and legal institutions, and calls for due deliberation in which a justice-centered reconstruction of the existing laws and legal systems is possible. Such a process enables the creation of a fair system where equality and justice can be a reality.

On the individual bias level, the process provides the framework for the parallel scrutiny of the actions of those involved in making, interpreting, and enforcing the law. The paradigm enables a deconstruction of the implicit and structural biases that plague the law and legal system; it affects the recognition and exposure of the skewed perceptual playbooks upon which the somnolent law is based, and provides the grounds for deliberation by considering multiple narratives and histories allowing solutions to effect a just—awakened—reimagining of the law.

IV. AWAKENING: RE/VIEWING *CARSON*

Having articulated the methodological and substantive foundations for the awakened paradigm, and being mindful of the principle that the right of one person to perform their religion is limited if it affects the fundamental rights of others, the next step is to illustrate its application. Before engaging in an illustration, it is significant to recall that the First Amendment protects free exercise *and* prohibits the establishment of religion; it envisions the separation of church and state.[184] Patently, the two clauses are in tension, as whenever the state finds the right to free exercise, it is advancing religion.[185] In the past, the Supreme Court recognized the interplay in the clauses and referred to it as a "play in the joints."[186] With the Court's elevation of religion above all rights, the play in the joints was diminished, reduced to a rusted hinge. *Carson*, in taking the next step, bolted the joint in the Free Exercise position, locked out the

[184] *See supra* text accompanying notes 78–83.

[185] *See supra* notes 57–58 and accompanying text.

[186] Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2019 (2017) (quoting Locke v. Davey, 540 U.S. 712, 718 (2004)).

Establishment Clause, and elucidated the biased—unawakened—First Amendment jurisprudence.[187]

For over two decades, all courts that heard challenges to the Maine law's requirement—that private secondary schools receiving state funds through its tuition assistance program be "nonsectarian"—upheld it as constitutional.[188] In *Carson*, the U.S. Supreme Court held the nonsectarian requirement to be a violation of the Free Exercise Clause.[189] Under the rubric of discrimination, the Court declared that while a state has no obligation to fund private schools, if the state decides to provide such funding, it cannot discriminate against religious institutions.[190]

The *Carson* decision is asleep: it makes respecting the Establishment Clause "a constitutional violation."[191] By deploying a discrimination trope and mandating the public funding of religious institutions, the decision not only elevates religion over all other rights but also effectively erases all other rights and interests present in the conflict. Going even further than *Espinoza*, it mandates taxpayers—some of whom would not be allowed to study at the school, some of whom could be fired by the school, some of whom would not be hired by or allowed to work at the school, and some of whom would not be allowed to send children to the school—to fund the religious instruction that excludes them. This outcome mandates state support for the marginalization of the religiously shunned, even if constitutionally protected against discrimination by anyone else; it perpetuates the vulnerability of non- or different-believers; it preserves and entrenches hierarchies of power.

Applying the proposed methodology, *Carson* fails across all the elements of the paradigm. It is easy to *recognize* the problem. First, the decision is an affront to the *dignity* of many, including members of the LGBTQ+ community, those who are pro-choice, those who use contraceptives, those who are sexually active outside of marriage, or those who engage in myriad other private activities that runs contrary to the specific religious tenets of the now taxpayer-funded institution. Religious schools can discriminate against those who do not align

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[187] Carson v. Makin, 142 S. Ct. 1987, 2013–14 (2022) (Sotomayor, J., dissenting); *see supra* text accompanying note 167.

[188] *See* Press Release, ACLU, ACLU Comment on Supreme Court Decision in *Carson v. Makin* (June 21, 2022), https://www.aclu.org/press-releases/aclu-comment-supreme-court-decision-carson-v-makin.

[189] *Carson*, 142 S. Ct. at 2002.

[190] *See id.*

[191] *Carson*, 142 S. Ct. at 2014 (Sotomayor, J., dissenting) ("[T]he Court leads us to a place where separation of church and state becomes a constitutional violation.").

with their religious beliefs, and *Carson* makes for this discrimination to be state-funded.[192]

The Court's decision directly conflicts with *anti-subordination* principles. *Carson* exposes the reality of our biased hierarchal system, placing religion on a pedestal while simultaneously subordinating the fundamental rights to privacy, intimacy, and equality as well as the rights of parents to choose how to raise their children. For example, at a Catholic or evangelical Christian school, LGBTQ+ parents and their children—be they heterosexual or LGBTQ+—as well as heterosexual parents with LGBTQ+ children, or divorced parents, or single parents, or parents using contraceptives, could be excluded from being part of the school's community. The Court, in supporting state-funded religion, is subordinating the listed fundamental rights. Parents who want their children to attend schools with tuition assistance programs for practical reasons such as distance—which brought Maine's program existence in the first place—may be denied for myriad discriminatory reasons justified by religion.[193] Teachers seeking employment may be denied because they do not comport with the school's religious ideologies. While religion is a right at issue, so are rights that the Court's decision ignored.

Further, the Court's approach fails to consider the *multidimensionality* of the problem before it. The Court, in espousing nondiscrimination against religion, wholly embraces discrimination by religion. By mandating taxpayers to finance religious education, it is allowing religious discriminatory practices, multiple affronts to dignity, and the harms caused to many by its single focus on rights of the religious alone. Yet, discriminatory practices in the name of religion when funded by the state become discriminatory practices of, and possibly attributable to, the state.

To be sure, religions are free to set their norms and promulgate their beliefs, including discriminatory ones on the basis of, for example, sex and sexuality. It is a completely different matter to mandate the (religiously) *marginable* who are the targets of discriminatory religious tenets, to fund the institutions that can freely exclude and condemn them. Similarly, it is inconsistent to mandate the state to fund discriminatory practices by religious actors. In the context of education, the Court fails to acknowledge the state's interest in the education of children who are potentially excluded and shunned from educational institutions based on the institution's religious foundations. All these matters are indivisible

[192] *See id.* at 2011.
[193] *Id.* at 1993 (majority opinion) (explaining why the program was initially implemented).

from the Court's myopic view of discrimination and should lead to a larger analysis and, most likely, a different result.

A critical evaluation of the Court's isolated focus on religion *exposes* *Carson*'s flawed reasoning. In abandoning the Establishment Clause, the Court establishes a hierarchy of constitutional rights and values with religion at the top, thereby relegating other fundamental rights to a subordinate status. *Carson* promotes prohibited discrimination—exclusion of students, teachers, staff, and parents who are gay, non-binary, using contraceptives, cohabiting with unmarried partners (gay and heterosexual alike), engaging in pre-marital sex, along with those who are members of a different religion or are non-religious. Religious schools have admissions and hiring policies that allow them to discriminate on the basis of sex, gender, gender-identity, and religion, among other protected bases.[194] The *Carson* majority's legal analysis is asleep: it is an affront to dignity, has myriad subordinating consequences, fails to take into account the multidimensional nature of the underlying framework—both persons and rights—that should be considered in the resolution of the issue, and has marginabilizing effects.

With the recognition and exposure of the multidimensional nature of the problem and its subordinating, marginalizing effects, the next steps are to *deliberate* on how to *resolve* the problem: some towns have no public high schools and the state has created a tuition assistance program to fill the void.[195] In deliberating to find a solution, the first step is to consider the dignity and honor of all individuals whose interests and rights are affected. It requires naming all the stakeholders, including not only religious institutions but also the parents, the students, the teachers, the staff, and the state. Such analysis produces a much vaster information matrix than considering only the religious institution's interest. An awakened analysis of First Amendment law could have crafted a solution that not only embraces both the Establishment Clause and the Free Exercise Clause, but also considers the interests of the multiple interested parties. The Court's solution adopted the majority's biased perceptual playbooks giving primacy to religion, more specifically Christianity,[196] at the expense of

[194] *Id*. at 2011 (Breyer, J., dissenting).

[195] *Id.* at 1993 (majority opinion).

[196] The decision concerns two Christian schools—thus, there was no consideration of traditionally marginalized groups and religions. *See id.* at 1994–95. The schools at issue center their teachings around Biblical principles, putting Christianity at the top of the hierarchy, instead of civic education, which has previously been the standard for public school education. *See id.* at 2008 (Breyer, J., dissenting). The Court has recently made discriminatory motivations against non-Christian religions permissible, but continually refuses to restore separation of church and State when Christianity is in play. *See* Linda Greenhouse, *supra* note 14. Although

all other beliefs.[197] The majority, in establishing FEE, protected only the interests of the litigants whose interests are aligned with the Court's fabricated FEE hierarchy. The Court locates religion at the top.

An awakened analysis rejects focusing only on religion and insists on considering all other affected interests. The Court failed to consider that some of the persons potentially affected by its decision are members of a group that, throughout history, have been and continues to be vulnerable and marginalized. For example, the analysis would consider the best interests of the parents who are not only a single identity (such as LGBTQ+) but are individuals or couples who want to exercise their right to choose their children's education. Teachers with differing religious beliefs would be heard and their concerns about more limited employment opportunities in an already rural setting would be considered. Deliberation would take into account the interests of students, especially those who are excluded from the religious schools, who may have to travel to attend schools—religious or non-religious. Teachers' concerns about the consequence of the immense discretion of religious institutions regarding employment decisions and other internal affairs would be heard.[198]

Carson displays the Court majority's biased perceptual playbooks, possibly based on the Justices' own religious affiliations,[199] that prioritize Christian

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Dobbs v. Jackson Women's Health Organization is technically about abortion, and thus privacy, the movement to overturn *Roe v. Wade* has been a religious one. *Id.* It is no coincidence that the five members of the *Dobbs* majority opinion were raised in the Catholic Church. Associated Press, *Anti-Roe Justices a Part of Catholicism's Conservative Wing*, U.S. NEWS (June 30, 2022, 1:14 PM).

[197] Trump v. Hawaii, 138 S. Ct. 2392, 2417, 2420 (2018) (noting that President Trump's Proclamation on immigration labeled as a "Muslim ban" was not enough to trigger strict scrutiny).

[198] *See generally* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2060 (2020) (deferring to churches in the selection of high-ranking officials and "on matters of faith and doctrine" (internal quotations omitted)).

[199] Frank Newport, *The Religion of the Supreme Court Justices*, GALLUP (Apr. 8, 2022), https://news.gallup.com/opinion/polling-matters/391649/religion-supreme-court-justices.aspx (noting the Justices' religions, with Justices Alito, Coney-Barrett, Kavanaugh, Roberts, and Thomas being Catholic and Gorsuch having been raised Catholic but converting to Episcopalian to marry an English woman); Linda Greenhouse, *God Has No Place in Supreme Court Opinions*, N.Y. TIMES (Sept. 9, 2021), https://www.nytimes.com/2021/09/09/opinion/abortion-supreme-court-religion.html (noting, regarding the allowing of Texas to enforce its new abortion law, "that the four of the [C]ourt's six Roman Catholic justices and a fifth who was raised Catholic but is now Episcopalian, all conservative, allowed a blatantly unconstitutional law to remain in place"); *see also* Gabriella Borter & Julia Harte, *U.S. Bishops Vote to Draft Communion Statement that May Rebuke Biden*, REUTERS (June 18, 2021) (noting that the Catholic Church has attempted to deny President Biden Catholic communion because of his pro-choice political stance); Lanouar Ben Hafsa, *Lobbying for the Unborn: The American Catholic Church and the Abortion Issue*, 2 MÉMOIRE(S), IDENTITÉ(S), MARGINALITÉ(S) DANS LE MONDE OCCIDENTAL CONTEMPORAIN, Aug. 26, 2015, at ¶ 11, https://journals.openedition.org/mimmoc/2320 (noting that the Catholic Church has been lobbying stridently against abortion since *Roe v. Wade* was decided in 1973).

beliefs even at the sacrifice of other fundamental constitutional values. The Court, in a sleight of hand, by asserting that its decision simply enables individual choice, seeks to obscure the reality that it is mandating public funding of religious institutions to which the Court has also given a free pass to ignore laws of general application and freely to discriminate. *Carson* allows religion to negate the fundamental rights of others. The proposed awakened paradigm would place in the light, and the decision-making process would consider, the myriad constitutional rights at stake and not allow the unbridled exercise of one right, in this case religion, to interfere with the fundamental rights of others.

CONCLUSION

Awakening the law is a multilayered process that seeks to find justice in complex legal conflicts; it is an ongoing process. A difficulty of unveiling perceptual playbooks' biases and challenging the status quo is that the burden of contesting it falls on those who have been marginalized or subordinated by the perceptual narratives incorporated into law: the perceptual playbooks of the lawmakers, enforcers, interpreters. In turn, the persons and groups that have enjoyed privilege under the status quo, as it incorporates and represents their perceptual playbooks, must recognize the privilege, expose its unjust effects, deliberate on those effects, and participate in crafting just solutions that include the interests of those excluded—the marginable and the subordinated. This process requires unearthing and deconstructing the sites of subordination and privilege alike.

The resolution of constitutional tensions requires consideration of all interests involved in a constitutional rights collision. One fundamental right's exercise must be tempered when it interferes with others' enjoyment of their fundamental rights. Yet, FEE has created a hierarchy of rights that elevates Free Exercise above all others. Ironically, the subordination of rights has eviscerated the Establishment Clause. Even the Assembly Clause, by giving MFN status to religion, has elevated religion and invalidated states' rights to protect their citizens' health and welfare in a time of a global pandemic. These outcomes are contrary not only to the spirit if not the letter of the Constitution, but also to established human rights norms.

Deploying a FEE jurisprudence, the Court has framed countless cases as concerning only Free Exercise rights. The Court's framework trammels upon and erases multiple other constitutional rights, including privacy, intimacy, and nondiscrimination/equality. In *Carson*, the Court denied equality and

nondiscrimination rights of parents, children, and staff; it wholly erased the separation of church and state by mandating citizens to fund religion.[200]

This Article has unveiled and deconstructed the implicit and structural biases of FEE. By deploying their perceptual playbooks, and embracing FEE, those who make, administer, enforce, and interpret the law, enable unjust, inequitable results that negate fundamental rights. If FEE continues to flourish, it will effect the erasure, if not the dismantling, of established fundamental rights and freedoms.

The proposed awakened paradigm, informed by established human rights norms and the First Amendment's own history, allows for the recognition, exposure, deliberation, and resolution of the injustices effected by FEE. This awakened paradigm provides a framework for resolving constitutional tensions. First, dignitarian rights of all those whose interests may be affected in resolving the conflict must be protected. Once the varied constitutional rights at stake are identified, the conflict must be resolved in such a way that no constitutional right is entirely subordinated to another, as under FEE all rights are subordinated to religion. Multidimensionality requires an articulation of all the rights that can be affected in a particular dispute. The framework ensures that the voices and constitutional interests of the marginable are heard. In taking a holistic approach to constitutional collisions, the awakened paradigm allows for justice to prevail.

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[200] *See* Carson v. Makin, 142 S. Ct. 1987, 2014 (2022) (Sotomayor, J., dissenting).