University of Arkansas at Little Rock William H. Bowen School of Law
Bowen Law Repository: Scholarship & Archives

Faculty Scholarship

2022

# Reclaiming Establishment: Identity and the 'Religious Equality Problem'

Faraz Sanei
*University of Arkansas at Little Rock William H. Bowen School of Law*, fsanei@ualr.edu

Follow this and additional works at: https://lawrepository.ualr.edu/faculty_scholarship

 Part of the Constitutional Law Commons, and the Religion Law Commons

## Recommended Citation

Faraz Sanei, Reclaiming Establishment: Identity and the "Religious Equality Problem', 71 U. Kan. L. Rev. 1 (2022).

This Article is brought to you for free and open access by Bowen Law Repository: Scholarship & Archives. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Bowen Law Repository: Scholarship & Archives. For more information, please contact mmserfass@ualr.edu.

# Reclaiming Establishment: Identity and the 'Religious Equality Problem'

*Faraz Sanei**

ABSTRACT

*Since at least 2017, the Court has implicitly recognized a right of equal access to generally available public benefits based on the beneficiary's religious identity or status. In* Carson v. Makin *(2022), the Court went a step further and, for the first time, concluded that the "status-use distinction lacks a meaningful application" in both theory and practice. It then held that restrictions on the use of public benefits for sacral purposes amount to religious discrimination because they impose substantial burdens on free exercise rights.* Carson*'s holding, and the rationale underlying it, contravene settled case law and effectively gut the Establishment Clause by prohibiting restrictions on the use of public funds for core religious purposes anytime government provides a generally available public benefit. They also undermine a unique architectural feature of the Religion Clauses which considers "religion"—or religious conduct, to be more exact—constitutionally special and commands a requisite degree of separation between church and state.*

*This Article employs a conceptual framework that reimagines religious freedom's key components as constitutionally distinguishable from one another. It argues that religious identity implicates an equality right that is legally distinct—and severable—from religious belief and practice (e.g., free exercise) which trigger fundamental rights interests. An explicit acknowledgment of a "right to religious identity" that requires full substantive equality between religious and nonreligious entities only*

---

* Assistant Professor of Law, University of Arkansas at Little Rock, William H. Bowen School of Law. I am grateful to Edith Beerdsen, Christopher Buccafusco, Caroline Mala Corbin, Marc DeGirolami, Katie Eyer, Rick Garnett, Christopher Jaeger, Jocelyn Getgen Kestenbaum, Christopher Lund, Ira Lupu, Mark Movsesian, Ngozi Okidegbe, Michael Pollack, Mona Reed, Zalman Rothschild, Elizabeth Sepper, John Sexton, David Simson, Scott Skinner-Thompson, and participants at the Junior Faculty Forum (University of Richmond School of Law), SEALS Prospective Law Teachers Workshop, Lawyering Scholarship Colloquium (New York University School of Law), Academic Careers Program Scholarship Clinic (New York University School of Law), Clinical Writers' Workshop (New York University School of Law), and Junior Faculty Workshop (Benjamin N. Cardozo School of Law) for engaging with my ideas and sharing their suggestions on how to improve this draft.

*when they engage in secular conduct can bring much needed clarity, and stability, to an emerging religious equality jurisprudence that is increasingly at odds with settled constitutional principles. This right should be housed in the Establishment Clause because its equality principle prohibits government from discriminating between religious and secular identities (and among religious denominations), while its separation principle precludes it from directly benefiting religious exercise. Ultimately, a reconceptualization of religious freedom doctrine informed by the distinctive features of identity can help rectify the doctrinal imbalance between the Religion Clauses resulting from Free Exercise "bloat" and empower the Establishment Clause to reclaim its rightful place in the constitutional hierarchy.*

CONTENTS

## I. INTRODUCTION

On March 28, 2019, Justice Kavanaugh of the U.S. Supreme Court joined several of his colleagues in granting an "eleventh-hour" stay request that temporarily halted plans to execute Patrick Henry Murphy at the state penitentiary in Huntsville, Texas.[1] Murphy, an adherent of Pure Land Buddhism, lodged the appeal on Free Exercise and Establishment Clause grounds because he objected to the Texas Department of Criminal Justice (TDCJ) policy of only allowing Christian and Muslim pastors into the execution chamber.[2] "As this Court has repeatedly held," Kavanaugh wrote in his concurring opinion, "governmental discrimination against religion—in particular, discrimination against religious persons, religious organizations, and religious speech—violates the Constitution."[3] He then suggested that the TDCJ had two choices in addressing "an equal-treatment case of this kind": either allow all religious advisers into the execution chamber, or prohibit all religious advisers from the chamber and only allow them access to the adjoining viewing room.[4] "[T]he choice of remedy going forward is up to the State," Kavanaugh wrote.[5]

Five days after the *Murphy* Court's decision to grant the stay, the TDOC changed its policy to prohibit all spiritual advisers from gaining access to the execution chamber.[6]

The Court issued the stay in *Murphy* less than two months after vacating a similar stay of execution in *Dunn v. Ray*.[7] In that case, the Alabama Department of Corrections (ADOC) denied Domineque Ray's request to allow his imam to be by his side in the execution chamber when prison authorities administered the lethal injection.[8] To justify the denial, ADOC had cited a longtime policy of only allowing a Christian chaplain, whom the state claimed is a prison employee and trained to be part of the "execution team," to be present in the chamber at the time of execution.[9]

---

1. Murphy v. Collier, 139 S. Ct. 1475, 1475 (2019) (mem.).
2. *Id.*
3. *Id.* (Kavanaugh, J., concurring).
4. *Id.* (Kavanaugh, J., concurring).
5. *Id.* at 1476 (Kavanaugh, J., concurring).
6. Cameron Langford, *Texas Bans All Chaplains from Execution Chambers*, COURTHOUSE NEWS SERV. (Apr. 3, 2019), https://www.courthousenews.com/texas-bans-all-chaplains-from-execution-chambers/ [https://perma.cc/GMJ9-PSZ9].
7. Dunn v. Ray, 139 S. Ct. 661 (2019) (mem.).
8. *See* Ray v. Comm'r, Ala. Dep't of Corr., 915 F.3d 689, 693 (11th Cir. 2019) (discussing Ray's request for a religious accommodation).
9. Emergency Motion and Application to Vacate Stay of Execution at 5–6, Dunn v. Ray, 139 S. Ct. 661 (2019) (mem.) (No. 18A815),

Ray, a Muslim, then sought relief in the form of a stay of execution, arguing that ADOC's policy violated both the Establishment Clause and the Religious Land Use and Institutionalized Persons Act (RLUIPA).[10] ADOC eventually granted Ray's request that a Christian pastor not be present in the chamber at the time of the execution, but refused to allow his imam access.[11] The Eleventh Circuit issued a stay concluding that Ray had a "substantial likelihood of success on the Establishment Clause and because the other equitable factors tip in his favor."[12]

But the Court granted Alabama's application to vacate the stay entered by the Eleventh Circuit "[b]ecause Ray waited until January 28, 2019 to seek relief."[13] In a blistering dissent, Justice Kagan noted, "[t]he clearest command of the Establishment Clause . . . is that one religious denomination cannot be officially preferred over another."[14] Alabama could not justify its policy allowing only Christian pastors to enter the execution chamber unless it established that the policy was narrowly tailored to serve a compelling interest, she noted.[15] Justice Kagan notes, "[b]ut the State has offered no evidence to show that its wholesale prohibition on outside spiritual advisers is necessary to achieve that

---

https://www.supremecourt.gov/DocketPDF/18/18A815/87337/20190206175918511_State%20Emergency%20Motion%20to%20Vacate.pdf [https://perma.cc/DSV2-4HQK].

10. *See* Ray v. Dunn, No. 19-CV-88, 2019 WL 418105, at *3 (M.D. Ala. Feb. 1, 2019). President Clinton signed the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §§ 2000cc–2000cc-5, into law in 2000 as an effort to increase protections against targeted and incidental regulations that impose substantial burdens on the free exercise of religion by religious persons who are imprisoned (or otherwise institutionalized) or by entities whose religious liberty rights are interfered with by zoning and other land use regulations. Unlike the Religious Freedom Restoration Act (RFRA) which only applies to the federal government, RLUIPA applies to both federal and state government actions. *See generally* City of Boerne v. Flores, 521 U.S. 507, 509–536 (1997) (holding that Congress exceeded its Fourteenth Amendment enforcement powers when it sought to apply RFRA to the states).

11. *Ray*, 2019 WL 418105 at *6.

12. *Ray*, 915 F.3d at 695.

13. *Dunn*, 139 S. Ct. at 661 (citing Gomez v. N.D. Cal., 503 U.S. 653, 654 (1992) (per curiam)).

14. *Id.* at 661 (Kagan, J., dissenting) (quoting Larson v. Valente, 456 U.S. 228, 244 (1982)).

15. *Id.* at 663 (Kagan, J., dissenting). Justice Kagan's approach relied on the Court's ruling in *Larson v. Valente* which held that denominational discrimination is always suspect and triggers strict scrutiny to determine whether the Establishment Clause's requirement of governmental neutrality has been violated. *See Larson*, 456 U.S. at 246. *Larson* is a somewhat unorthodox Establishment Clause case for several reasons. They include the fact that: (a) its holding relies on *Widmar v. Vincent*, 454 U.S. 263 (1981), a Free Speech Clause case that applies strict scrutiny even though Establishment Clause cases do not generally involve tiered scrutiny analysis; and (b) in dicta the Court noted that Minnesota's passage of the 50 percent rule involved "excessive entanglement" with religion. For the purposes of this Article, however, it provides general support for the notion that disparate treatment of religious, and more specifically denominational, identity violates the Establishment Clause. *See id.* at 246–47, 255.

goal."[16]

Notwithstanding Justice Kagan's compelling dissent, Ray was executed and pronounced dead at 10:12 p.m. on February 7, 2019, without his imam by his side.[17]

Two months after his concurring opinion granting the stay in *Murphy*, Kavanaugh made an unusual clarifying statement to distinguish the Court's seemingly disparate rulings in the two cases.[18] He doubled down on the procedural differences between the cases,[19] but also noted that the Eleventh Circuit had incorrectly granted Ray's application for stay of action because he had never made an "equal-treatment" argument and had instead only sought to have ADOC's Christian pastor removed from the execution chamber when the lethal injection was administered.[20] Once ADOC agreed to Ray's demand, Kavanaugh argued, his Establishment Clause argument became moot.[21] In contrast, the "Court's stay in Murphy's case was appropriate, and the stay facilitated a prompt fix to the *religious equality problem* in Texas' execution protocol."[22] Some

16. *Dunn*, 139 S. Ct. at 662 (Kagan, J., dissenting). Justice Kagan properly scrutinized Alabama's justification for only allowing a Christian chaplain in the execution chamber (on the basis that the individual was properly trained to participate in executions) notwithstanding the fact that ADOC agreed not to require the chaplain to be in the execution chamber for Ray's execution. This is because *as long as* Alabama still had a policy of allowing a Christian chaplain in the execution chamber but not a Muslim one, Ray had a cognizable discrimination claim based on denominational preference.

17. Lauren Gill, *Domineque Ray is Executed in Alabama After Supreme Court Bid Fails*, PROPUBLICA (Feb. 8, 2019, 3:58 PM), https://www.propublica.org/article/domineque-ray-is-executed-in-alabama-after-supreme-court-bid-fails [https://perma.cc/XW8H-U25E].

18. Murphy v. Collier, 139 S. Ct. 1475, 1476–78 (2019) (mem.) (Kavanaugh, J., stating).

19. *Id.* (Kavanaugh, J., stating). In his March 2019 concurring opinion to grant the stay, Kavanaugh had noted that Murphy had filed his application for a stay "in a sufficiently timely manner." *Id.* at 1476 n.* (Kavanaugh, J., concurring). In his dissenting opinion to the granting of a stay of execution, however, Justice Alito rejected Kavanaugh's argument that Murphy had filed his appeal in a timely manner. *Id.* at 1478–85 (Alito, J., dissenting).

20. *Id.* at 1476–78 (Kavanaugh, J., stating). More specifically, Kavanaugh noted that Ray had only made an Establishment Clause argument that requiring a Christian pastor to be in the execution chamber, which ADOC had previously asserted was a part of the state's longtime execution protocol policy, showed an unlawful preference for Christianity. Once ADOC decided not to allow any pastors in the chamber during Ray's execution, his Establishment Clause argument was rendered moot. *Id.* (Kavanaugh, J., stating).

21. *Id.* (Kavanaugh, J., stating). Unlike Murphy, Ray did not make a Free Exercise Clause claim though he did allege a RLUIPA violation connected to the "substantial burden" imposed on his religious exercise if ADOC denied his imam access to the chamber at the time of execution. *Id.* (Kavanaugh, J., stating). *But see Dunn*, 139 S. Ct. 661. It is not entirely clear why Kavanaugh failed to interpret Ray's Establishment Clause and statutory free exercise claims as ones alleging discriminatory or unequal treatment.

22. *Murphy*, 139 S. Ct. at 1477 (Kavanaugh, J., stating) (emphasis added). By "a prompt fix," Kavanaugh was referring to TDOC's decision to ban all spiritual advisers from the execution chamber. *Id.* (Kavanaugh, J., stating).

religious liberty advocates maintained that the disparate outcomes in the two cases were, in part, related to a failure on the part of Ray's counsel to rely on the "nondiscrimination principle" of the Free Exercise Clause instead of the Establishment Clause.[23]

Fast forward to April 2020. During that month, the U.S. Small Business Administration (SBA) made an unprecedented announcement that faith-based organizations, including "pervasively religious" entities such as churches and other houses of worship, would be eligible to receive loans as part of the federal government's $2 trillion economic relief package to stimulate the economy following largescale disruptions caused by the COVID-19 pandemic.[24] The FAQ that accompanied the agency's announcement noted that "loans under the program can be used to pay the salaries of ministers and other staff engaged in the religious mission of institutions."[25] Under the SBA's Payment Protection Program (PPP) designed to protect the salary of employees on payroll, recipients could also qualify for certain types of loan forgiveness at a later date.[26]

---

23. *See* Patrick Henry Murphy v. Bryan Collier, BECKET: RELIGIOUS LIBERTY FOR ALL, https://www.becketlaw.org/case/murphy-v-collier/ [https://perma.cc/2KNJ-63BR] (claiming that the Court's "eleventh-hour" intervention in Murphy's case was the result of "new legal arguments" that "relied on cases that support the Free Exercise of religion [] and prevent discrimination against people with different religious beliefs"). For more information on the Court's increasing reliance on nondiscrimination/equality principles in the context of free exercise rights, see *infra* Parts II.A. and III.A.

24. Tom Gjelten, *Another Break from the Past: Government Will Help Churches Pay Pastor Salaries*, NAT'L PUB. RADIO, (Apr. 6, 2020, 7:17PM), https://www.npr.org/sections/coronavirus-live-updates/2020/04/06/828462517/another-break-from-the-past-government-will-help-churches-pay-pastor-salaries [https://perma.cc/W8TE-Q92R]; *see, e.g.*, Kelsey Dallas, *A New Religion Debate: Is it Wrong for the Government to Send Stimulus Money Directly to Churches?*, DESERET NEWS, (Apr. 10, 2020, 11:00PM), https://www.deseret.com/indepth/2020/4/10/21215015/coronavirus-stimulus-ppp-paycheck-protection-loans-small-business-church-marco-rubio-pence-religion [https://perma.cc/3VKR-DHQ7]. The SBA had traditionally limited public funding to for-profit small businesses, but the scope of the COVID-19 crisis prompted it to expand its coverage to nonprofit organizations, including religious entities. The public funding scheme is part of Congress' CARES Act (2020).

25. Frequently Asked Questions Regarding Participation of Faith-Based Organizations in the Paycheck Protection Program (PPP) and the Economic Injury Disaster Loan Program (EIDL), SMALL BUS. ADMIN. 2 (Apr. 3, 2020, 11:25PM), https://www.sba.gov/sites/default/files/2020-06/SBA%20Faith-Based%20FAQ%20Final-508.pdf [https://perma.cc/XW7G-RCXP].

26. *Id.* The stimulus package's PPP loans were used to cover what many consider a core religious function—clerical salaries at houses of worship. In a *New York Times* opinion piece published two months after the SBA announcement, three prominent church-state scholars lamented the agency's decision and said it was the latest example in a long line of cases reflecting "the quiet demise of the already ailing separation of church and state." Nelson Tebbe, Micah Schwartzman & Richard Schragger, *The Quiet Demise of the Separation of Church and State*, N.Y. TIMES (June 8, 2020), https://www.nytimes.com/2020/06/08/opinion/us-constitution-church-state.html [https://perma.cc/LB48-SULA]. "The entanglement of church and state will bring predictable conflicts," the scholars wrote, and "the risk of government favoritism for some religions over others, and for religion over nonreligion, will be heightened." *Id.*

In making the announcement, the SBA said it would refuse to enforce previous regulations that "bar the participation of a class of potential recipients based solely on their *religious status*" and would instead "propose amendments to conform those regulations to the Constitution."[27] A few weeks later, the SBA announced it was also waiving its affiliation rules for faith-based organizations because they believed those rules would "substantially burden" groups that are religiously committed to hierarchical forms of organization in violation of the Religious Freedom Restoration Act (RFRA).[28] It refused to do the same for similarly situated secular organizations.[29]

The language used by the SBA was a nod to the Supreme Court's *Trinity Lutheran Church of Columbia, Inc. v. Comer* ruling in 2017.[30] In that case, the Court suggested that categorical exclusions from otherwise "generally available" public benefits schemes always run afoul of the Free Exercise Clause if they are based solely on the religious identity (or status) of the beneficiary.[31] But the Court also noted that such exclusions "impose[] a penalty on the free exercise of religion that must be subjected to the 'most rigorous' scrutiny."[32] While the majority opinion in that case insisted the ruling was only limited to the specific facts at issue (resurfacing children's playgrounds), many legal experts suspected that the 7-2 majority opinion effectively mandated federal, state, and local governments to treat religious and secular organizations alike for funding purposes.

Later, in *Espinoza v. Montana Department of Revenue*, the Court extended the religious equality rule announced in *Trinity Lutheran* to indirect school aid cases.[33] The holding's underlying rationale left little

---

27. SMALL BUS. ADMIN., *supra* note 25, at 1 (emphasis added).

28. Business Loan Program Temporary Changes, 13 C.F.R. § 121 (2020). Under SBA rules only organizations that are under a particular size in terms of numbers of staff and employees are eligible to qualify for financial assistance. Under the affiliation rules, the SBA could aggregate the number of employees to determine eligibility if an entity was affiliated with other (often larger) organizations. *Id.*

29. Large secular nonprofit organizations excluded from the affiliation rules included entities like Planned Parenthood. Micah Schwartzman, Richard Schragger & Nelson Tebbe, *The Separation of Church and State Is Breaking Down Under Trump*, THE ATLANTIC, (June 29, 2020), https://www.theatlantic.com/ideas/archive/2020/06/breakdown-church-and-state/613498/ [https://perma.cc/BYU6-269G]; *see also* Tebbe, Schwartzman & Schragger, *supra* note 26.

30. 137 S. Ct. 2012 (2017).

31. *Id.* at 2019 (citing McDaniel v. Paty, 435 U.S. 618, 628 (1978)).

32. *Id.* at 2024 (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993)).

33. 140 S. Ct. 2246, 2256 (2020). The public aid in *Trinity Lutheran* involved the payment of a direct subsidy (in the form of a reimbursement grant that would allow the church to "install

doubt that the Court considered Montana's constitutional no-aid provision, which was similar to Missouri's in *Trinity Lutheran*, to be unconstitutional on its face.[34] In so doing, it put an end to any doubts that *Trinity Lutheran* was simply about resurfacing children's playgrounds.

The Court's recent holding in *Carson v. Makin*—another school choice case—confirms that *Trinity Lutheran* and *Espinoza* are more radical and sweeping than their narrow holdings would suggest.[35] In *Carson*, the Court held that Maine's policy of prohibiting the use of tuition assistance programs by parents who wish to send their children to religious schools amounted to discrimination in violation of the Free Exercise Clause so long as it allowed parents to use public funds to support their child's private secular education.[36] For the first time, the Court directly addressed a lingering question that had remained unresolved in *Trinity Lutheran* and *Espinoza*: whether, in addition to barring governments from categorically disqualifying beneficiaries based solely on their religious *status*, the Free Exercise Clause also prohibits them from restricting *use* of those funds for sacral purposes.[37]

Writing for the majority, Chief Justice Roberts flatly rejected the "status-use distinction" and concluded that "the prohibition on status-based discrimination . . . is not a permission to engage in use-based

---

playground surfaces made from recycled tires") to a church's daycare center. *Trinity Lutheran*, 137 S. Ct. at 2014. The public aid in *Espinoza*, on the other hand, involved an indirect transfer payment funded by taxpayer dollars that would provide families with tuition assistance to offset the costs of enrolling their children in (secular or religious) private schools. *Espinoza*, 140 S. Ct. at 2251.

34. Nonetheless, the Court did not actually strike down Montana's no-aid constitutional provision because plaintiffs had mounted an "as applied" challenge. *Id.* at 2278 (Ginsberg, J., dissenting). A major thrust of the Court's opinion in *Espinoza* focused on the anti-Catholic animus that motivated many states to adopt no-aid clauses in their constitutions after Congress failed to pass a federal Blaine Amendment in 1875 which would have prohibited states from directly or indirectly aiding "sectarian" schools. "[M]any of the no-aid provisions [in various state constitutions] belong to a more checkered tradition shared with the Blaine Amendment of the 1870s." *Id.* at 2259; *see also infra* note 168 discussing taint connected to status or identity-based discrimination.

35. 142 S. Ct. 1987 (2022).

36. *Id.* at 1989. Unlike in Missouri and Montana, Maine does not have a constitutional no-aid provision and the law at issue concerned a legislative provision requiring "that any school receiving tuition assistance payments must be 'a nonsectarian school in accordance with the First Amendment of the United States Constitution.'" *Id.* at 1994 (citing ME. REV. STAT. ANN. tit. 20-A, § 2951(2) (West 2021)). Petitioners brought suit against the commissioner of the Maine Department of Education for enforcing the law. *Id.* 1994–96.

37. *See id.* Chief Justice Roberts' majority opinion acknowledged that petitioner parents' wish to enroll their children in religious schools was motivated, at least in part, by education that "aligned with their sincerely held religious beliefs" and amounted to religious exercise. *See id.* at 1995. *But see infra* Part VI.B. (arguing that the Religion Clauses require governments to determine what constitutes "religion" so they can properly navigate the secular-sacral divide, including in the context of education and school choice).

discrimination."[38] It also dismissed Maine's argument that the legislature's nonsectarian requirement was similar to the religious use carve-out the state of Washington had implemented in *Locke v. Davey* when it denied a scholarship recipient who wished to use public funds to pursue a devotional theological degree without violating the Free Exercise Clause.[39] It did this by narrowing and distinguishing the facts of that case to solely apply to the states' "historic and substantial" tradition in not using taxpayer funds to pay for the training of clergy, an "essentially religious endeavor."[40]

Notwithstanding the Court's declarations to the contrary, its evisceration of a status-versus-use distinction contravenes settled case law by *requiring* governments to publicly fund religious exercise—including core religious uses such as indoctrination, worship, and prayer—anytime they provide "indirect aid" to religious entities by way of a generally available public benefit.[41] But, as will be illustrated below, the underlying rationale for rejecting the distinction could be equally applied to "direct aid" cases like the PPP. It, therefore, undermines a unique architectural feature of the Religion Clauses which considers "religion"—or religious conduct, to be more exact—constitutionally special and commands a requisite degree of separation between church and state.

But before going there, it may be worthwhile exploring the seemingly tenuous connection between the Court's adjudication of the 2019 death penalty cases and the SBA's decision to include religious entities as beneficiaries as part of the PPP. At first blush, the two scenarios appear to involve completely different issues, rights, stakes, and government interventions. In fact, both implicate what Kavanaugh referred to as the "religious equality problem" in *Murphy*, and for which a majority of the justices increasingly—and exclusively—look to the Free Exercise Clause

38. *Carson*, 142 S. Ct. at 2001. In reaching this conclusion, Chief Justice Roberts noted that neither *Trinity Lutheran* nor *Espinoza* (both opinions he authored) "suggested that use-based discrimination is any less offensive to the Free Exercise Clause." *Id.* He then concluded that because "a neutral benefit program in which public funds flow to religious organizations through the independent choices of private benefit recipients does not offend the Establishment Clause," Maine's "interest in separating church and state more fiercely than the Federal Constitution cannot qualify as compelling in the face of the infringement of free exercise." *Id.* at 1997–98 (citing Widmar v. Vincent, 454 U.S. 263, 276 (1981)) (cleaned up).

39. 540 U.S. 712 (2004).

40. *Carson*, 142 S. Ct. at 2002 (quoting *Locke*, 540 U.S. at 720–25).

41. *See infra* note 101 and 142 and accompanying text (explaining the difference between direct and indirect aid cases but casting doubt on the utility of this conceptual framework for constitutional purposes).

for answers.[42]

Since at least 2019, Kavanaugh and the Court's majority have begun to articulate the contours and boundaries of an emerging religious equality jurisprudence that is so expansive that it seems to apply to any and all cases that implicate the Religion Clauses—regardless of whether religiously-motivated conduct (or free exercise) is at issue.[43] With its *per curiam* order in *Tandon v. Newsom* granting an injunction challenging California's COVID-related regulations prohibiting at-home religious gatherings,[44] the Court seems poised to overturn the longstanding constitutional rule that incidental burdens substantially interfering with the free exercise of religion do not, as a general matter, require governments to grant exemptions to religious objectors.[45] Expanding the protective reach of the Free Exercise Clause beyond laws that impose targeted burdens on religious exercise will undoubtedly alter the Religion Clauses, but to appreciate the full potential of the Court's emerging religious equality jurisprudence one needs to look beyond the recent slew of COVID-19 cases.

In the thirty years since its ruling in *Employment Division v. Smith*, the Supreme Court has increasingly relied on the First Amendment's Free Exercise Clause as the go-to remedy to address disparate treatment of religion vis-à-vis nonreligion. According to scholars like Jim Oleske, it has done this by dishonestly treating the Free Exercise Clause as a remedy against both intentional (or targeted) burdens on free exercise rights and disparate impact resulting from secular indifference that, at most, neglects or undervalues religion.[46] This despite the fact that *Smith* only concerned

---

42. *See* Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2609–15 (2020) (mem.) (Kavanaugh, J., dissenting). Kavanaugh cited *Murphy* as an example of a situation where government "expressly discriminate against religious [persons] because of religion" and violates the Free Exercise Clause. *Id.* at 2610 (Kavanaugh, J., dissenting) (citing Murphy v. Collier, 139 S. Ct. 1475 (2019) (mem.)).

43. *See, e.g.*, *Murphy*, 139 S. Ct. 1475; Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067 (2019); *Calvary Chapel*, 140 S. Ct. 2603; Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020); Tandon v. Newsom, 141 S. Ct. 1294 (2021) (per curiam). *See also* Nelson Tebbe, *The Principle and Politics of Equal Value*, 121 COLUM. L. REV. 2397 (2021).

44. *Tandon*, 141 S. Ct. 1294.

45. Concerns about the Court's willingness to overturn *Employment Division v. Smith*, 494 U.S. 872 (1990) were somewhat mollified in *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021). Although a 9-0 majority held the City's standard foster care "contractual non-discrimination requirement [was] not generally applicable" because it allowed for individualized exemptions, key justices, including Barrett and Kavanaugh, seemed to suggest they were not yet ready to abandon *Smith* without understanding the full implications of doing so. *Fulton*, 141 S. Ct. at 1878; *see id.* at 1882–83 (Barrett & Kavanaugh, JJ., concurring).

46. James M. Oleske, Jr., *Free Exercise (Dis)honesty*, 2019 WIS. L. REV. 689, 726–33 (2019)

laws or regulations whose "object or purpose" was to target religion qua religion.[47] As a result, the Free Exercise Clause now operates as a hybrid guarantor of both religious liberty *and* equality and seems primarily concerned with detecting—and "smoking out"—invidious secular discrimination against religion, writ large.[48] This, in turn, leads to a conflation of fundamental rights and equal protection modes of analysis.[49]

Admittedly, however, the constitutional distinctions between equal protection and fundamental rights analysis are more muddled when religion is at issue.[50] This is, in part, because of the unique normative framework of religious freedom: religion is at once a *belief system*, a *set of practices* manifesting those beliefs, and an *identity*.[51] This dynamic feature of religious freedom doctrine[52] empowers advocates, and courts, to

---

(arguing that the Court's approach in *City of Boerne* shows that *Smith's* neutrality and general applicability prongs were only concerned with discriminatory intent and not disparate impact resulting from incidental burdens on religion); *see also* Michael W. McConnell & Max Raskin, *If Liquor Stores Are Essential, Why Isn't Church?*, N.Y. TIMES (Apr. 21, 2020), https://www.nytimes.com/2020/04/21/opinion/first-amendment-church-coronavirus.html [https://perma.cc/5FRX-WKP7]; *see infra* note 90 (explaining how this Article uses the term "disparate impact").

47. Oleske, *supra* note 46, at 730.

48. This Article uses the term "religion (or nonreligion), writ large" to denote a notion of religiosity (or non-religiosity) that includes all the key components for religious freedom. More specifically, "religion, writ large" includes religious identity, religious belief, and religious conduct motivated by that belief (the latter two are collectively "free exercise"). Nonreligion, includes the absence of religious identity, belief (e.g., agnosticism, atheism, or secular indifference), and conduct (e.g., secular conduct).

49. The term "equal protection mode of analysis" was first used by Justice Brennan in *Walz v. Tax Commission of New York*. 397 U.S. 664, 696 (1970) (Brennan, J., concurring) (noting that the Establishment Clause does not invalidate a New York City tax exemption to religious organizations who ostensibly use their properties for religious purposes).

50. The case law surrounding LGBT rights—including *Obergefell v. Hodges*, 576 U.S. 644 (2015), *Romer v. Evans*, 517 U.S. 620 (1996), and *Lawrence v. Texas*, 539 U.S. 558 (2003)—further complicates the issue because it also implicates fundamental right and equal protection concerns within the context of equal liberty and dignity. *See, e.g.*, Laurence H. Tribe, *Equal Dignity: Speaking its Name*, 129 HARV. L. REV. F. 16, 17 (2015) (arguing that "*Obergefell's* chief jurisprudential achievement is to have tightly wound the double helix of Due Process and Equal Protection into a doctrine of *equality dignity*"). One consequence of this hybrid approach is that the Court has increasingly identified sexual intimacy and marriage rights at a higher level of abstraction to ensure equal liberty and dignity. *See, e.g.*, Kenji Yoshino, *A New Birth of Freedom?:* Obergefell v. Hodges, 129 HARV. L. REV. 147, 164–66 (2015). For more analysis of this issue, see *infra* Part III.A.

51. Identity has both expressive and imputed characteristics. To the extent that antidiscrimination law—including the Equal Protection Clause and civil rights legislation aimed at prohibiting private discrimination—are primarily focused on proving discriminatory intent they prioritize the *discriminator's motivation* for animus or disparate treatment regardless of whether their perception of the victim's identity is accurate or not. *See infra* note 160 and accompanying text.

52. This Article uses the term "religious freedom" to refer to the Court's overall development of religious liberty and church-state doctrine as reflected in the First Amendment's Religion Clauses and federal (and sometimes state) statutory protections. On the other hand, it will primarily use the

reframe nearly every religion case as one that involves either undue burdens on free exercise, religious discrimination, or—as is increasingly the case—both. They do this by collapsing the traditional constitutional lines between identity, benefits, and equal protection analysis on the one hand; and free exercise, burdens, and fundamental rights analysis on the other.

For years, this conflation was largely driven by a narrow set of unemployment benefits cases[53] holding that restrictions on the religious use of public benefits amount to substantial burdens on free exercise, and a relatively obscure regulatory burdens case where the Court concluded that the exercise of a non-free exercise right based on religious identity amounted to an "unconstitutional penalty upon [an individual's] exercise of his religious faith."[54] This conflation occurred even though, in at least some of these cases, the connection between the individual's identity and their religious conduct was indirect or attenuated at best.[55] But *Trinity Lutheran* changed the rules of the game by reviving—and adopting—the rationale in these two lines of cases. For the first time, the Court explicitly held that categorically excluding *pervasively religious entities*—not just individuals—from direct government benefit programs (unrelated to unemployment schemes) violated the Free Exercise Clause because it discriminated based on the entities' religious identity.[56]

This Article will show that *Trinity Lutheran*, *Espinoza*, and *Carson* represent an arguably more important but under-appreciated inflection point in the development of the Court's religious equality jurisprudence than *Smith*. Public benefits cases, like *Trinity Lutheran*, provide the Court with a golden opportunity to clearly delineate the complex doctrinal relationship between *religious equality* and *religious liberty* by carefully teasing out the essential differences between equal protection and

---

term "religious liberty" to refer to the liberty components/principles of constitutional (e.g., Free Exercise Clause) or statutory (RFRA) provisions that implicate a *fundamental rights mode of analysis* that assesses the government's interest in curtailing and, therefore, burdening, free exercise rights. In contrast, it will primarily use the term "religious equality" to refer to the equality or nondiscrimination components/principles of constitutional provisions (e.g., Establishment Clause) that implicate an *equal protection mode of analysis*. This mode of analysis, for which the remedy is equal treatment (e.g., "leveling up" or "leveling down"), assesses the government's interest in disparate treatment of individuals or entities that are otherwise engaged in *similar secular or religious conduct* on the basis of their religious/secular identities. Lastly, it will use the term "separation principle" to refer to the Religion Clauses'—but especially the Establishment Clause's—requirement of structural separation between church and state on the one hand, and sacral versus secular conduct on the other.

53. *See* discussion *infra* Parts II.A., II.B., & III.C.

54. McDaniel v. Paty, 435 U.S. 618, 633 (1978) (Brennan, J., concurring).

55. *See id.* at 633–36 (Brennan, J., concurring).

56. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2024 (2017).

fundamental rights modes of analysis, respectively. They also highlight the critical role that religious identity plays in preserving these constitutional boundaries.

This line-drawing exercise can be particularly illuminating in the benefits context because, as a constitutional matter, government is not required to provide aid to, or fund the exercise of, rights by private citizens.[57] Since government has lots of latitude to decide *what* to fund and *how* to fund it, fundamental rights analysis is less relevant in benefits cases than equal protection concerns.[58] As long as it does not condition access or enjoyment of generally available benefits in an effort to restrict the beneficiary's fundamental rights *outside* of the government program its funding restrictions will likely pass constitutional muster. On the other hand, restrictions based on the identity (or status)[59] of a recipient should trigger equal protection concerns, especially if they involve "suspect" classifications such as race, national origin, and religion.[60]

Viewed in this context, this Article proposes to re-shift the doctrinal fulcrum of the Court's religious equality jurisprudence away from the Free Exercise Clause and towards the Establishment Clause in benefits cases and cases where burdens implicate non-free exercise concerns. It does so in five parts. **Part II** focuses on the Court's increasing reliance on the Free Exercise Clause to remedy "religious equality problem(s)" and identifies some of the reasons behind this trend. It argues that this

---

57. *See generally* Palmer v. Thompson, 403 U.S. 217 (1971) (standing for the general proposition that government is not constitutionally required to fund the exercise of rights, including those which are fundamental). *See also* David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 864, 866 (1986) (agreeing with Richard Posner's characterization that the U.S. Constitution "is a charter of negative rather than positive liberties," but identifying provisions in the Bill of Rights, including some applications of the Equal Protection Clause, where "constitutional duties that can . . . be described as positive"); NELSON TEBBE, RELIGIOUS FREEDOM IN AN EGALITARIAN AGE 89–90 (2017); Yoshino, *supra* note 50, at 173–74.

58. Equal protection analysis, however, is relevant in both the burdens and benefits context because they rely less on the distinction between negative and positive rights. But in cases where benefits are so systematic and widespread that they create vested rights, government may be bound by certain procedural due process requirements before it can deprive beneficiaries from enjoying those entitlements. *See, e.g.*, Matthews v. Eldridge, 424 U.S. 319 (1976).

59. This Article generally treats "status" and "identity" interchangeably but prefers the latter label.

60. Courts generally rely on the Religion Clauses, and not the Equal Protection Clause, to address religious discrimination (including disparate treatment based on religious identity or status). *But see* Steven G. Calabresi & Abe Salander, *Religion and the Equal Protection Clause: Why the Constitution Requires School Vouchers*, 65 FLA. L. REV. 909 (2013); Susan Gellman & Susan Looper-Friedman, *Thou Shalt Use the Equal Protection Clause for Religion Clause Cases (Not Just the Establishment Clause)*, U. PA. J. CONST. L. 665 (2008) (arguing that courts should apply the Equal Protection Clause to religious discrimination claims). *See also infra* note 255 and accompanying text.

overreliance has resulted in Free Exercise Clause "bloat"[61] that has thrown Religion Clause jurisprudence into disarray by collapsing important legal distinctions between religious identity and belief/practice on one hand, and equal protection and fundamental rights analysis on the other. It also explains how *Trinity Lutheran*, *Espinoza*, and *Carson* have contributed to this "bloat."

**Part III** provides an account of the main features of the emerging religious equality jurisprudence taking shape under the Roberts Court. It shows how these features—conflation of equality and liberty; comingling of benefits and burdens; and collapsing of status and use—flout generally accepted constitutional rules in other areas of the law. It then focuses on the latter feature as a particularly troubling manifestation of Free Exercise "bloat" which undermines the Establishment Clause's structural neutrality mandate requiring government to properly navigate the sacral-secular divide to ensure the requisite degree of separation between church and state. Advocates of the "neutral aid" theory, including Thomas Berg and Douglas Laycock, argue that the status-versus-use distinction is constitutionally suspect because restrictions on funding for religious purposes amount to discrimination that imposes substantial burdens on the free exercise of religion.[62] This Article rejects that theory and argues instead that equality between religious and secular entities in the benefit context, regardless of whether they engage in secular or sacral conduct eviscerates, the separation principle of the Establishment Clause which prohibits funding of core religious uses.

**Part IV**, the Article's descriptive contribution, frames the analysis by recognizing the dynamic normative framework of religion as a set of beliefs, practices, and identities. It acknowledges that this framework has largely contributed to the constitutional conflations that feature prominently in the Court's emerging religious equality jurisprudence, but rejects the notion that religious freedom is so normatively unique that it requires a wholesale exception to generally accepted rules surrounding

---

61. The use of "bloat" in reference to the Free Exercise Clause evokes Marc DeGirolami's use of the term in connection with the Court's increasing reliance on the Establishment Clause during the Warren and Burger eras. *See generally* Marc O. DeGirolami, *The Bloating of the Constitution: Equality and the U.S. Establishment Clause*, *in* THE SOCIAL EQUALITY OF RELIGION OR BELIEF (Alan Carlin ed. 2016).

62. Thomas Berg & Douglas Laycock, *Symposium:* Espinoza, *Funding of Religious Service Providers, and Religious Freedom*, SCOTUSBLOG (July 1, 2020, 6:22 PM), https://www.scotusblog.com/2020/07/symposium-espinoza-funding-of-religious-service-providers-and-religious-freedom/ [https://perma.cc/SM3Q-MW2M]; *see also* Thomas C. Berg & Douglas Laycock, Espinoza, *Government Funding, and Religious Choice*, 35 J.L. & RELIGION 361, 364–68, 379 (2020) [hereinafter *Government Funding and Religious Choice*] (which is a longer version of their symposium article).

equality and liberty. Ever since *Everson v. Board of Education*, the Court has implicitly acknowledged that the religious identity of an entity is distinguishable from that entity's exercise of religion.[63] More specifically—and contrary to the Court's recent holding in *Carson*—it has recognized that religious identity is *legally severable* from religious belief and practice because religious entities often engage in—and, in fact, must engage in—secular conduct to function. As such, an entity's apparent secular or religious identity (e.g., what the entity *is*) cannot always be an accurate proxy for what it *does*.

**Part V** presents the Article's normative contribution. It asserts that the Court's holding in *Trinity Lutheran*—that categorical exclusions of religious entities from generally available public benefits schemes amounts to discrimination—rightly sought to protect the church's "right to religious identity." But the Court mistakenly housed this equality right in the Free Exercise Clause despite the fact that the religious identity discrimination at issue did not really implicate free exercise rights. Instead, the Court should have ruled that Missouri's categorical prohibition on public aid to pervasively religious institutions plainly violated the Establishment Clause's equality principle prohibiting government from inhibiting religion.[64]

Based on the foregoing, the Article argues that the Court should explicitly affirm the (firmly settled) notion that the Establishment Clause prohibits funding of core religious uses.[65] And that it should do so by tethering the "right to religious identity" to the clause's structural neutrality mandate requiring government to properly navigate the sacral-secular divide to ensure the requisite degree of separation between church and state.[66] Its failure to do so will effectively gut the Establishment

---

63. 330 U.S. 1, 18 (1947).

64. *See* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (citing Bd. of Educ. v. Allen, 392 U.S. 236, 243 (1968)).

65. Mitchell v. Helms, 530 U.S. 793 (2000) (upholding a federal program that provided educational materials and equipment directly to public, private, and parochial schools in Louisiana because the direct aid was not for religious use, did not advance religion, and did not cause excessive entanglement between church and state).

66. This Article is premised on the fundamental political and legal understanding that religion—and *religious exercise* more specifically—is constitutionally "special" because it requires structural and architectural separation between church and state. *See, e.g.*, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171 (2012) (acknowledging the special role of religion, and religious institutions, in the American constitutional order and rejecting the notion that a church's internal autonomy can be adequately protected by (secular) freedom of association principles embedded in the First Amendment's Free Speech Clause alone); *see also* Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 YALE L. J. 1611 (1993). *But see* Micah Schwartzman, *What if Religion is not Special?*, 79 U. CHI. L. REV. 1351 (2012); Nelson Tebbe, *Government*

Clause.

Finally, **Part VI** will apply the "right to religious identity" framework to several of the religious equality claims the Court has recently adjudicated, or will likely address in the near future, before providing some conclusory observations about what recognizing religious identity means for the development of religious freedom jurisprudence going forward.

## II. RELIGIOUS EQUALITY AND FREE EXERCISE 'BLOAT'

This section will set the stage by showing how the Court has come to (over)rely on the Free Exercise Clause as a panacea to resolving "religious equality" claims. It will trace the slow transformation of the Free Exercise Clause from a weak liberty clause primarily focused on safeguarding the rights of religious minorities in a narrow set of cases, to a muscular antidiscrimination provision aimed at ensuring at least full equality between religious and nonreligious persons, entities, and institutions in both the burdens and benefits contexts. It will then show how *Trinity Lutheran* and *Espinoza* represent a critical inflection point: they could have either (a) further contributed to Free Exercise "bloat" by entirely collapsing the important constitutional lines between benefits and burdens, equal protection and fundamental rights modes of analysis, and religious status and religious use; or (b) led the Court to recognize a unique and severable right to religious identity that will preserve these constitutional boundaries.

To understand why, we need to step back and identify three related but

---

*Nonendorsement*, 98 MINN. L. REV. 648 (2013); Tebbe, *supra* note 43; CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 6 (2007) (arguing that the notion of "[e]qual liberty . . . denies that religion is a constitutional anomaly, a category of human experience that demands special benefits and/or necessitates special restrictions"). At the very least, this requires government *itself* to refrain from adopting a religion, officially identifying as religious, or exercising religion (by establishing a state church, for example). There is also much consensus among scholars that separation also means that government actions, including the passage of legislation affecting citizens, must be motivated by a secular purpose. This applies to both regulatory burdens (limiting the free exercise of religion) and benefits advancing or facilitating religion. Much else about what separation means, and requires, is disputed among scholars. According to Marc DeGirolami, regardless of whether separation is constitutionally mandated or not "establishment has a powerful conceptual claim of political priority to free exercise as exemption in America." Marc O. DeGirolami, *Establishment's Political Priority to Free Exercise*, 97 NOTRE DAME L. REV. 715, 719 (2022). Notwithstanding disagreements regarding the nature and scope of constitutional separation between church and state, the Religion Clauses' substantive content, and its importance both doctrinally and historically, require government not only to appreciate but to *legally distinguish* between what is *secular* and what is *sacral*. *See generally* Gillette v. United States, 401 U.S. 437 (1971); Welsh v. United States, 398 U.S. 333 (1970) (attempting to distinguish religion and religious belief from other belief systems).

distinct trends in the Court's Free Exercise Clause jurisprudence that converge in *Trinity Lutheran* and *Espinoza*: (1) the broader post-*Smith* evolution in the Court's approach towards free exercise burdens as essentially equality or nondiscrimination claims between religion and secular conduct; (2) the notion that any restrictions on the use of public benefits for sacral purposes, but not secular ones, violates the "neutral aid" principle and amounts to a substantial burden on free exercise rights; and (3) the concept that discrimination on the basis of an individual or entity's religious identity automatically implicates free exercise concerns in both the benefits and burdens context (even in situations where only secular conduct is at issue). While all three trends illustrate how the Court has come to increasingly rely on a robust Free Exercise Clause nondiscrimination principle, the second and third arguably have greater consequences. This is because they not only contribute to Free Exercise "bloat" but can ultimately provide the *coup de grace* for an Establishment Clause that has traditionally prohibited public funding of core religious uses.

### *A. Equality Between (Burdens on) Sacral and Secular Conduct*

Prior to the increasingly muscular free exercise decisions passed down by the Roberts Court, many religious freedom scholars and practitioners primarily saw the First Amendment's Free Exercise Clause as a nondiscriminatory "shield" protecting religious minorities against majoritarian regulatory burdens.[67] Under this narrative, religious exemptions from otherwise generally applicable laws were primarily used to "level the playing field" between religious majorities and minorities in an effort to remedy the disparate impact of incidental regulatory burdens on the latter.[68] Court decisions like *Sherbert v. Verner* in 1963 and *Wisconsin v. Yoder* in 1972 seemed to reinforce this religious equality narrative and religious freedom scholars took notice.[69]

---

67. *See infra* note 70 and accompanying text.

68. This leveling assumes legislation resulting from the democratic process often has a disparate impact on religious minorities because they are less likely to insulate themselves from incidental burdens that may result from indifference or neglect that nonetheless imposes substantial burdens on their free exercise. This is perhaps all the more relevant in the case of legislative, as opposed to judicial, religious exemptions from otherwise generally applicable laws. *See, e.g.*, Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465 (1999) (arguing that the hybrid statutory/judicial RFRA model, which Volokh calls the "common-law model for religious exemption," is better at safeguarding religious freedom than legislative exemptions or judicial accommodations pursuant to *Sherbert*). Note, however, that sometimes smaller and more concentrated religious groups may be more effective in lobbying for religious exemptions.

69. 374 U.S. 398 (1963); 406 U.S. 205 (1972).

Indeed, the vast majority of free exercise victories which resulted in religious exemptions between 1963 and 1990 involved religious minority groups. Most of these cases allowed plaintiffs to secure access to unemployment benefits schemes state governments sought to deny them because they objected to certain employment requirements based on their religious convictions.[70] One involved a religious exemption from state compulsory education laws.[71] As Michael McConnell observed in his 1986 article on Religion Clause neutrality, "[i]n a curious example of doctrinal imperialism, the 'equal protection mode of analysis' has come to dominate the interpretation of many other clauses of the Constitution."[72] He questioned whether, when it comes to the exercise of fundamental rights, including religious liberty, neutrality (or equality) is enough.[73]

With the Court's decision in *Employment Division v. Smith* in 1990, however, the arguably pluralist free exercise experiment came to an abrupt end.[74] In *Smith*, the Court held that laws that merely impose incidental burdens on religious exercise would no longer merit heightened scrutiny resulting in religious exemptions.[75] *Smith* seemingly set back efforts to expand religious liberty via the Free Exercise Clause.[76] But, perhaps paradoxically, it also contributed to an important reconceptualization of the Free Exercise Clause that has, in turn, paved the way for the Court's new religious equality jurisprudence.

---

70. *See, e.g.*, Frazee v. Ill. Dep't of Emp. Sec., 489 U.S. 829 (1989); Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136 (1987); Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707 (1981); *Sherbert*, 374 U.S. 398. In all four cases, plaintiffs argued that their respective states' determinations that they did not qualify for unemployment benefits because their terminations were the result of religiously motivated refusals to do work (and, therefore, did not constitute "good cause") violated their religious rights. And in each case, the Court agreed, holding that denial of unemployment benefits amounted to a substantial burden on their free exercise of religion.

71. *Yoder*, 406 U.S. at 207.

72. Michael W. McConnell, *Neutrality Under the Religion Clauses*, 81 NW. U. L. REV. 146, 146 (1986) (questioning the wisdom of employing equal treatment analysis to liberty rights, including the Religion Clauses "that appear from their language to denote specific substantive liberties and institutional arrangements").

73. *Id.* at 146–47.

74. 494 U.S. 872 (1990).

75. *Id.* at 885.

76. Many religious liberty advocates continue to believe that *Smith* was wrongly decided and should be overruled. The Court had an opportunity to overrule *Smith* in *Fulton* but refused to do so. *See supra* note 45 and accompanying text. *But see* Jim Oleske, Tandon *Steals* Fulton*'s Thunder: The Most Important Free Exercise Decision Since 1990*, SCOTUSBLOG (Apr. 15, 2021, 10:13 AM), https://www.scotusblog.com/2021/04/tandon-steals-fultons-thunder-the-most-important-free-exercise-decision-since-1990/ [https://perma.cc/5X43-5VZN] (arguing that the Court effectively overruled *Smith* in *Tandon* by explicitly adopting the "Most Favored Nation" theory of the generally applicable prong of the *Smith* test). *See also* Steve Vladeck, *The Supreme Court Is Making New Law in the Shadows*, N.Y. TIMES (Apr. 15, 2021) https://www.nytimes.com/2021/04/15/opinion/supreme-court-religion-orders.html [https://perma.cc/P9MF-R6ZM].

Under the *Smith* regime, the primary focus of the religious liberty inquiry gradually shifted away from examining so-called "discriminatory" regulations targeting denominational (minority) religious practices, to determining whether government regulations were "neutral" and "generally applicable" *as between religion and non-religion*, writ large.[77] If the Court determined that regulations were neither neutral nor generally applicable, it would revert to a pre-*Smith* strict scrutiny balancing test to assess whether (a) the regulation in question was a "substantial burden" on free exercise; (b) if it could nonetheless be justified by a compelling state interest; and, if so, (c) whether the burden was narrowly tailored to satisfy that interest.[78] A regulatory interference that failed this test would either be rendered unconstitutional per se or require an as-applied exemption for the religious adherent.[79]

Despite the *Smith* straight jacket, therefore, the Free Exercise Clause has slowly morphed into a more dynamic constitutional provision that is increasingly viewed by some as a "sword" protecting religious believers from any disparate government treatment that treats them unfavorably vis-à-vis nonreligion.[80] By the early 2000s, federal courts were increasingly reviewing government regulations with more exacting scrutiny and developing innovative ways to circumvent *Smith's* default rational basis review.[81] Under this rejuvenated brand of the Free Exercise Clause, any evidence of disparate treatment between religion and nonreligion—ranging from explicit references to, selective application of, or pretextual

77. *See generally* Oleske, *supra* note 46.

78. *See Smith*, 494 U.S. at 883.

79. *Id.* Under this framework, government legislation or regulation that targets religious exercise (sometimes referred to as "religion qua religion") would constitute a per se violation. *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Haileah, 508 U.S. 520 (1993) (invalidating an otherwise facially neutral city ordinance banning animal sacrifice on the basis that it was neither neutral nor generally applicable and was instead gerrymandered to target the specific religious practice of the Santeria church). On the other hand, government action that only incidentally (but substantially) burdens religious exercise would only require a religious exemption as applied to the conduct in question. *See generally* Stephanie H. Barclay & Mark L. Rienzi, *Constitutional Anomalies or As-Applied Challenges? A Defense of Religious Exemptions*, 59 B.C. L. REV. 1595 (2018).

80. *See generally* Oleske, *supra* note 46. *But see* Luke Goodrich & Rachel Busick, *Sex, Drugs, and Eagle Feathers: An Empirical Study of Federal Religious Freedom Cases*, 48 SETON HALL L. REV. 353, 353 (2018) (arguing that empirical data undermines the notion that religious freedom cases post-*Smith* have transformed from a "shield for protecting religious minorities into a sword for imposing Christian values in the areas of abortion, contraception, and gay rights").

81. *See, e.g.*, Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly, 309 F.3d 144, 165–67 (3d Cir. 2002); Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 361–63 (3d Cir. 1999). *See generally* Douglas Laycock & Steven T. Collis, *Generally Applicable Laws and the Free Exercise of Religion*, 95 NEB. L. REV. 1, 10 (2016) (elaborating the various ways that laws or regulations may not satisfy the "generally applicable" prong of the *Smith* test, including the use of "individualized exemptions").

targeting against religion—triggers strict scrutiny and a presumption that the discrimination imposes a substantial burden on religious exercise.[82]

One short-circuiting approach the Court has adopted is to scrutinize the government's neutrality by developing an animus (or hostility) doctrine that is particularly sensitive to detecting—and neutralizing—"discrimination" against religion by non-religion.[83] Another, arguably more effective approach, is to apply a more expansive reading of the "generally applicable" prong of the *Smith* test. In their amicus brief in support of appellants in *Stormans, Inc. v. Selecky*, Douglas Laycock and several other religious freedom scholars highlighted the important nondiscrimination aspects of the Free Exercise Clause which, they argued, prohibited secular discrimination against religiously-motivated conduct.[84] In so doing, they relied on Justice Jackson's opinion in *Railway Express* which highlighted the relationship between equal protection and fundamental rights cases.[85]

But Laycock and the others endorsed an equality approach that went beyond targeted burdens on religious liberty to also cover disparate impact resulting from "unintentional [secular] neglect or indifference."[86] In their amicus brief, they wrote that "*Smith* and *Lukumi* create a special kind of equality rule that goes well beyond the traditional bounds of equal protection and nondiscrimination law" and does not simply require religion to "be singled out" or the state to "act with bad motive" for there

---

82. *See, e.g.*, Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1876–81 (2021); Masterpiece Cakeshop Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1732 (2018).

83. *See, e.g.*, *Masterpiece Cakeshop*, 138 S. Ct. at 1729–31. For a critical review of the Court's application of animus doctrine, see Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L. REV. 133 (2018). *See also* Caroline Mala Corbin, *Intentional Discrimination in Establishment Clause Jurisprudence*, 67 ALA. L. REV. 299, 321 (noting that "the Supreme Court seems to demand much more to satisfy intentional discrimination in the establishment (and equal protection) context than in the free exercise one").

84. Brief of Const. L. Professors as Amici Curiae in Support of Appellees at 1–2, Stormans, Inc. v. Wiesman, 794 F.3d 1064 (9th Cir. 2015) (Nos. 12-35221, 12-35223).

85. *Id.* at 25 ("[T]here is no more effective practical guarantee against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally." (quoting Ry. Express Agency v. City of New York, 336 U.S. 106, 112 (1949) (Jackson, J., concurring))). In an article affirming the importance of the nondiscrimination principle of the Free Exercise Clause in COVID-related cases, Cass Sunstein also cited this case to argue that unlike liberty principles, "antidiscrimination principles . . . trigger political safeguards against unjustified actions." Cass R. Sunstein, Our Anti-Korematsu 12–13 (Dec. 29, 2020) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3756853 [https://perma.cc/R4WF-F4G7].

86. James Oleske, Jr., Lukumi *at Twenty: A Legacy of Uncertainty for Religious Liberty and Animal Welfare Laws*, 19 ANIMAL L. 295, 329 (2013) (noting that Laycock's view, although "intuitively appealing . . . does not withstand closer scrutiny"). Despite this, Oleske notes that the Supreme Court has "confirmed the equivalence of its free exercise and equal protection tests, with a reminder that the ultimate inquiry in both contexts concerns animus." *Id.* at 336 n.234.

to be a free exercise violation.[87] "Laws that burden religion and apply to some but not all *analogous secular conduct* are not generally applicable," they wrote.[88] As Jim Oleske and other religious freedom scholars have argued, this is a fundamental misinterpretation (or misapplication) of *Smith* which focused on intentional or targeted burdens on free exercise.[89]

This reconceptualization of Free Exercise Clause cases primarily as disparate impact discrimination claims has been critical to the clause's reinvigoration.[90] In responding to *Smith*, it is fair to say that the Court has fashioned an expansive religious equality jurisprudence that addresses what Kavanaugh called the "religious equality problem" by requiring government to treat religious conduct *at least as favorably as* secular conduct.[91] This approach is manifested in what scholars have referred to as the Most Favored Nation (MFN) theory of religious liberty: as long as there is a secular exemption for any type of regulated activity the regulation in question is not "generally applicable" and courts must *fully equalize treatment between the secular and religious conduct* (and similarly exempt the latter from government regulation).[92]

As such, the Free Exercise Clause's so-called "nondiscrimination principle" is now a key feature in many, if not most, free exercise complaints entertained by federal courts notwithstanding the diversity or complexity of the issues and themes involved. The recent batch of free exercise challenges filed by churches and houses of worship during the COVID-19 pandemic affirms the increasing importance of this new brand

---

87. Brief of Const. L. Professors as Amici Curiae in Support of Appellees, *supra* note 84, at 12.

88. *Id.* at 2.

89. *See* Oleske, *supra* note 46 and accompanying text; *see also* Amicus Curiae Brief of Church-State Scholars in Support of Appellee's Petition for Rehearing at 67, Monclova Christian Acad. v. Toledo-Lucas Cnty. Health Dep't, 984 F.3d 477 (6th Cir. 2020) (No. 20-4300), 2021 WL 124792 (arguing that *Lukumi* was about "whether the nature and degree of under-inclusion is so 'substantial' that it suggests the regulation was 'drafted with care' to *target religious practice*" (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 543 (1993) (emphasis added))).

90. This Article uses the term "disparate impact" somewhat differently than it is usually conceptualized in equality jurisprudence. More specifically, it refers to "disparate impact" in situations where government regulations impose incidental burdens on *free exercise rights* due to (secular) neglect or indifference and there is some analogous secular conduct that is not similarly regulated. This would, according to some advocates, mean that the regulation is no longer "generally applicable." The implications of this approach are wide-reaching because most laws include exceptions and would therefore not be considered "generally applicable."

91. Murphy v. Collier, 139 S. Ct. 1475, 1476–78 (2019) (mem.) (Kavanaugh, J., stating); *see also* Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2613 (2020) (mem.) (Kavanaugh, J., dissenting) (explaining further his view of what the Constitution's Religion Clauses prohibit when it comes to religious equality); *see* South Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1651 (2020) (Kavanaugh, J., dissenting).

92. MFN is often credited to Douglas Laycock who introduced the concept in the early 90s. *See generally* Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 49–50 (1990).

of religious equality jurisprudence.[93] For example, in a series of shadow docket cases between 2020 and 2021 challenging state and local government efforts to restrict large gatherings with the aim of reducing COVID-19 infection rates, a majority of the Court's justices seemed to embrace the MFN theory of religious equality when the restrictions applied to collective religious worship.[94] The Court's recent decision in *Fulton* is also an affirmation of this more expansive notion of religious equality in the burdens context.[95]

### *B. Equality Between Sacral and Secular Use (of Benefits)*

As the regulatory state began to expand its public welfare footprint in the second half of the 20th century, state and local governments increasingly struggled with how (and whether) to provide "neutral aid" to religion without violating the liberty, equality, and separation principles of the Religion Clauses.[96] Since the early 1970s, the prevailing doctrine on public aid to religion implicated the three-part (or pronged) *Lemon* test: if such aid was (a) provided for non-secular purposes, (b) had the primary effect of advancing religion, *or* (c) excessively entangled the government

---

93. For more analysis regarding the flaws in MFN theory as applied to COVID shutdown orders, see *infra* Part III.A.

94. *See* Zalman Rothschild, *Free Exercise's Lingering Ambiguity*, 11 CAL. L. REV. ONLINE 282, 283–87 (2020) (noting the futility and/or difficulty in applying a comparability test between secular and religious conduct). Some versions of this MFN approach to *Smith's* "generally applicable" prong require the secular and religious conduct to be "comparable" in nature, while others consider any type of secular exemption to require the religious exemption regardless of whether they are "comparable" in scope and nature. *Compare, e.g.*, Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021), *and Calvary Chapel*, 140 S. Ct. at 2607, 2610 (Kavanaugh, J., dissenting), *with* Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 66–68 (2020), *and Calvary Chapel*, 140 S. Ct. at 2605–07 (2020) (Alito, J., dissenting). This Article refers to the more expansive reading as the Single Secular Exemption (SSE) (as opposed to MFN). Although Douglas Laycock has been a proponent of MFN, he has seemingly rejected SSE as a "silly" application of *Smith's* "general applicability" test in Covid-related cases. *See* Jim Oleske (@JimOleske), TWITTER (Dec. 11, 2020, 7:43 PM) https://twitter.com/JimOleske/status/1337573861299085313.

95. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1878 (2021) (standing for the proposition that the *mere existence* of a secular exemption mechanism, without more, means the regulation in question fails the "generally applicable" prong of *Smith* (requiring a religious exemption unless government has a compelling interest to deny it)).

96. *See, e.g.*, Locke v. Davey, 540 U.S. 712 (2004); Mitchell v. Helms, 530 U.S. 793 (2000); Lemon v. Kurtzman, 403 U.S. 602 (1971); Everson v. Bd. of Educ., 330 U.S. 1 (1947). A fundamental assumption of this Article is that the Religion Clauses are endowed with liberty, equality (nondiscrimination), and separation principles, and that these principles manifest themselves differently in each of the clauses. *See supra* note 52 (for definitions of what each of these principles comprises); *see also* Caroline Mala Corbin, *Nonbelievers and Government Speech*, 97 IOWA L. REV. 347, 378–414 (2012) (identifying and disaggregating the liberty and equality "components" of the Establishment Clause and arguing that active and passive government speech implicates both).

in religious matters then it violated the Establishment Clause.[97]

Over the years, however, the Court's application of the *Lemon* test has been inconsistent and has resulted in doctrinal amendments or modifications as the justices saw fit.[98] Prior to this term, it was fair to say that a majority of justices on the Roberts Court believed the *Lemon* test was all but dead and is no longer good law.[99] In *Kennedy v. Bremerton School District*, the Court finally abandoned the *Lemon* test, particularly with regard to government endorsement of religion, and instead adopted a history and tradition approach that "faithfully reflects the understanding of the Founding Fathers."[100] It is not immediately clear, however, whether the *Lemon* test (or remnants of it) still apply in the public aid context. But if they do not, what is the current constitutional rule on public aid to religion?

Until *Trinity Lutheran*, the prevailing view among scholars was to look at several well-known public aid cases that involved either indirect aid (where recipients wished to use generally available public vouchers and scholarship funds to attend religious schools[101] or enroll in theological studies, respectively)[102] or direct aid where local governments lent education materials and equipment to public and private—including religious—schools.[103] A third tangentially relevant category of public aid

---

97. *Lemon*, 403 U.S. at 612–13. *See infra* Part V.B. for more analysis on how entanglement interacts with the "right to religious identity."

98. For example, Justice O'Connor applied a modified version of the *Lemon* test called the "endorsement test" to determine if government displays or expression that included religious content violated the Establishment Clause. *See, e.g.*, Lynch v. Donnely, 465 U.S. 668, 681–83 (1984). O'Connor later amended this test in *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753, 772–73 (1995) (O'Connor, J., concurring) and explained that the endorsement test should "focus[] on the perception of a reasonable, informed observer." *Id.*

99. *See, e.g.*, Am. Legion v. Am. Humanists Ass'n, 139 S. Ct. 2067, 2080–85 (2019) (refusing to apply either the *Lemon* test or its variants to a cross erected on government property without overruling *Lemon*).

100. 142 S. Ct. 2407, 2428 (2022) (quoting Town of Greece v. Galloway, 572 U.S. 565, 577 (2014)).

101. *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639 (2002). This case had forerunners such as *Agostini v. Felton*, 521 U.S. 203 (1997) and *Zobrest v. Catalina Foothills School District*, 503 U.S. 1 (1993), which progressively relaxed restrictions on public aid cases as long as individuals exercised true private choice and directed the public aid to religious organizations or services. For more on the utility of the Court's "indirect aid" doctrine, see *infra* note 142 and accompanying text.

102. *See, e.g.*, Locke v. Davey, 540 U.S. 712 (2004).

103. *See, e.g.*, Mitchell v. Helms, 530 U.S. 793 (2000). Another related category of public aid cases that is relevant is government tax schemes that affect religious organizations' free exercise concerns. *See, e.g.*, Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (rejecting argument that revocation of tax exemption scheme based on the university's policy prohibiting interracial dating and marriage violated its free exercise rights); United States v. Lee, 455 U.S. 252 (1982) (rejecting argument that forcing employer to fund his employees' social security benefits scheme via taxes violated his free exercise rights). For a more in-depth discussion of these cases, see *infra* Part III.B.

cases involved those where the government allowed limited access to its property, and sometimes provided direct funding to, citizens who wished to engage in religious speech or conduct.[104]

By 2002, the rough rule on aid to religion cases could be summarized this way: as long as public benefits indirectly flow to religious entities as a result of the true private choice of individual beneficiaries, or they directly flow to them but are not used for core sacral purposes such as religious indoctrination or worship, they do not violate the Establishment Clause. Moreover, regardless of the direct or indirect nature of the aid provided, governments have wide latitude to place restrictions on *how* their public funds are used, including on religious uses of those funds, without violating the Free Exercise Clause.[105]

But for some, the unemployment cases decided by the Court from 1963 until 1990 provide a better understanding of the constitutional rule on public aid to religion.[106] They argue that these cases stand for the proposition that restrictions (or conditions) on the use of public benefits that implicate the beneficiary's religious beliefs or conduct amount to substantial burdens on their free exercise rights.[107] As noted earlier, all four plaintiffs in those cases argued that their disqualification from the unemployment benefits scheme resulted from religiously motivated refusals to work which violated their free exercise rights.[108] And the Court agreed.[109] In *Thomas v. Review Board*, for example, the majority wrote that "[w]here the state conditions receipt of an *important benefit* upon conduct prescribed by religious belief, or where it denies such a benefit . . .[it may] put[] *substantial pressure* on an adherent to modify his behavior and to violate his beliefs."[110] It further noted that even if the compulsion is indirect it amounts to a substantial infringement of free exercise rights.[111]

---

104. *See, e.g.*, Christian Legal Soc'y v. Martinez, 561 U.S. 661 (2010); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995); Widmar v. Vincent, 454 U.S. 263 (1981). Though these cases may be viewed as public benefits cases that can raise Religion Clauses concerns, the Court has often adjudicated them using Free Speech Clause jurisprudence.

105. Notably, the majority decision in *Locke v. Davey* rejected Scalia's argument that "when the State exacts a financial penalty of almost $3,000 for religious exercise—whether by tax or by forfeiture of an otherwise available benefit—religious practice is anything *but* free." 540 U.S. 712, 731 (2004) (Scalia, J., dissenting).

106. *See supra* note 70 and accompanying text.

107. *Government Funding and Religious Choice*, *supra* note 62 at 377–78.

108. *See supra* note 70 and accompanying text.

109. *Id.*

110. Thomas v. Rev. Bd. Of Ind. Emp. Sec. Div., 450 U.S. 707, 717–18 (1981) (emphasis added).

111. *Id.* On the contrary, this Article asserts that the unemployment benefits cases, including

Not surprisingly, the foregoing characterization of public aid cases under *Thomas* and its companion unemployment benefits cases is in tension with the prevailing view outlined in the preceding paragraph. But for scholars like Berg and Laycock these cases simply reinforce the notion that the Religion Clauses—and the Free Exercise Clause's "nondiscrimination principle" in particular—require full substantive equality[112] between religious and secular entities in all aspects of public funding, including how the beneficiaries wish to use those funds.[113] Consequently, the Court should either narrowly interpret *Locke* to only apply to the specific set of circumstances in that case or overrule its underlying rationale that government may restrict use of its public funds for religious purposes without running afoul of the Free Exercise Clause.[114]

### *C. Religious Identity Discrimination as Free Exercise Burden*

While the Court was slowly reframing its Free Exercise Clause inquiry in terms of nondiscrimination between religious and secular conduct in both the burdens and benefits contexts, it was also coming to terms with religion's dynamic and unique normative framework *as both a fundamental right (to be exercised) and a (protected) identity*.[115] The Court's efforts to grapple with this dynamic framework can be traced to its recognition, in the late 19th and early 20th century, that religion as a right can be conceptualized in different ways. And that this conceptualization may result in different levels of constitutional protection against government efforts to regulate religion in both the burdens and

---

*Sherbert v. Verner* and *Thomas v. Review Board*, possessed their own peculiar characteristics and are distinguishable from other generally available benefits schemes. Unlike ad hoc or generally available benefits schemes, unemployment schemes are complex social safety programs that all employees pay into and, thus, have a vested interest in. As such, it is reasonable to view terminations resulting from religiously motivated refusals to do work (that were deemed not to satisfy the "good cause" requirement) as substantial burdens on religious exercise. *See, e.g.*, *supra* note 70 and accompanying text. Moreover, there is a plausible argument that such religious exemptions do not amount to funding of core religious purposes such as worship, prayer, and indoctrination.

112. This Article generally uses the term "full substantive equality" to refer to the requirement that government must provide equal treatment between beneficiaries notwithstanding their *religious (or secular) identities or the nature of the conduct* for which they seek funding (e.g., secular or religious). In the alternative, it will use "formal equality" to refer only to the requirement that government provide equal treatment between beneficiaries solely on the basis of their religious or secular *identity*.

113. *Government Funding and Religious Choice*, *supra* note 62 at 362.

114. *Id.* at 8–10. For more discussion of *Locke* and its significance to the status-versus-use distinction, see *infra* Parts II.D., III.C., and IV.A.

115. For more on the important legal distinctions between religious belief, conduct, and identity (and the varying levels of constitutional protection each is afforded), see *infra* Part IV.A.

benefits contexts.[116]

In 1978, the Court's plurality held in *McDaniel v. Paty* that a Tennessee constitutional provision prohibiting religious ministers from running for public office violated the Free Exercise Clause because it amounted to religious "status" discrimination.[117] The Court's rationale was that the prohibition conditioned the exercise of one right (running for public office) on the surrender of another (exercising religion).[118] This restriction effectively "imposed an unconstitutional penalty upon appellant's exercise of his religious faith."[119] According to the Court, therefore, it is not just the denial of public benefits based on conduct motivated by religious beliefs that amounts to a substantial burden on free exercise rights. Categorical prohibitions on the exercise of rights or privileges based on religious identity also violate the Free Exercise Clause *even if* no free exercise rights are directly at issue.

The Court's rationale in *McDaniel* would eventually play an outsized role in its holdings in both *Trinity Lutheran* and *Espinoza*. Interestingly, the majority opinions in both relied more heavily on the rationale in *McDaniel* (that religious status discrimination effectively acted as a "penalty on the free exercise of religion") than on the rationale that conditioning receipt of unemployment benefits upon conduct mandated by the beneficiary's religious beliefs imposed a substantial burden on free exercise.[120] Regardless, the Court's holding in *McDaniel* contributed significantly to Free Exercise "bloat" by further entrenching the view that discrimination on the basis of religious identity violates of the Free Exercise Clause's nondiscrimination principle.

### *D. Trinity Lutheran: Free Exercise Burdens, Benefits, and Identity Converge*

Trinity Lutheran Child Learning Center submitted an application to

---

116. *See id.*

117. 435 U.S. 618, 626–27 (1978). The plurality opinion and the concurring opinions were all over the map in terms of their justification and understanding of what "status" meant, but the ministerial status of the plaintiff played a prominent role. *See id.* at 626–46. See *infra* Part IV.A. for more regarding the various opinions and the relationship between status/identity in *McDaniel*, and other components of free exercise (e.g., religious belief and practice).

118. *McDaniel*, 435 U.S. at 626.

119. *Id.* at 633 (Brennan & Marshall, JJ., concurring). It is important to note that this language was not used by the plurality opinion, but by the concurring opinions of Justices Brennan and Marshall.

120. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2019 (2017); Espinoza v. Montana Dep't of Revenue, 140 S. Ct. 2246, 2255 (2020).

receive a public grant pursuant to Missouri's scrap tire program.[121] The program offered reimbursement grants to qualifying nonprofit organizations that installed playground surfaces made from recycled tires.[122] Despite meeting all the relevant criteria as a qualifying participant, Missouri's Department of Natural Resources rejected the center's application once it determined that it operated under the auspices of Trinity Lutheran Church.[123] It did so because it had an express policy denying grants to any applicant owned or controlled by a religious entity pursuant to Article I, Section 7 of Missouri's Constitution.[124]

The Court's majority held, for the first time, that the agency's policy violated the free exercise rights of Trinity Lutheran by categorically denying it an otherwise available public benefit solely because of its religious status.[125] The majority opinion began by noting that although the parties both acknowledged that the Missouri policy was not mandated by the Establishment Clause, that fact did not help "answer the question under the Free Exercise Clause, because we have recognized that there is 'play in the joints' between what the Establishment Clause permits and the Free Exercise Clause compels."[126] It further noted that when the Court has rejected Free Exercise Clause challenges, it has been careful to distinguish neutral and generally applicable laws from those that target religion for disfavored treatment.[127] In this case, the agency policy imposed "special disabilities on the basis of . . . religious status" which triggered the strictest scrutiny.[128] The Court characterized the disfavored treatment imposed on Trinity Lutheran as a "penalty" on the free exercise of religion because it required the center to make a choice between participating in an otherwise available benefit or remaining a religious institution.[129]

The majority distinguished *Trinity Lutheran* from *Locke*, observing

---

121. *Trinity Lutheran*, 137 S. Ct. at 2017.

122. *Id.*

123. *Id.* at 2018.

124. *Id.* at 2017. The constitutional no-aid provision required that "no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion." *Id.*

125. *Id.* at 2025. Interestingly, the majority did *not* hold that the no-aid provision in Missouri's constitution was a per se violation of the Free Exercise Clause. As such, the case was effectively an "as applied" challenge and the Court only held that Montana's *policy* of categorically denying a grant to the center based on its religious status was unconstitutional. The same is true for the challenge to Montana's no-aid provision in *Espinoza*. *See Espinoza*, 140 S. Ct. at 2278 (Ginsberg, J., dissenting).

126. *Trinity Lutheran*, 137 S. Ct. at 2019.

127. *Id.* at 2020.

128. *Id.* at 2021 (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993) (which, in turn, relies on *McDaniel*)).

129. *Id.* at 2024.

that in that case the Court accepted Washington state's decision not to allow a scholarship recipient to use public funds to pursue a devotional theology degree because the restriction did not apply to *who* the recipient was but *how he chose to use* the funds.[130] More specifically, Davey intended to pursue a devotional theological degree and the state had an anti-establishment interest in not funding an "essentially religious endeavor."[131] Finally, the Court noted that the state's preference to "skat[e] as far as possible from religious establishment concerns" did not amount to a compelling interest, especially in the face of a clear infringement on free exercise.[132]

In a footnote towards the end of its opinion, the Court clarified that its ruling is limited to cases of "express discrimination based on religious identity with respect to playground resurfacing."[133] Not all of the seven members of the majority joined this footnote.[134] It is not immediately clear if the reason they chose not to is because they disagreed with the identity-based characterization of *Trinity Lutheran*, did not think its holding should be limited to playground resurfacing, or some combination of the two. What is clear, however, is that the majority rejected Missouri's argument that this case is indistinguishable from *Locke*.

The majority's decision in *Trinity Lutheran* also rejected the lower federal courts' rulings that because Missouri was under no obligation to provide an affirmative benefit to the public in the first place it could withhold it on account of the recipient's religious status.[135] In so doing, the Court relied on the rationale in *McDaniel v. Paty*.[136] In *McDaniel*, as in *Trinity Lutheran*, the Court interpreted the conditions imposed by Tennessee as "an unconstitutional penalty" or a "special disabilit[y] on the

---

130. According to Chief Justice Roberts's majority opinion, "Davey was not denied a scholarship because of who he *was*; he was denied a scholarship because of what he proposed *to do*—use the funds to prepare for the ministry. Here there is no question that Trinity Lutheran was denied a grant simply because of what it is—a church." *Id.* at 2023.

131. *Id.*

132. *Id.* at 2024.

133. *Id.* at 2024 n.3. The full footnote reads: "This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination." *Id.*

134. Only Justices Kennedy, Alito, and Kagan joined Roberts's opinion in full, with Justices Thomas and Gorsuch concurring in part but refusing to join footnote 3, and Justice Breyer concurring only in the judgment. *See id.* at 2025 (Thomas, J., concurring in part); *id.* at 2026 (Gorsuch, J., concurring in part); *id.* (Breyer, J., concurring in the judgment).

135. *Id.* at 2018–19.

136. *Id.* at 2021–22 ("Like the disqualification statute in [*McDaniel v. Paty*, 435 U.S. 618 (1978)], the Department's policy puts Trinity Lutheran to a choice: It may participate in an otherwise available benefit program or remain a religious institution.").

basis of . . . religious status" that triggered strict scrutiny.[137] Arguably, therefore, *Trinity Lutheran* could also be seen as an unconstitutional condition on religious belief or conduct rather than just a case about discrimination against religious identity or status.[138]

Justice Gorsuch's concurrence specifically focused on the footnote. He questioned whether the identity versus belief or conduct distinction mattered for the purposes of a Free Exercise Clause inquiry and rejected the notion that the general principles presented in the holding should solely be limited to cases involving funding of playground resurfacing.[139] He also noted that the First Amendment's Free Exercise Clause should not care about such distinctions because the clause guarantees "free *exercise* of religion, not just the right to inward belief (or status)."[140] The tone and tenor of this concurrence foreshadowed the Court's opinion in *Carson* where it finally eviscerated the status-use distinction and limited *Locke* to the specific facts at issue.[141]

Justice Sotomayor, who wrote the dissenting opinion (which Justice Ginsburg joined), was not convinced. She distinguished *Trinity Lutheran* from the line of cases implicating indirect aid programs "in which aid reaches religious institutions 'only as a result of the genuine and independent choices of private individuals.'"[142] She similarly distinguished it from direct funding cases where the religious institution provides assurances that the public funds would not be used for religious

---

137. *McDaniel*, 435 U.S. at 633 (Brennan & Marshall, JJ., concurring); Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 533 (1993) (citation omitted) (discussing *McDaniel*).

138. The Court effectively characterized the choice as a form of "indirect coercion or penalt[y] on the free exercise of religion" as opposed to an "outright prohibition[]" that is plainly unlawful under the Free Exercise Clause. *Trinity Lutheran*, 137 S. Ct. at 2022 (quoting Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 450 (1988)).

139. *Id.* at 2026 (Gorsuch, J., concurring).

140. *Id.* (Gorsuch, J., concurring).

141. *See* Carson v. Makin, 1142 S. Ct. 1987, 2001 (2022).

142. *Trinity Lutheran*, 137 S. Ct. at 2028–29 n.2 (Sotomayor, J., dissenting) (citing Zelman v. Simmons-Harris, 536 U.S. 639, 649 (2002)). Although beyond the scope of this Article, there are reasons to seriously question the utility of the direct versus indirect aid conceptual framework adopted by the Court in *Zelman*. First, although both *Espinoza* and *Carson* are considered "indirect aid" cases, the petitioner parents and the schools involved all benefited from the tuition assistance schemes. In fact, it can be argued that petitioner parents in both cases were direct beneficiaries. If so, *Mitchell* and not *Zelman*, should guide the Court's adjudication of these cases. Second, and perhaps more pertinent to the issues addressed in this Article, it is not clear how much work the indirect nature of the public aid program is doing in *Carson*. If the status-use distinction is conceptually unworkable and amounts to free exercise discrimination against parent petitioners (who are, arguably, themselves direct beneficiaries), are there really any constitutional limits left when it comes to direct public funding of religious entities (including those that are pervasively religious)? In other words, doesn't the evisceration of the status-use distinction also undermine the utility of the direct-indirect aid distinction? *See also infra* Parts VI.A.–B. for further analysis regarding problems associated with the Court's direct versus indirect aid conceptual framework, particularly in light of its holding in *Carson*.

activity.[143] She ended her dissent by arguing that even if we assume that directly funding the center does not violate the Establishment Clause, it does not automatically follow that Missouri's decision not to fund Trinity Lutheran is a violation of the Free Exercise Clause.[144] For support, she relied on the discretionary "play in the joints" rationale the Court adopted in *Locke* and the slippery slope between funding of religion and restrictions on religious freedom rooted in the historical experiences of the states.[145]

Three years later, in *Espinoza v. Montana Department of Revenue*, the Court appeared to extend the rule against religious identity discrimination announced in *Trinity Lutheran* to indirect school aid cases.[146] It held that anytime federal, state, or local governments decide to provide indirect public aid to private secular schools via a school choice voucher (or other payment transfer scheme), they must ensure that the funds can also be used at private religious schools.[147] The majority opinion effectively sustained plaintiffs' as applied challenge and reversed the Montana Supreme Court's decision to invalidate the entire tuition assistance program to prevent the use of public funds at any private schools.[148]

In so doing, the Court rejected the state's argument that any alleged religious discrimination against both religious schools and the parents who wished to send their kids to those schools was rendered moot once authorities decided to "level down" and get rid of the entire funding scheme.[149] But the holding's underlying rationale left little doubt that the Court considered Montana's constitutional no-aid provision, which was similar to Missouri's and 38 other states, unconstitutional on its face. And it put an end to any doubts that *Trinity Lutheran* was limited to seemingly secular activities like resurfacing children's playgrounds.

---

143. *Id.* at 2029 (Sotomayor, J., dissenting); *see, e.g.*, Mitchell v. Helms, 530 U.S. 793, 842–43 (2000) (O'Connor, J., dissenting); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 875–76 (1995) (Souter, J., dissenting).

144. *Trinity Lutheran*, 137 S. Ct. at 2040 (Sotomayor, J., dissenting).

145. *Id.* (Sotomayor, J., dissenting).

146. 140 S. Ct. 2246, 2256–57 (2020). The public aid in *Trinity Lutheran* involved the payment of a direct subsidy in the form of a reimbursement grant that would allow the church to install "playground surfaces made from recycled tires" to a church's daycare center. *Trinity Lutheran*, 137 S. Ct. at 2017. The public aid in *Espinoza*, on the other hand, involved an indirect transfer payment funded by taxpayer dollars that would provide families with tuition assistance to offset the costs of enrolling their children in (secular or religious) private schools. *Espinoza*, 140 S. Ct. at 2251.

147. *Espinoza*, 140 S. Ct. at 2262–63.

148. *Id.*

149. *Id.* at 2261–62. As Justice Ginsburg noted in her dissent, Montana's decision to "level down" and get rid of the entire indirect aid program altogether should have rendered the litigation moot. *Id.* at 2281 (Ginsburg, J., dissenting). *But see infra* note 190 and accompanying text (offering the majority's explanation for why a "leveling down" remedy was insufficient).

The stage was thus set for *Carson* to manifest what *Trinity Lutheran* spawned: the emergence of a religious equality jurisprudence—grounded wholly in the Free Exercise Clause—that contravenes settled case law, flouts generally accepted constitutional rules in other areas of the law, and effectively guts the Establishment Clause by prohibiting restrictions on the use of public funds for core religious purposes anytime government provides a generally available public benefit.

## III. THE EMERGING RELIGIOUS EQUALITY JURISPRUDENCE

Over the past few decades the Court has slowly refined the substance and contours of a religious freedom doctrine that primarily views the Religion Clauses—and the Free Exercise Clause in particular—as a way of addressing what Justice Kavanaugh termed the "religious equality problem" in *Murphy*.[150] Perhaps more than any other justice on the Roberts Court, it is Kavanaugh who has been most thorough in attempting to explain what the Court actually means by religious equality. In *Calvary Chapel*, for example, he explained that the Court's religious equality cases generally fall into four distinct categories: (a) laws that expressly discriminate against religious organizations; (b) laws that expressly favor religious organizations; (c) facially neutral laws that do not expressly discriminate between religion and nonreligion but may still infringe on free exercise because they are either motivated by hidden animus or they nonetheless impose incidental substantial burdens that justify religious exemptions;[151] and (d) laws that create regulated and exempt categories that may impose substantial burdens on religious exercise.[152]

---

150. In *American Legion v. American Humanist Association*, Kavanaugh provided a general typology of religious freedom, and especially Establishment Clause cases: (a) religious speech/symbol; (b) religious exemptions; (c) government benefits/tax exemptions; (d) school prayer; and (e) limited public forum. 139 S. Ct. 2067, 2092 (2019) (Kavanaugh, J., concurring). He noted that the Court has refused to apply the *Lemon* test in any of these five Establishment Clause cases, implying that the test is no longer good law. *Id.* (Kavanaugh, J., concurring). *But see infra* Part V for more on the relevance of the *Lemon* test, and specifically its "effects prong," to the Article's normative argument that the right to religious identity is best housed in the Establishment Clause.

151. Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2610–11 (2020) (mem.) (Kavanaugh, J., dissenting). This category primarily implicates the "neutrality" prong of the *Smith* test. Interestingly, though, Kavanaugh seems to suggest that even if a regulation is neutral but imposes incidental substantial burden on the exercise of religion it may be necessary to provide an exemption (in clear contravention of *Smith*). The cases he cites in support of the third category, however, are less about religious exemptions and more about internal autonomy of religious organizations via the "ministerial exception" (which implicates both Free Exercise and Establishment Clause protections). *See id.* at 2611 (Kavanaugh, J., dissenting).

152. *Id.* at 2610 (Kavanaugh, J., dissenting). This category mostly implicates the "generally applicable" prong of the *Smith* test and shows Kavanaugh's favorable view of the MFN (or SSE) approach.

Putting aside whether this is—or should be—an accurate characterization of the current state of religious equality jurisprudence, it is noteworthy that Kavanaugh's typology largely frames the issue by assessing whether there is express or implicit disparate treatment between religious and secular individuals or organizations based on their status.[153] What is missing from the discussion is any reference to whether these cases occurred in the benefits or burdens context, or whether there was actually religious conduct or exercise at play. The implication seems to be that *any* disparate treatment based on religious status, or more broadly between "religion and nonreligion," automatically amounts to an infringement on free exercise rights in both the benefits and burdens context. And the Court gets there by adopting an equal protection mode of analysis that requires, at the very least, *full substantive equality of treatment* between religion and nonreligion in all contexts.

This emerging religious equality jurisprudence has the potential to radically alter constitutional law in two ways. First, it will undermine Religion Clause jurisprudence by repudiating the general consensus that religion, and free exercise more accurately, is constitutionally "special."[154] More specifically, it will upset the balance between the Establishment and Free Exercise clauses which has traditionally imposed certain disabilities on government's ability to exercise, endorse, or fund religion on the front-end while acknowledging that free exercise should be afforded certain privileges and protections over secular conduct on the back-end (including exemptions from generally applicable laws).[155] Second, and equally important, the Court's emerging religious equality jurisprudence has the potential to radically alter basic constitutional rules surrounding equality and fundamental rights analysis.[156]

---

153. *See id.* (Kavanaugh, J., dissenting).

154. *See* Calabresi & Salander, *supra* note 60 and accompanying text; *infra* notes 165–66 and accompanying text; *see also infra* Parts IV and V (for further explanation on the underlying presumption of this Article that religious exercise is constitutionally "special").

155. *See supra* note 66. The disabilities on government exercising, endorsing, or funding religion (or, more specifically, core religious uses) implicate the Establishment Clause's separation principle and are strictly prohibited. *See, e.g.*, Corp. of Presiding Bishop v. Amos, 483 U.S. 327, 337 (1987) (noting that "[f]or a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence"); *see also infra* Part V.B. According to this Article, however, the Establishment Clause's requirement that government not "inhibit" religion implicates the clause's equality principle and should implicate strict scrutiny review similar to the Equal Protection Clause. *See infra* Part V.A.

156. *See, e.g.*, Tebbe, *supra* note 43; Sunstein, *supra* note 85. *See generally* JAMAL GREENE, HOW RIGHTS WENT WRONG (2021). According to Nelson Tebbe, the Court's evolving religious equality jurisprudence has effectively produced a new and distinct principle in constitutional discourse which he calls "equal value." Equal value "prohibits government from regulating protected activities

Viewed in this context, this section explores the ways the emerging religious equality jurisprudence flouts fundamental and generally accepted constitutional rules. It shows how the Court's religious equality jurisprudence collapses the traditional constitutional lines between identity, benefits, and equal protection analysis on the one hand; and free exercise, burdens, and fundamental rights analysis on the other. And it maintains that *Trinity Lutheran* and *Espinoza* both reinforced these conflations, and provided an opportunity for the Court to reconcile them by recognizing that religious identity is distinguishable, and severable, from religious belief and conduct. The Court's holding in *Carson* shut the door on that possibility.

### *A. Conflating Equality and Liberty*

The controversy surrounding *Smith*'s alleged misapplication aside, the Court's emerging religious equality jurisprudence is concerning for other, more fundamental, constitutional reasons. First, equal treatment jurisprudence, including under the Equal Protection Clause of the Fourteenth Amendment, does not generally look beyond intent to determine whether disparate treatment amounts to discrimination.[157] So while intentional disparate treatment of particular classes of individuals such as racial or religious groups usually triggers strict scrutiny analysis, laws or policies that merely have an incidental disparate impact on these groups prompt only rational basis review.[158]

Second—and more relevant to this Article—undue burdens on the exercise of rights, including those considered fundamental such as speech or religion, do not generally amount to "discrimination" in the

---

while exempting other activities to which the government's interest applies just as readily." Tebbe, *supra* note 43, at 2397. Tebbe traces the scholarly and jurisprudential roots of "equal value" in the religion context to Douglas Laycock and Samuel Alito's interventions in the 1990s, respectively. *Id.* at 2413–14; *see, e.g.*, Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUPR. CT. REV. 1, 49–50 (1990); Brief of Const. L. Professors as Amici Curiae in Support of Appellees, *supra* note 84, at 12. He argues that "[a]lthough the principle is being developed in the context of free exercise, it has implications for other guarantees in constitutional law." Tebbe, *supra* note 43, at 2397.

157. *See, e.g.*, Washington v. Davis, 426 U.S. 229, 242 (1976); Ashcroft v. Iqbal, 556 U.S. 662, 676 (2009) ("Under extant precedent purposeful discrimination requires more than intent as volition or intent as awareness of consequences. It instead involves a decisionmaker's undertaking a course of action because of, not merely in spite of, [the action's] adverse effects upon an identifiable group." (cleaned up)).

158. *See, e.g.*, *Washington*, 426 U.S. at 247. *But see* Laura Portuondo, *Effecting Free Exercise and Equal Protection*, 72 DUKE L.J. (forthcoming 2023) (arguing that the Court's adoption of a disparate impact rationale for Free Exercise Clause cases warrants a similar approach for the Equal Protection Clause).

constitutional sense.[159] This is because fundamental rights analysis is primarily concerned with identifying the permissible threshold for government regulations aimed at restricting the exercise of individual liberty rights—or what people *do* and not *who* they are[160]—to advance a compelling government interest.[161] As such, it is constitutionally meaningless to allege that government is engaging in "discrimination" against Conduct A if it imposes regulatory restrictions on it.[162] Moreover, the fact that government regulations burden Conduct A but not Conduct B is largely irrelevant to the analysis, particularly if the restrictions at issue affect rights or interests that are neither similar in scope nor nature.[163] This is true in the case of fundamental rights, such as speech, and other individual rights that are "implicit in the concept of ordered liberty" and deserve special constitutional protection.[164] But it is even more significant

---

159. One possible exception is cases which are at the intersection of equal protection and substantive due process, what some have called the "fundamental interest branch of equal protection." Tebbe, *supra* note 43, at 2431. But, according to Tebbe, this "branch of equal protection is largely defunct as a practical matter, having been displaced by substantive due process in many applications." *Id.*

160. The central feature of identity discrimination, on the other hand, is the notion that disparate treatment is motivated by targeting grounded in the discriminator's *explicit or implicit imputed presumptions about the essence of who someone is* (including the type of behavior or conduct they are likely to engage in because of that identity). *See infra* Part IV.A.

161. This inquiry may be further complicated in cases where government engages in classification and disparate treatment of groups based on *what* they *do* (e.g., their conduct) instead of *who* they *are* (e.g., their status or identity). If the classified conduct implicates or restricts fundamental rights, then government must have a compelling interest in "discriminating" against the group engaging in it. *See, e.g.*, Skinner v. Oklahoma, 316 U.S. 535, 541–42 (1941) (invalidating a state criminal statute requiring the forced sterilization of individuals convicted of certain crimes but not others as a violation of the Equal Protection Clause, in part, because the statute implicated the fundamental right to procreate).

162. It is more accurate to say that government is possibly failing to provide adequate protections for the liberty interest at issue, especially vis-à-vis other rights or interests which are not identified as fundamental. Courts do sometimes refer to "discrimination" outside of the identity context when assessing whether burdens on the exercise of fundamental rights are unconstitutional. For example, in Free Speech Clause jurisprudence courts often refer to "discrimination" when government restricts certain types of speech based on the subject matter or views expressed. Content-based speech restrictions trigger strict scrutiny while viewpoint-based restrictions are categorically prohibited. Tebbe, *supra* note 43, at 2455–57. Arguably, the same is true regarding the neutrality requirement of free exercise principles (which some advocates refer to as the Free Exercise Clause's nondiscrimination principle). *See, e.g.*, Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HAR. L. REV. 1175, 1181 (1996).

163. One important exception is instances where the targeted conduct is so intimately connected to a protected identity—especially one that is linked to immutable characteristics—that it triggers "suspect classification" heightened scrutiny. *See generally* Romer v. Evans, 517 U.S. 620 (1996) (invalidating a Colorado statute targeting members of the LGBT community on the basis that it was motivated by animus and thus failed rational basis review). *See also supra* note 50. For more analysis on the complications inherent in the identity-conduct classification, see *infra* Part IV.A.

164. Palko v. Connecticut, 302 U.S. 319, 325 (1937). The identification and protection of

when free exercise rights are at issue since religion is not only explicitly protected but is also constitutionally "special" in a way that sets it apart from other liberty rights: it demands a requisite degree of separation between church and state.[165] This separation, in turn, affords religion—and religious exercise more specifically—unique privileges *and* disadvantages not ascribed to other fundamental rights.[166]

To further illustrate the point that burdens on individual liberties do not implicate "discrimination" concerns, consider the objective of fundamental rights analysis. When determining where the acceptable constitutional boundary limiting fundamental rights (including free exercise) lies, courts must balance the individual liberty interest with the government's justification for limiting that right to advance a compelling government interest.[167] While the use of *comparable* or *analogous* conduct that is otherwise exempt from government regulation may help inform whether the government's interest in restricting the fundamental right at issue is truly compelling (especially if the analogous conduct undermines or frustrates the government's interest in equal measure), it does not suggest that the two types of conduct are necessarily the same or "equal." Moreover, the fundamental rights mode of analysis always requires a fact-intensive inquiry that must take both sides of the constitutional ledger into account.[168] And the analysis with regard to the "government interest" side of the ledger is often much more complex and multi-faceted than in Equal Protection Clause analysis.[169]

Consider, for example, the Court's recent COVID-19 cases that implicate the Free Exercise Clause's so-called "nondiscrimination

---

fundamental rights requires the satisfaction of other criteria such as whether the right is "deeply rooted in [the] Nation's history and tradition." *See, e.g.*, Yoshino, *supra* note 50, at 150 (citing language from, and discussing, the Court's three-part test in *Washington v. Glucksberg*, 521 U.S. 702 (1997)).

165. *See generally* Schwartzman, *supra* note 66; Greene, *supra* note 66. *See also supra* note 60 and accompanying text.

166. *See generally* Greene, *supra* note 66.

167. *See generally* GREENE, *supra* note 156.

168. It should be noted that Equal Protection Clause jurisprudence (including strict scrutiny triggered when suspect classifications are at issue) also requires courts to consider both sides of the constitutional ledger to determine if government has a compelling interest in treating similarly situated individuals differently. But inherent in equal protection jurisprudence is the notion that disparate treatment resulting from classifications related to *who we are*, as opposed to *what we do*, is particularly repugnant and rarely, if ever, justifiable. *See, e.g.*, W. Kerrel Murray, *Discriminatory Taint*, 135 HARV. L. REV. 1190, 1268 (2022) (focusing mostly on status-based discrimination cases because they are "uniquely pernicious"). *See also infra* note 184 and accompanying text.

169. *See* Tebbe, *supra* note 43, at 2470–74 (arguing that the adoption of baselines in selecting the proper comparators (or analogous conduct) in the Court's COVID-19 religious discrimination cases is different than the one it used in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), and racial justice cases, and that the differing results suggest that the application of the "equal value principle" is likely driven by other factors such as political partisanship).

principle." Remember that the Court's adoption of the MFN (or SSE) theory of religious equality maintains that as long as the government exempts certain types of secular conduct from COVID-19 shutdown orders (e.g., conduct related to "essential" services or businesses), they must do the same for religious conduct that similarly frustrates the government's interest in reducing COVID-19 infection rates. The failure to do so suggests that the regulations are not generally applicable and thus trigger strict scrutiny.

Putting aside whether the secular and religious activities at issue are actually comparable in terms of the government's compelling interest to limit the spread of the coronavirus, there is an independent argument that the exempted secular conduct may offer unique societal benefits that offset some of the costs associated with its under-regulation.[170] If so, courts should not solely focus on whether underinclusive regulation (of secular comparators) undermines a particular government interest. They should instead adopt a more holistic approach that takes both the costs and benefits of under-regulation into account in light of contextual factors. Indeed, several recent lower federal court decisions have implicitly done this by rejecting some of the underlying assumptions inherent in the MFN/SSE risk assessment framework that triggers strict scrutiny anytime government allows secular exemptions but not religious ones.[171]

The foregoing analysis is much less relevant for equal protection purposes because that mode of analysis is implicated when government engages in discriminatory treatment of *different identities*, especially if they are engaged in conduct that is similar (if not exactly the same) in scope and nature.[172] Unlike disparate treatment of conduct, disparate

---

170. For example, the secular benefits that accrue from allowing "essential businesses" to continue operations include large-scale multiplier effects that can impact society at large and not just members of particular religious communities that gather for collective worship. This is especially relevant in times of public emergency. Moreover, the Establishment Clause's separation principle requires the government's interests to be *secular*, and not religious, in nature.

171. *See, e.g.*, Does 1-6 v. Mills, 566 F. Supp. 3d 34, 48 (D. Me.), *aff'd*, 16 F.4th 20 (1st Cir. 2021), *cert. denied sub nom.* Does 1-3 v. Mills, 142 S. Ct. 1112 (2022) (reasoning that there is a fundamental difference between medical and religious exemptions for COVID-19 vaccinations because, in part, the "risks associated with the two are not comparable."); W.D. v. Rockland County, 521 F. Supp. 3d 358, 403 (S.D.N.Y. 2021) (concluding that New York's emergency declaration mandating vaccines against measles was generally applicable even though it provided a medical exemption and not a religious one because the former is related to the vaccine's core purpose). Although the rationale behind these rulings does not explicitly consider the "benefits" of under-regulation, it recognizes the need for a more holistic assessment of governmental interests.

172. *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644, 672 (2015) (noting that the Due Process and Equal Protection Clauses "set forth independent principles" and "may rest on different precepts and are not always co-extensive"). *But see id.* (noting that the Due Process and Equal Protection Clauses

treatment of different identities engaged in similar or comparable conduct *does* amount to "discrimination" in the constitutional sense. Even if the underlying conduct is a fundamental right that is constitutionally protected, remedying the discrimination simply requires equal treatment (or a leveling) of the different identities at issue.[173]

Moreover, while targeted regulations against particular religious groups or communities could present an equal treatment problem, they may not always involve burdens on fundamental rights such as free exercise. Take, for example, an extreme (and imaginary) government policy that imposes a tax on all Lutherans who purchase alcoholic beverages but not others. The regulation would certainly infringe on certain freedoms, but not necessarily ones that burden the exercise of a fundamental liberty since drinking alcohol is not a protected right.[174] Nonetheless, it would present a discrimination problem that likely violates the Equal Protection Clause since religion, or religious identity more accurately, is a "suspect class."[175]

Now consider what would happen if the government amends the discriminatory policy and instead imposes a poll tax on all Lutherans, but not other religious (or nonreligious) adherents. Clearly, this regulatory burden is both discriminatory *and* interferes with the exercise of a fundamental right guaranteed by the Twenty-Fourth Amendment: voting.[176] The key difference between this and the previous regulatory interference is that the first can be remedied if the government imposes the alcohol tax on everyone or no one, while the second cannot be addressed by simply imposing the tax on everyone. The same conclusion would hold if a regulatory interference burdened religious exercise—say it imposed a ban on building houses of worship but only imposed it on Lutherans. The government may be able to remedy the unequal treatment by extending the ban to all religious adherents, but the ban itself would likely be declared unconstitutional because it would impose a substantial burden on the free

---

"are connected in a profound way" and the "[r]ights implicit in liberty and rights secured by equal protection . . . may be instructive as to the meaning and reach of the other.").

173. Yoshino, *supra* note 50, at 173–74 (arguing that Justice Kennedy's reliance on (substantive) Due Process in both *Obergefell* and *Lawrence* more effectively advanced the equal dignity concerns of the LGBT community than sole reliance on the Equal Protection Clause because it required governments not only to equalize treatment but to also "level up" to protect everyone's rights).

174. While it is true that consumption of alcohol is not generally considered a fundamental right, restrictions on the use of alcoholic products such as wine may nonetheless trigger liberty concerns if they substantially burden an adherent's free exercise rights. Consider, for example, consumption of wine by Catholics during Communion.

175. *See supra* note 60 and accompanying text.

176. U.S. CONST. amend. XXIV, § 1.

exercise of religion that is unlikely to survive strict scrutiny.[177]

In this sense, equal treatment concerns can be remedied separately from undue burden ones, even in cases where government is unconstitutionally discriminating on the basis of suspect classifications *and* unduly burdening the exercise of fundamental rights. Relatedly, equal treatment remedies should take priority over undue burden ones because (a) they are easier to implement; and (b) equality rights are (arguably) more foundational than liberty rights.[178]

### *B. Comingling Benefits and Burdens*

In addition to conflating equality and fundamental rights modes of analysis, the Court's emerging religious equality jurisprudence also collapses the constitutional lines between benefits and burdens. It is generally accepted that the Constitution's Bill of Rights provides negative liberty protections against government interference with fundamental (and other) liberty rights.[179] Outside of a few narrow exceptions, it does not provide rights holders with claims against government for lack of action, such as its failure to provide safety and security or essential goods and services such as education, health, or housing.[180] Nor does it impose an affirmative obligation on government to fund the exercise of rights or interests in the form of public benefits or entitlements.[181]

We can say, therefore, that government's hands are somewhat tied when it *burdens* liberty rights—especially those considered fundamental such as speech and religion—but it has near full discretion to support the exercise of those rights through public *benefits* schemes (or not). This discretion includes wide latitude to decide what to fund and how to fund it.[182] Notwithstanding legitimate debates surrounding where the proper

---

177. *See infra* Part VI.D.

178. *See supra* note 168 and accompanying text; *infra* note 184 and accompanying text.

179. *See, e.g.*, Currie, *supra* note 57, at 864.

180. *See, e.g.*, Town of Castle Rock v. Gonzales, 545 U.S. 748, 768 (2005) (holding that citizens do not have a constitutionally recognizable "property interest" obligating government to protect their personal safety and security); DeShaney v. Winnebago Cnty. Dept. of Soc. Servs., 489 U.S. 189, 195–96 (1989) (holding that the Due Process Clause does not impose a special duty on government to provide services to the public for protection against private actors); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 18 (holding that education is not a fundamental right). *But see* Currie, *supra* note 57, at 886 (identifying provisions in the Bill of Rights, including some applications of the Equal Protection Clause, where "constitutional duties . . . can . . . be described as positive").

181. *See* TEBBE, *supra* note 57, at 56–58.

182. This discretion is, in part, related to the government speech doctrine. Unlike Free Speech Clause jurisprudence, which strictly limits the government's ability to regulate private speech (by

baseline lies for differentiating a burden from a benefit in light of the ever-expanding footprint of the regulatory state, it is generally accepted that benefits and burdens are constitutionally distinguishable from one another.[183]

There are two notable exceptions to the benefits versus burdens constitutional dichotomy. The first implicates an equal protection mode of analysis grounded in Equal Protection Clause jurisprudence: government is prohibited from discriminating in the provision of benefits (or burdens) based on suspect classifications unless it has a compelling reason to do so.[184] Constitutionally recognized "suspect classes" include race, religion, and national origin.[185] In this way, it can be said that the Constitution creates a "quasi-positive right" to government benefits: so long as government creates a public benefits scheme, it must "level up" to ensure that no one is denied access to, and enjoyment of, those benefits on the basis of their protected status or identity.[186] But it always retains the option to "level down" and get rid of the benefits scheme altogether—and for everyone—without violating its constitutional obligations.[187]

---

requiring restrictions to be content and viewpoint neutral), government has wide discretion to adopt, and express, particular viewpoints based on its policy preferences. *See generally* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550 (2005). The *Johanns* decision regarding which types of activities to fund or not fund may be seen as an exercise of its powers to engage in government speech. *See, e.g.*, Rust v. Sullivan, 500 U.S. 173, 192–93 (1991). One notable exception is religious government speech, which violates the Establishment Clause. *See, e.g.*, Corbin, *supra* note 96, at 349.

183. *See, e.g.*, Rick Hills, *Anti-discrimination Law in Baseline Hell*, BALKINIZATION (July 20, 2020), https://balkin.blogspot.com/2020/07/anti-discrimination-law-in-baseline-hell.html [ https://perma.cc/8KL8-58P4]; Frederick Mark Gedicks & Rebecca G. Van Tassell, *Of Burdens and Baselines*, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 323 (Micah Schwartzman, Chad Flanders & Zoë Robinson eds., 2016); Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1454–59 (2015); Cass Sunstein, *Why the Unconstitutional Conditions Doctrine is an Anachronism (with Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593, 601–04 (1990).

184. The strict scrutiny (or heightened/intermediate scrutiny for "sex" as a quasi-suspect class) requirement that applies to disparate treatment based on constitutionally protected statuses or identities is, arguably, more robust than strict scrutiny applied by courts in other contexts (including for burdens imposed on the exercise of fundamental rights). This is, in part, because equal treatment analysis is rooted in the notion that government discrimination based solely on the immutable characteristics of individuals is rarely, if ever, justifiable since it violates core constitutional principles of justice and fairness. *See generally* Yoshino, *supra* note 50, at 148 ("*Obergefell* made liberty the figure and equality the ground."). The Court's increasingly "color-blind" approach to Equal Protection Clause cases, including for remedial measures aimed at correcting historical and structural racial inequalities, further reinforces the notion that there can never be any justification for disparate treatment based on race (and other protected statuses) by government. *See, e.g.*, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007) (plurality opinion) (wherein Chief Justice Roberts declared that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.").

185. *See supra* note 60 and accompanying text.

186. *See* Heckler v. Mathews, 465 U.S. 728, 739–40 (1984).

187. *Id.*

The second notable exception involves the unconstitutional conditions doctrine.[188] This doctrine has many possible applications, but in the benefits context it means that government cannot condition access to, or enjoyment of, generally available public benefits in an effort to restrict the beneficiary's exercise of its fundamental rights *outside* of the government program.[189] Relatedly, government may always remedy an unconstitutional conditions problem either by (a) ensuring that restrictions imposed on the beneficiaries' use of public funds are directly related to the interests advanced by the funding scheme itself; or (b) "leveling down" and getting rid of the funding scheme altogether.[190] The very fact that "leveling down" remains a viable remedy *even if* it imposes burdens on the exercise of fundamental rights reinforces the notion that benefits are constitutionally distinguishable from burdens.[191]

The foregoing rationale applies with equal force to tax exemptions schemes which are a form of government benefits. As long as government provides tax exemptions in a way that (a) does not discriminate on the basis of suspect classes or (b) seeks to leverage the benefit in a manner that restricts the exercise of fundamental rights unrelated to the benefits scheme, its tax scheme will pass constitutional muster. Of particular relevance is the Court's developing jurisprudence regarding tax exemption schemes for religious institutions. Such schemes are admittedly more complicated since faith-based entities often engage in religious exercise

---

188. Sunstein, *supra* note 183, at 620–21 (arguing that the unconstitutional conditions doctrine's focus on subsidy versus penalty is unresolvable given the realities of the modern regulatory state, and that courts should instead evaluate the constitutionality of spending conditions in light of the "nature of the incursion on the relevant right" and the "legitimacy and strength of the government's justifications for any such incursion").

189. Cass Sunstein defined the doctrine by noting that "although government may choose not to provide certain benefits altogether, it may not condition the conferral of a benefit, once provided, on a beneficiary's waiver of a constitutional right." *Id.* at 593 n.2; *see also* Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 570 U.S. 205, 206 (2013) (holding that the government's funding requirement allowing only nonprofit organizations that have an explicit policy opposing sex work to receive public funds to combat HIV/AIDS worldwide imposed an unconstitutional condition that violated potential beneficiaries' First Amendment rights because it sought to "leverage funding to regulate speech outside the contours of the federal program itself").

190. *But see* Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2254–57 (2020) (reasoning that a "leveling down" prompted by a judicial order validating Montana's no-aid constitutional provision should be invalidated because it was guided by an incorrect understanding regarding what the First Amendment actually required and was, in any case, motivated by discriminatory animus against religious entities). *See also* Murray, *supra* note 168, at 1265–66 (discussing the case of *Palmer v. Thompson*, 403 U.S. 217 (1971), and what it means for "leveling down" where there is evidence that the decision is tainted by discriminatory motive or intent).

191. *But see* Mathews v. Eldridge, 424 U.S. 319, 332–33 (1976) (standing for the proposition that in cases where benefits are so systematic and deeply ingrained that they create vested rights, government may be bound by certain procedural due process requirements before it can deprive beneficiaries from enjoying those entitlements).

which could implicate the Establishment Clause's prohibition on public funding of religious exercise.

Nonetheless, the Court has held that so long as government provides tax exemption status regardless of an entity's secular or religious status, and the motivation for providing the benefit is driven by secular governmental interests, it neither violates the Equal Protection Clause nor the Establishment Clause.[192] An example of a permissible secular interest is incentivizing not-for-profit private organizations to undertake charitable or social welfare projects that advance the public good, including in the field of education.[193] Of course, government may just as easily decide to "level down" and get rid of the tax exemption scheme altogether without implicating any constitutional concerns.[194]

But what happens when the conditions for securing (or continuing to enjoy) tax exemption relief impose burdens on religious exercise that prevent a beneficiary from fully, or equally, enjoying the fruits of that benefit? In *Bob Jones University v. United States*, the Court considered whether the Internal Revenue Service's decision to revoke tax exempt status for a university that had a policy prohibiting interracial dating and marriage between students amounted to a violation of the Free Exercise Clause.[195] It rejected the university's religious liberty claim by concluding that the government had a compelling interest in "eradicating racial discrimination in education" and that this interest "substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs."[196]

While the Court acknowledged that the "[d]enial of tax benefits will inevitably have a substantial impact on the operation of private religious

---

192. *See, e.g.*, Waltz v. Tax Comm'n of New York, 397 U.S. 664, 674–77 (1970) (upholding a New York City tax exemption to religious organizations because its purpose and primary effect were not to advance religion and the scheme involved minimal entanglement between state and church). Any benefit conferred to religious organizations was merely incidental to the religious character of the beneficiaries and applied equally to secular organizations that similarly advanced the government's public interest. Conversely, in *Texas Monthly, Inc. v. Bullock*, the Court invalidated a Texas law that exempted *only* religious publications from a sales tax on the basis that it violated the Establishment Clause. 489 U.S. 1, 14–15 (1989).

193. *See generally Waltz*, 397 U.S. 664.

194. *Bullock*, 489 U.S. at 18.

195. 461 U.S. 574, 582 (1983). The university also argued that the revocation of its tax-exempt status violated the Establishment Clause. *Id.* at 602–03. The Court rejected both arguments. *Id.* at 605.

196. *Id.* at 604. The Court cited *Lee*, for the proposition that "[n]ot all burdens on religion are unconstitutional" and that government "may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest." *Id.* at 603 (citing United States v. Lee, 455 U.S. 252, 257–58 (1982)). It also noted that there were "no 'less restrictive means' . . . available to achieve th[is] governmental interest." *Id.* at 604 (citation omitted).

schools," it also noted that it "will not prevent those schools from observing their religious tenets."[197] Nonetheless, it applied a strict scrutiny standard[198] to reach its decision, suggesting that perhaps the revocation may have triggered an unconstitutional condition concern.[199] The underlying rationale of the *Bob Jones* holding, therefore, seems to be consistent with the principle that government has wide discretion to impose conditions on the enjoyment of its benefits schemes so long as it does not discriminate on account of the beneficiary's protected status nor seeks to restrict its exercise of fundamental rights outside of that program.[200]

### *C. Collapsing Status and Use*

*Trinity Lutheran* and *Espinoza* forced the Court to squarely confront the relationship between religious status and free exercise (or "use") in the benefits context. The Court faced several related questions in this regard: (1) does disparate treatment based solely on the religious *status* of a beneficiary constitute religious discrimination?; and (2) what about restrictions on the *religious use*[201] of public funds by those religious entities—do they amount to religious discrimination? If so, how can this

197. *Id.* at 603–04.

198. Another reading of *Bob Jones* is that the application of strict scrutiny was neither necessary to, nor dispositive of, the Court's adjudication of the case and was effectively dicta. In relying on strict scrutiny in its ruling, the Court was simply sending a strong signal that promoting racial equality in education via federally funded spending programs "serve[s] a public purpose" and is consistent with "established public policy." *Id.* at 586. So *even if* the revocation of tax-exempt status amounted to a substantial burden on free exercise rights or qualified as an unconstitutional condition, it would nonetheless survive strict scrutiny because it furthered a compelling government interest.

199. The unconstitutional conditions argument is perhaps strengthened by the fact that the IRS provided Bob Jones University with tax exempt status until 1971 when it reversed course and decided that doing so did not advance the public interest. As such, there is a presumption that the revocation may have been an impermissible attempt to coerce the beneficiary into waiving a constitutional right. *But see* Joy Milligan, *Remembering: The Constitution and Federally Funded Apartheid*, 89 U. CHI. L. REV. 65, 72–73 (2022) (arguing that until the 1980s courts recognized a no-aid principle rooted in the Fifth Amendment's equal protection component which imposed an affirmative obligation on government not to fund private entities perpetrating racial discrimination).

200. The Court made clear that its rationale only applied to *educational institutions* and not churches or other pervasively religious entities, suggesting that if government revoked tax exemption status for a house of worship based on its religiously motivated discriminatory policies it may amount to a violation of the Free Exercise Clause. *Bob Jones*, 461 U.S. at 604 n.29.

201. This Article uses "core religious use" to denote inherently religious exercise that is facilitated or supported by the provision of (direct or indirect) public benefits. "Core religious use" includes exercise that primarily advances the objectives of spiritual and sacral belief by way of indoctrination, prayer, worship, or other inherently religious conduct. The author acknowledges, however, that the "free exercise" of religion may involve both secular and sacral components that are, at least legally speaking, distinguishable from "inherently religious" or "core religious" uses and practices.

be squared with the seemingly longstanding rule that direct financial support of inherently religious conduct—otherwise known as free exercise of religion—violates the First Amendment's Establishment Clause?

The Court's answers to these questions—respectively "Yes," "Maybe," and "Not Applicable"—resulted in a 7-2 opinion in *Trinity Lutheran* that was both confusing and clarifying. On the one hand, the majority relied, in part, on an expansive reading of *Smith* to conclude there was sufficient evidence of religious discrimination in violation of the Free Exercise Clause.[202] While it was careful to note that its holding was strictly limited to religious *status* discrimination, dicta suggested that several justices had serious doubts as to whether the religious status-versus-use distinction is legally sound or practically workable.[203]

These suspicions echo those expressed by religious freedom scholars Thomas Berg and Douglas Laycock, who argue that any governmental restrictions on the religious use of public benefits amount to discrimination because they impose undue burdens on free exercise rights and, therefore, violate the Religion Clauses' requirement of "neutral aid."[204] More specifically, they assert that both *Trinity Lutheran* and *Espinoza* provide proof that the Court has effectively adopted the "neutral aid" theory of the Religion Clauses. The theory is essentially a derivative of the authors' views on substantive neutrality—or "incentive neutrality"—in the benefits context. The Religion Clauses' substantive neutrality requirement, they maintain, compels "government to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance."[205] They note that this form of substantive neutrality best protects "private choice" and "religious voluntarism," and therefore ensures that "religious belief and practice can be free" when it comes to matters of religion or nonreligion.[206] And they believe that the Court's rulings in *Trinity Lutheran* and *Espinoza* confirm this interpretation of the Religion Clauses.[207]

---

202. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2019 (2017) ("The Free Exercise Clause 'protects religious observers against unequal treatment' and subjects to the strictest scrutiny laws that target the religious for 'special disabilities' based on their 'religious status.'" (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533, 542 (1993))); *accord* Espinoza v. Montana Dep't of Revenue, 140 S. Ct. 2246, 2254 (2020) (quoting the same).

203. *See supra* notes 139–41 and accompanying text.

204. *See generally Government Funding and Religious Choice*, *supra* note 62.

205. *Id.* at 372.

206. *Id.*

207. *Id.* at 361 ("There was nothing surprising about the decision, and it changed little; it was the inevitable next link in a long chain of decisions. To those observers still attached to the most expansive rhetoric of no-aid separationism, it is the world turned upside down. But the Court has been steadily marching away from that rhetoric for thirty-five years now.").

Several important conclusions naturally flow from an interpretation of the Religion Clauses that rests on the "neutral aid" theory. First, Religion Clause neutrality is less about the government's embrace of secular separationism, per se, than it is about *equal treatment* of religion and nonreligion, writ large. Second, neutrality is best achieved when government adopts a "hands off" policy with respect to regulation (of religion) in the burdens context and treats religion as well, if not better than, nonreligion. Regardless of this equality requirement, however, religious exercise must receive exemptions under certain conditions that do not accrue to secular beliefs and conduct (since they are not fundamental rights).

Third, and perhaps most importantly for this Article, the Court should reject a no-aid separationism view of the Establishment Clause and instead ensure that religion and nonreligion enjoy *full substantive equality*—and not just formal equality—of benefits.[208] This means that any and all restrictions that apply to public funding of secular uses must equally apply to religious uses. Lastly, any funding conditions that (a) substantially burden the religious conscience of beneficiaries and, therefore, limit their enjoyment of public benefits;[209] (b) discriminate based on the religious identity of the beneficiary; or (c) restrict their enjoyment of public benefits, including prohibitions on core religious uses, infringe on religious liberty rights and violate the "nondiscrimination principle" of the Free Exercise Clause.[210]

Following its most recent ruling in *Carson*, it is fair to conclude that the Court has accepted most, if not all, of the normative justifications of the "neutral aid" theory.

## IV. RELIGIOUS IDENTITY

In light of the foregoing analysis identifying the various ways the Roberts Court's emerging religious equality jurisprudence flouts fundamental and generally accepted constitutional rules, one question we should ask is whether religious freedom's unique and dynamic normative framework in fact *requires* it to be exempted from those rules? More specifically, do the conflations discussed not make constitutional sense when religion operates as a *belief system*, a *set of practices* manifesting

208. *Id.* at 372. Berg and Laycock use the term "formal neutrality" instead of "formal equality." *Id. See also supra* note 112 and accompanying text.

209. Proponents of the "neutral aid" theory do not distinguish between substantial burdens on religious conscience and exercise that result from incidental burdens versus targeted ones.

210. *Id.* at 363.

those beliefs, and an *identity* all at once? Do they not render the aforementioned dichotomies "legally [un]sound" and "practically [un]workable"? As discussed in this section, the answer should be "No" because religious identity is distinguishable—and indeed severable—from religious belief and conduct (otherwise known as free exercise) in both the benefits and burdens context.

### *A. Key Components of Religious Freedom*

Ever since *Reynolds v. United States*, and all the way up to *Trinity Lutheran*, *Espinoza*, and most recently *Carson*, the Court has attempted to distinguish between the various components of religious freedom doctrine by ascribing different analytical frameworks—and varying levels of constitutional scrutiny—to those seeking its protection. The inquiry began with efforts to define, and distinguish, between religion as *belief or conscience* and religion as *practice or conduct* despite an acknowledgment that the two are undoubtedly linked.[211] In *Reynolds*, the Court ruled that the Free Exercise Clause forbids government from regulating belief but allows it to regulate practices even if they are motivated by religious belief.[212] Almost sixty years later, in *Cantwell v. Connecticut*, the Court noted that the Religion Clauses embrace both the freedom to believe and the freedom to act.[213] It acknowledged that the former is an "absolute" right, but cautioned that the "second cannot be" because it must "remain[] subject to regulation for the protection of society."[214]

But how is a regulation that targets conduct motivated by religious belief different than one which directly targets the belief itself? Or, perhaps more to the point, how is a law that targets religious belief different than one that targets conduct manifesting those beliefs? The No Religious Test Clause of the U.S. Constitution states that "no religious Test shall ever be required as a Qualification to any Office or public Trust

---

211. *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993).

212. Reynolds v. United States, 98 U.S. 145, 166 (1879).

213. 310 U.S. 296, 303 (1940).

214. *Id.* at 303–04 (citing *Reynolds* and applying the Free Exercise Clause to the states through the Fourteenth Amendment of the U.S. Constitution); *see also* Braunfeld v. Brown, 366 U.S. 599, 603 (1961) (noting that "[t]he freedom to hold religious beliefs and opinions is absolute."); Bowen v. Roy, 476 U.S. 693, 699 (1986) ("Our cases have long recognized a distinction between the freedom of individual belief, which is absolute, and the freedom of individual conduct, which is not absolute."). The Court later affirmed the strict constitutional prohibition against laws targeting religious belief in *Lukumi*, stating that "a law targeting religious beliefs as such is never permissible." *Lukumi*, 508 U.S. at 533; *see also supra* note 72 and accompanying text.

under the United States."[215] But this provision applies only to federal office and the Court has never incorporated it against the states per the Fourteenth Amendment.[216] In *Torcaso v. Watkins*, however, the Court unanimously held that religious tests for state office-holding violate the Religion Clauses of the First Amendment.[217] The Court struck down a Maryland state constitutional requirement that all holders of public office declare their belief in the existence of God.[218] In doing so, it noted that "neither a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion.'"[219]

Fifteen years earlier, in *West Virginia State Board of Education v. Barnette*, the Court held that a public school could not compel Jehovah's Witness students to salute the American flag and recite the pledge of allegiance in contravention of their religious beliefs.[220] In a famous quote, Justice Jackson wrote that "[i]f there is any fixed star in our constitutional constellation, it is that no official . . . can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein."[221] Although the majority decided *Barnette* on compelled (religious) speech grounds and not the Religion Clauses of the First Amendment, the case is often cited as laying the foundation for the principle that compelling individuals to *act against their religious beliefs or conscience* receives the highest levels of scrutiny under the U.S. Constitution.[222]

A review of *Torcaso*, *Barnette*, and the U.S. Constitution's No Religious Test Clause suggests that laws, regulations, or government actions directly targeting religious beliefs usually involve an affirmative act—such as an interrogation or the taking of an oath—intended to probe an individual's inner conscience in order to identify and cast out objectionable beliefs. To the extent that such an interrogation is akin to an inquisition, it is absolutely prohibited (or, at the very least, receives the

---

215. U.S. CONST. art. VI.

216. Alan E. Brownstein & Jud Campbell, *The No Religious Test Clause*, NAT'L CONST. CTR., https://constitutioncenter.org/the-constitution/articles/article-vi/clauses/32#no-religious-tests-campbell [https://perma.cc/92W5-GQJ7].

217. 367 U.S. 488, 495–96 (1961).

218. *Id.* at 495 (following *Cantwell*, 310 U.S. at 303–04, to reach its decision). It was not until *Cantwell* that the U.S. Supreme Court incorporated the Free Exercise Clause via the Fourteenth Amendment and applied it to the states.

219. *Torcaso*, 367 U.S. at 495.

220. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

221. *Id.*

222. *But see* Laurence H. Tribe, *Equal Dignity: Speaking its Name*, 129 HARV. L. REV. F. 16, 26 (2015) (noting "that *Barnette*, like *Obergefell*, relies on no single clause of the Bill of Rights but on the broader postulates of our constitutional order.").

highest level of scrutiny).[223]

The Court's developing normative framework regarding the distinguishable elements of religious freedom doctrine has increasingly led to the identification of a new component: religious identity.[224] In *McDaniel v. Paty*, the Supreme Court distinguished its decision in *Torcaso* from a Tennessee statute disqualifying ministers from serving as delegates to the state's constitutional convention solely on account of their religious conduct or status.[225] In doing so, the majority argued that the Maryland law interfered with religious beliefs that are absolutely protected, while the Tennessee prohibition was "directed primarily at status, acts, and conduct" that may be subject to reasonable regulations.[226] In a footnote explaining its reasoning, the majority wrote that "a court should be cautious in expanding the *scope* of [the absolute] protection [afforded to belief] since to do so might leave government powerless to vindicate compelling state interests."[227]

But where exactly is the demarcation line between identity and belief? How does government identify and ascribe a religious identity or status to an individual (or a community) if not by reference to their religious beliefs? To answer this question it is important to acknowledge that imputed identity, and the equal protection concerns it implicates, are not just about targeting or burdening an identity as such, but about the *unlawful imputed presumption* that government makes about *who* those people are (including what they *may* believe in and what types of "unfavorable" conduct they *may* engage in).[228] In this way, we can

---

223. The right to have, not have, or change one's religion or belief—referred to as the *forum internum* in international human rights law—is absolutely protected under Article 18(2) of the International Covenant on Civil and Political Rights and can never be interfered with for any reason. International Covenant on Civil and Political Rights art. 18(2), Dec. 16, 1966, 999 U.N.T.S. 171 (1976). Examples of interferences with the *forum internum*, or conscience, include targeted and coercive measures (such as inquisitions) aimed at forcing an individual to adopt or change their religious beliefs or to speak or act against their conscience.

224. For a recent article exploring the distinctive features of religious identity and its relationship to religious beliefs in the criminal procedure context, see Anna Offit, *Religious Convictions*, 101 N.C. L. REV. (forthcoming 2022) (citing to federal and state cases distinguishing between religious affiliation and religious beliefs for *voir dire* but arguing that the line between the two is hazy and both should be protected under *Batson* to ensure juror diversity).

225. 435 U.S. 618, 626–27 (1978).

226. *Id.* at 627.

227. *Id.* at 627 n.7. It should be noted that the "individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all." Wallace v. Jaffree, 472 U.S. 38, 52–53 (1985).

228. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 634 (1996). In *Romer*, the Court cited *Davis v. Beason*, 133 U.S. 333 (1890), to distinguish between government regulations targeted at Mormons because of their advocacy of polygamy (receiving strict scrutiny under the Free Speech Clause), their

sometimes view identity as an analytical *proxy* for belief (and conduct) but not as a legal *substitute* for those components of religious freedom.[229]

The foregoing analysis relies upon Supreme Court precedent to argue that the various components of religious freedom doctrine are legally distinguishable from one another. Religious belief is distinguishable from religious conduct, and religious identity is distinct from religious belief. But the central focus of the Court's most recent controversies involves whether governments can directly or indirectly provide funds to religious entities who wish to use those public funds for religious purposes. More specifically, these cases ask whether there is—or should be—a constitutional distinction between religious status and religious use, otherwise known as free exercise in the benefits context.[230]

This Article argues that there is, and should be, such a distinction. As previously noted, the Court first addressed this issue in *Locke v. Davey*, which asked if the state of Washington could deny a scholarship recipient who wished to use public funds to pursue a devotional theological degree without violating the First Amendment's Free Exercise Clause.[231] In its opinion, the Court noted that Washington's program neither denied ministers the right to participate in the political affairs of their community nor required them to choose between their religious beliefs and receiving a government benefit.[232] Instead, Washington had permissibly chosen not to fund a particular category of instruction.[233] In reaching its decision, the Court also acknowledged that Washington's restriction on the use of its funds was in keeping with the state's antiestablishment interest in not using taxpayer funds to pay for the training of clergy, an "essentially religious endeavor."[234]

The majority in *Trinity Lutheran* agreed that *Locke* was distinguishable from their case. "Davey was not denied a scholarship because of *who* he was," they wrote.[235] "[H]e was denied a scholarship

---

religious status (receiving strict scrutiny under the Equal Protection Clause), and their *actually engaging* in the act of polygamy in violation of state criminal statutes (which may empower government to penalize them by restricting their right to vote without triggering constitutional concerns). *Id.* at 634; *see also supra* note 163 and accompanying text.

229. This interpretation of the distinction between religious identity and belief (or conduct) reinforces the broader notion in *McDaniel* that a disability on religious status may, in the extreme, act as a penalty on the free exercise of religion. *McDaniel*, 435 U.S. at 626.

230. *See, e.g.*, Carson v. Makin, 142 S. Ct. 1987 (2022); Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2020); Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017).

231. 540 U.S. 712, 719 (2004).

232. *Id.* at 720–21.

233. *Id.* at 721.

234. *Id.*

235. *Trinity Lutheran*, 137 S. Ct. at 2023.

because of *what he proposed to do*—use the funds to prepare for the ministry . . . [T]here is no question that Trinity Lutheran was [categorically] denied a grant simply because of what it *is*—a church."[236] The *Espinoza* court adopted the same exact rationale three years later.[237] Notwithstanding the two majorities' decisions to characterize the religious identity discrimination at play as a penalty on free exercise rights, they acknowledged a constitutional distinction between religious status and use that largely implicates equality concerns.

Berg and Laycock dismiss the applicability of *Locke* and maintain that it is a narrow decision limited to the facts at hand.[238] In the alternative, they echo Justice Thomas and Gorsuch's rejection of *Locke* and call for the Court to overrule it altogether.[239] In support of their position, Berg and Laycock rely on the Court's reference to religious "acts . . . and conduct" in *McDaniel* to bolster their argument that the Court does not ultimately distinguish between religious identity and conduct, and that *McDaniel* "reflects a broader rule" conflating the lines between religious identity and conduct because the Tennessee statute the Court invalidated "defined ministerial status 'in terms of conduct and activity.'"[240]

They do so despite the fact that *McDaniel* did not actually involve free exercise rights at all. The Tennessee constitutional provision imposed a categorical prohibition on ministers from serving as legislators regardless of whether they engaged in free exercise or not.[241] As the *Locke* court noted, the provision in *McDaniel* denied him "the right to participate in the *political affairs of the community*."[242] At no point did McDaniel argue that running for, or holding, public office amounted to religious conduct worthy of protection under the Free Exercise Clause.[243] Instead, he relied on a more tenuous connection between the prohibition and "[ministers] who exhibit a defined level of intensity of involvement in protected

236. *Id.* (emphasis added).

237. Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2257 (2020).

238. *Government Funding and Religious Choice*, *supra* note 62, at 368 (arguing that the *Locke* court "characterized a post-secondary theology degree as a 'distinct category of instruction.'").

239. *Id.* at 9 ("[Locke's] logic is now more strained than ever; it is ripe for overruling."); *see also supra* notes 130–32 and accompanying text.

240. *Government Funding and Religious Choice*, *supra* note 62, at 365–66.

241. McDaniel v. Paty, 435 U.S. 618, 626–27 (1978).

242. Locke v. Davey, 540 U.S. 712, 720 (2004) (distinguishing *Locke* from *McDaniel* in rejecting plaintiff's Free Exercise Clause challenge) (emphasis added).

243. Moreover, the exercise of religion by a government employee would violate the Establishment Clause if it were pursued in their official capacity. *See generally* Corbin, *supra* note 96.

religious activity."[244]

In short, there is analytical tension and internal inconsistency that runs through the line of cases from *McDaniel* to *Trinity Lutheran* and *Espinoza*: while each of them either implicitly or explicitly acknowledges legal distinctions between religious identity on the one hand and religious belief and conduct on the other (collectively "free exercise"), they also entrench the notion that religious identity discrimination amounts to a penalty on free exercise rights and thus violates the Free Exercise Clause.

### *B. The Severability of Religious Identity*

The previous subsection showed that religious freedom doctrine comprises several different components that are *legally distinct* from one another: religious identity, religious belief, and religious conduct (collectively the latter two comprise free exercise). Moreover, each of these components is afforded different types—and levels—of protection and can therefore be constitutionally disaggregated. Beliefs are absolutely protected from regulatory interference, while religious practices are qualified fundamental rights that may receive exemptions even when incidentally burdened.[245] Last but not least, religious identity implicates an equality right that is afforded a high level of protection against disparate treatment, while religious beliefs and practices trigger fundamental rights analysis.

But, as this section will show, religious identity is also *legally severable* from religious belief and practice. To get there, we can think of "religion" in one of two ways. First, we can focus in on the religious identity or status of the non-state actor (e.g., individual or entity) in question. Here, "religion" can refer to the denominational identity of individuals or entities (e.g., Muslim/Shia, Christian/Protestant,

---

244. *McDaniel*, 435 U.S. at 632 (Brennan, J., concurring) (emphasis added). As Caroline Corbin noted, the free exercise argument in *Trinity Lutheran* is rather weak because although the Court applies heightened scrutiny to Missouri's policy of categorically denying aid to religious institutions, it fails to actually engage in a "substantial burden" analysis. Corbin maintains that the Court instead acknowledges that there is, in fact, no real burden on the learning center's free exercise because the public benefit does not assist in advancing religion (and there is no direct or indirect coercion because there is little to no possibility that Trinity Lutheran will compromise its religious status to receive such aid). Caroline Mala Corbin, *Is There Any Silver Lining to* Trinity Lutheran Church, Inc. v. Comer*?*, 116 MICH. L. REV. ONLINE 137, 140–42 (2018).

245. Although many scholars primarily view RFRA as the prominent religious exemptions regime that is triggered when government incidentally burdens free exercise, the Court's expansive interpretation and application of *Smith* has effectively swung the door wide open for plaintiffs seeking constitutional exemptions for many incidental burdens via the Free Exercise Clause. *See supra* Part II.A.

Jewish/Hasidic, etc.), but it could also refer to pervasively religious entities, such as houses of worship, or nonprofit organizations that have religious missions. The alternative approach is to zero in on the nature of the conduct government seeks to regulate and ask whether it is sacral or secular. Here, "religion" refers exclusively to the sacral elements of the conduct that non-state actors engage in.

By separating the identity of the non-state actors in question from their belief and conduct (e.g., free exercise), we assume a hypothetical universe where religious and secular entities can each engage in secular or religious conduct. Yet we know that, in reality, secular entities are much less likely to engage in religious conduct than religious ones (if at all). The opposite, however, is simply not the case: religious entities can, and often do, engage in secular conduct. This incongruence means that governments cannot simply assume that the religious identity of a particular person, entity, or institution predetermines the nature of their conduct.

Religious identity is, therefore, uniquely severable from free exercise because religious entities often engage in—and, in fact, must engage in—secular conduct to properly function. As such, an entity's apparent secular or religious status/character (e.g., what the entity *is*) cannot always be an accurate proxy for what it *does*. It follows, therefore, that government should be prohibited from categorically excluding persons or entities from generally available public benefit schemes based solely on their religious identity. This approach is consistent with the Court's holdings (and their underlying rationales) in *Espinoza* and *Trinity Lutheran* even if it has not explicitly acknowledged a "right to religious identity."

### *C. Towards a "Right to Religious Identity"*

The severability of religious identity from religious exercise means that "religious discrimination" by government generally manifests itself in three distinct forms: (a) government treats religious persons/entities differently from nonreligious ones because it *presumes* they will engage in religious conduct; (b) government treats religious persons/entities differently from nonreligious ones when both are engaged in same or similar conduct that has a *predominately secular character*;[246] and (c)

246. This Article uses the term "predominately secular" as an acknowledgment that conduct by persons or entities that is motivated by religious beliefs does not necessarily (or always) implicate core religious purposes or uses such as indoctrination, prayer, and worship. So long as government acts with secular purpose, especially within the public aid context, any benefit to religious entities that facilitates their exercise of religion—including its advancement (because money is fungible)—is likely

government treats religious denominations differently from each other when they are engaged in either *similar secular or religious conduct*. These categories apply in both the benefits and burdens contexts.

The religious identity discrimination typology above reveals three important observations. First, in each of these scenarios the application of "equal protection mode of analysis" means that government can simply remedy the religious (identity) discrimination either by "leveling" up or down.[247] This is because differential treatment of the same or similar conduct[248] (whether secular or religious) means the only real variable driving the disparate treatment in question is *religious identity*.[249] The same rationale holds when government makes presumptions about conduct or behavior that non-state actors *may engage in* based solely on their religious identity. It should be noted, however, that in some cases government may only be able to level up to resolve the religious identity discrimination if leveling down would also substantially burden free exercise rights. But the right to religious identity requires equality of treatment irrespective of whether the underlying conduct implicates a fundamental right like free exercise or not.

Second, although the focus of this Article is religious discrimination, identity discrimination is reciprocal—any "right to religious identity" that protects religious persons or entities from identity discrimination vis-à-vis secular actors operates similarly to a "right to secular identity" that provides similar protections to secular persons or entities vis-à-vis religious actors. The same rationale applies to denominational identity so long as the underlying action is the same or similar in nature (implying that identity is the "but for" cause of the discrimination).[250]

Third, and perhaps most importantly, religious discrimination on the

---

to do so incidentally and will neither have the *primary effect* of *advancing* nor *inhibiting* religion. *See, e.g.*, Mark Storslee, *Church Taxes and the Original Understanding of the Establishment Clause*, 169 U. PA. L. REV. 111, 111 (2020) (arguing that "where a funding program serves a public good and does not treat the *religious aspect of a beneficiary's conduct* as a basis for funding, it is not an establishment of religion." (emphasis added)).

247. Note, however, that the Equal Protection Clause allows government to justify disparate treatment if it has a compelling interest to do so (though the strict scrutiny it applies is, arguably, more robust than that in the fundamental rights context especially where immutable characteristics are concerned).

248. For religious (or secular) identity discrimination to be at issue plaintiffs must establish that the government's differential treatment is not related to disparate conduct (or other legitimate factors). There is a critical question, therefore, regarding what constitutes same or similar enough conduct, but answering this question is beyond the scope of this Article. *See supra* note 94 and accompanying text.

249. *See supra* note 172 and accompanying text.

250. *See, e.g.*, Trump v. Hawaii, 138 S. Ct. 2392, 2417 (2018) ("[T]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." (quoting Larson v. Valente, 456 U.S. 228, 244 (1982))).

basis of identity does *not* involve instances where government treats religious persons/entities differently from secular ones because the former is engaged in predominately sacral conduct. This is because religion—or free exercise to be more exact—is constitutionally "special" and implicates religious liberty (or fundamental rights) and structural separation (church-state) concerns related to both the Free Exercise and Establishment clauses, respectively.[251] This is especially true in the benefits context because the Establishment Clause *specially disadvantages* religion by prohibiting government from exercising, endorsing, or funding core or inherently religious uses.[252]

In summary, we can say that the Court has at least implicitly recognized a "right to religious identity" that applies to both the burdens and benefits contexts and requires government to treat religious and secular entities alike when they engage in the same or similar conduct. This right may be conceptualized as a *right to equal treatment* of individuals, institutions, or entities by government regardless of religious identity or status.[253] And it may be implicated within the context of the exercise of fundamental rights such as religious liberty or, as often is the case, *other rights wholly unrelated to the free exercise of religion.*

## V. RECLAIMING THE ESTABLISHMENT CLAUSE

The Establishment Clause is particularly well-suited to house this nondiscrimination right because it can operate as an equality provision that protects religious or secular identity, especially when the exercise of rights other than the free exercise of religion are at issue. The Court has long recognized religion as a "suspect classification" triggering strict scrutiny via the Equal Protection Clause of the Fourteenth Amendment.[254] But

251. *See supra* notes 165–66 and accompanying text.

252. *See infra* Part V.B.

253. *See supra* Part IV.B.–C.

254. *See* Richard H. Fallon, *Tiers for the Establishment Clause*, 166 U. PA. L. REV. 59, 63 n.14 (2017) ("[T]he decision whether to prosecute may not be based on 'an unjustifiable standard such as race, religion, or other arbitrary classification.'" (quoting United States v. Armstrong, 517 U.S. 456, 464–65 (1996))); Miller v. Johnson, 515 U.S. 900, 911 (1995) ("At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." (quoting Metro Broad., Inc. v. FCC, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting)) (internal quotation marks omitted)); Burlington N. R.R. Co. v. Ford, 504 U.S. 648, 651 (1992) (identifying classifications drawn along "lines like race or religion" as "suspect"); City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (characterizing "distinctions such as race, religion, or alienage" as "suspect"). While religion has long been a "suspect classification" under the Equal Protection Clause, it is not immediately clear that *non-religious* identity is also a protected status under the clause. On the other hand, the Establishment Clause's focus on separation between the secular and sacral implicitly protects both religious and secular identity.

courts generally shy away from applying this clause and instead rely on the First Amendment when religion is at issue.[255] Unlike the Free Exercise Clause, the Equal Protection Clause is clearly not dependent upon the exercise of any fundamental rights and is particularly salient in the benefits context.[256]

As scholars like Caroline Mala Corbin have demonstrated, the Establishment Clause is a unique hybrid provision that is imbued with equality/nondiscrimination, liberty, and separation principles.[257] For the purposes of this Article, it is the interaction between the equality and separation principles which is of paramount importance, particularly in the benefits context. The latter provides the acceptable contours and boundaries of church-state relations and is particularly attuned to the important role religious (and secular) identity play in prohibiting government from unlawfully breaching the secular-sacral divide. On the other hand, the former imposes a two-way requirement on government not to favor religion over nonreligion, or nonreligion over religion.[258] Much has been written about the Establishment Clause's general disposition "disfavoring" government endorsement or direct financial support of religion, but the provision's requirement that government not *inhibit* religion is rarely, if ever, discussed.

An explicit acknowledgment of a "right to religious identity" by the

---

255. *See, e.g.*, Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2024 n.5 (2017) ("Based on this holding, we need not reach the Church's claim that the policy also violates the Equal Protection Clause."); McDaniel v. Paty, 435 U.S. 618, 639 (1978) (Brennan, J., concurring) (wherein the Court considered Free Exercise, Establishment and Equal Protection Clause claims but rejected the latter even after acknowledging that "government may not use religion as a basis of classification for the imposition of duties, penalties, privileges, or benefits").

256. *See, e.g.*, Palmer v. Thompson, 403 U.S. 217, 227 (1971) (holding that the city of Jackson's closure of all public swimming pools in response to court orders to integrate did not violate the Equal Protection Clause because there was no disparate treatment since no one had access).

257. *See, e.g.*, Corbin, *supra* note 96, at 378–414 (identifying and disaggregating the liberty and equality "components" of the Establishment Clause and arguing that active and passive government speech implicates both). According to some scholars, the intellectual origins of the Establishment Clause protect against coercion of conscience, and it also protects derivative liberty interests such as the right of nonreligious conscience as recognized in *Wallace v. Jaffree*. *See, e.g.*, Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346 (2002); Storslee, *supra* note 246, at 150 (noting church taxes were seen as "coerced religious observance" that violated individual conscience rights (because their sole purpose was to finance worship) and distinguishing from religious education which was considered a "public good").

258. *See, e.g.*, Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947) ("That Amendment requires the state to be a *neutral* in its relations with groups of *religious believers and nonbelievers*; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them." (emphasis added)); Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (citing Bd. of Educ. v. Allen, 392 U.S. 236, 243 (1968)) (holding that in order to satisfy the Establishment Clause a statute's "principal or primary effect must be one that *neither advances nor inhibits religion*." (emphasis added)).

Court can help fill that doctrinal gap and provide more clarity regarding the proper relationship between the Religion Clauses. This right should be grounded in the Establishment Clause because if structural neutrality means anything, it means (a) identifying a constitutional zone within which categorical denials of public funding based solely on the religious (or secular) identity *and* public funding of core religious uses are both prohibited; and (b) allowing for some government deference and discretion to decide whether—and how—to divert public funds to religious institutions to avoid excessively entangling church and state.[259]

### *A. Establishment Clause's Equality Principle: No 'Inhibiting' Religion*

The text of the Free Exercise Clause is viewed by many as the source for why religion receives special constitutional protections and privileges as a fundamental right. But, in many ways, the Establishment Clause provides a more foundational justification for why religion is, as a constitutional matter, "special" vis-à-vis nonreligion. Like the Free Exercise Clause, the Establishment Clause treats religion as unique, and it does so precisely because of religion's sacral aspects.[260] Unlike the Free Exercise Clause, however, it imposes structural obligations on governments to ensure neutrality and a requisite degree of separation between church and state because secular governments are not competent to legislate, regulate, exercise, endorse, or adjudicate matters of faith.[261] Notwithstanding this lack of competence, governments must exercise ultimate legal authority over the lives and activities of secular and religious persons, entities, and institutions alike. How can this tension be reconciled?

The Establishment Clause provides an answer. In the regulatory sphere, navigating the sacral-secular divide means defaulting towards free exercise protections that safeguard sacral beliefs and conduct without imposing unnecessary or disproportionate secular harms.[262] It is not

---

259. Despite the Court's rejection of the "*Lemon test*" in *Kennedy v. Bremerton*, the right to religious identity proposed in this Article (and the analysis supporting its use) relies heavily on the conceptual framework developed by the Court in *Lemon v. Kurtzman*. The three prongs of the traditional *Lemon test*—secular purpose, neutrality in effects, and entanglement—are relatively well-suited to assessing Establishment Clause concerns related to public funding of religious uses. This is, in part, because it is *easier* to analyze the effects of financial support for religious entities than determining whether general government "endorsement" of religious entities (via messages or symbols) has the overall effect of advancing or inhibiting religion.

260. *See supra* notes 66, 155 and accompanying text.

261. *See id.*

262. *See supra* Part II.A.

surprising, therefore, that conceptualizing *religion as a set of beliefs and practices*, the exercise of which is protected by the Constitution, is fundamental to the proper operation of the Free Exercise Clause. In the government self-regulation and benefits context, on the other hand, navigating the sacral-secular divide means a strict prohibition on government's own exercise of religion and, at the very least, directly funding the free exercise of religion by citizens.

But how does this constitutional specialness of religion work itself out in practice? One view, held by many church-state scholars, is that the Constitution's Free Exercise Clause *specially privileges* religion by requiring government to provide accommodations to religious adherents when there are incidental but substantial burdens on their religious exercise.[263] Alternatively, the separation requirement of the Establishment Clause suggests that the provision *specially disadvantages* religion.[264] But this categorical framing is flawed because it overlooks an important aspect of the clause's structural neutrality mandate: it is a *two-way* street. Although most Establishment Clause plaintiffs allege violations resulting from government favoring religion over non-religion, the Court has acknowledged that the clause also prohibits government from *favoring nonreligion over religion*.[265] Yet there are few, if any, cases that explicitly adjudicate this equality requirement of the Establishment Clause.

The Court's decisions in *Trinity Lutheran* and *Espinoza* provided an opportunity to fill this doctrinal void. Conceptualizing *religion as identity* can empower government to properly navigate the sacral-secular divide to ensure that religious persons, entities, and institutions are not discriminated against when they engage in what are predominately secular activities. More specifically, if we reconceptualize these cases primarily as "religious equality" controversies where the Court strikes down government action that disadvantages persons or entities *solely on account of their religious identity*, then it is feasible to argue that they are not inconsistent with the line of Establishment Clause cases going all the way back to *Everson v. Board of Education*. Remember that, in *Everson*, the Court held that a New Jersey program using government funds to reimburse parents for transportation costs associated with sending their

---

263. *See supra* notes 86-87, 245 and accompanying text; *see also supra* Part III.A. for further explanation on the underlying presumption of this Article that religious exercise is constitutionally "special."

264. *See supra* note 66 and accompanying text. *See also infra* Part V.B.

265. *See supra* note 258 and accompanying text. *See also infra* Part V.A. This equality principle of the Establishment Clause is most often reflected, and discussed, as part of the "primary effect" prong of the three-part *Lemon* test. *See supra* note 97 and accompanying text.

children to private religious schools was permissible and did not violate the Establishment Clause.[266]

The rule established by *Everson*, therefore, is that an entity's apparent secular or religious status or identity (e.g., what the entity *is*) cannot be an accurate proxy for what it *does*. It is ultimately this foundational distinction between secular and sacral conduct with which the Religion Clauses—and the Establishment Clause, in particular—is most concerned. Underlying the Court's rationale was the recognition that religious persons and entities often engage in secular activities not implicating the free exercise of religion, and that their categorical exclusion from generally available "public welfare" funds solely due to their religious identity is constitutionally suspect.[267]

Accordingly, the Court should have interpreted *Trinity Lutheran* and *Espinoza* narrowly to acknowledge a right to religious identity that forbids categorical prohibitions on both indirect and direct aid to religious institutions.[268] But it should have housed this right in the Establishment Clause instead of the Free Exercise Clause because the connection between religious identity discrimination and substantial burdens on the free exercise of religion is tenuous at best.[269] As Caroline Corbin has noted, the free exercise argument in *Trinity Lutheran* was weak because although the Court applied heightened scrutiny to Missouri's policy of categorically denying aid to religious institutions, it failed to actually engage in a "substantial burden" analysis.[270] Although *Everson* interpreted the Establishment Clause to merely permit public funding of religious institutions engaged in predominately secular conduct, there is no reason to believe that the clause's nondiscrimination principle cannot be interpreted in a way that mandates religious identity equality to ensure that government does not unlawfully "inhibit" religion.

Undoubtedly, the right to religious identity reshapes Establishment Clause jurisprudence by prohibiting governments from categorically excluding religious entities—including those that are pervasively religious—from receiving public aid based on general or ill-defined "[anti]establishment concerns."[271] Governments designing and administering generally available funding schemes would be legally required to open the gates and consider disbursing funds to religious

266. Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947).

267. *Id.* at 16.

268. *See supra* note 251 and accompanying text.

269. *But see infra* note 272 and accompanying text.

270. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2024 (2017).

271. *See infra* note 279 and accompanying text.

beneficiaries. But they would be required to do so not because categorical prohibitions on public aid to religious persons or entities substantially burden particular free exercise rights (as the Court reasoned in *Trinity Lutheran* and subsequent cases), but because they discriminate against religious beneficiaries on the basis of their identity and inhibit religion, writ large.[272]

This distinction is significant because it recognizes—and respects—the severability of religious identity from religious exercise. As such, governments would effectively be required to undergo a two-step process to determine whether religious beneficiaries can receive generally available public funds. They must first open up the playing field by allowing religious beneficiaries to apply for public funding on equal terms with all other beneficiaries based on the presumption that they will use such funds for secular purposes. Failing to do so would unlawfully inhibit religion and violate the Establishment Clause's equality principle. As a preliminary matter, therefore, the Establishment Clause's right to religious identity would require courts to strike down no-aid constitutional provisions similar to the ones in Montana, Missouri, and several dozen other states.[273] But, as will be discussed in the following section, governments must *also* guarantee that such funds will not be used for core religious purposes (e.g., free exercise) in violation of the Establishment Clause's separation principle.

---

272. *See supra note* 48 and accompanying text. While this view of the Establishment Clause's equality principle clearly distinguishes religious identity from religious exercise, it does not wholly reject the notion that there is *some connection* between religious identity discrimination and substantial burdens on the free exercise of religion. Instead, it acknowledges that categorically prohibiting religious persons or entities from receiving any public aid simply because of their identity may, in fact, impose "*substantial pressure on an adherent to modify [their] behavior* and [] violate [their] beliefs." Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 718 (1981) (emphasis added).

273. *See supra* note 34 and accompanying text; *see also infra* Parts VI.A.–B. for analysis specifically applying the right to religious identity to provisions categorically prohibiting direct or indirect public aid to pervasively religious institutions. Note, however, that the Establishment Clause's equality provision will likely not require striking down no-aid provisions in state constitutions that prohibit *all private schools* from receiving public funds regardless of their religious or secular status. *See, e.g.*, MISS. CONST. art. VIII, § 208 (prohibiting appropriation of public funding for "sectarian school[s], *or to any school that . . . is not conducted as a free school*" (emphasis added)); S.C. CONST. art. XI, § 4 (prohibiting appropriation of public funding "used for the direct benefit of any religious *or other private educational institution*" (emphasis added)). The Court's rationale in *Carson*—that government is only required to allow public funding of vouchers for religious schools so long as it allows them for private secular schools—reinforces this understanding.

### B. *Establishment Clause's Separation Principle: Prohibiting Funding of Core Religious Uses*

In many ways, *Trinity Lutheran* and *Espinoza* are consistent with previous case law wherein the Court gradually moved towards recognition of a distinct right to religious identity grounded in the First Amendment's Religion Clauses.[274] In other ways, they are radical departures from precedent because they implicate the relationship between the Religion Clauses by advancing the notion that aid to religion may not only be permissive under the Establishment Clause, but that it may (in certain cases) actually be *required* under the Free Exercise Clause. *Carson* left no doubt that this understanding of the Religion Clauses is now part of the Court's religious freedom doctrine.

But the legal distinction between religious status and use is critically important, in part, because it reinforces the view that the Establishment Clause's separation principle strictly prohibits public funding of core religious activities. Indeed, this understanding of the Establishment Clause is consistent with the intellectual origins of the clause,[275] historical tradition and practice,[276] and case law, including the Court's decision in cases like *Mitchell v. Helms*[277] requiring entities receiving direct public aid to guarantee that they will not divert funds to religious uses.[278] A prohibition on public funding of core religious uses is also important

---

274. *See, e.g.*, McDaniel v. Paty, 435 U.S. 618, 626–27 (1978) (acknowledging status-based discrimination against religion and holding that a regulatory prohibition *indirectly related to free exercise* violated both the Free Exercise and Establishment clauses).

275. *See, e.g.*, Feldman, *supra* note 257, at 353–54 (arguing that the intellectual origins of the Establishment Clause are rooted in Lockean ideals related to freedom of conscience, and that government endorsement or support of religion, including public funding of free exercise, violates this principle).

276. *See, e.g.*, Storslee, *supra* note 246, at 118 (noting church taxes were seen as "coerced religious observance" that violated individual conscience rights because their sole purpose was to finance worship).

277. Mitchell v. Helms, 530 U.S. 793, 801 (2000) (upholding a federal program that provided educational materials and equipment directly to public, private, and parochial schools in Louisiana because the direct aid was not for religious use, did not advance religion, and did not cause excessive entanglement between church and state).

278. Although the *Mitchell* plurality opinion authored by Justice Thomas did not explicitly endorse the view that the Establishment Clause strictly prohibits public funding of core religious uses in the benefits context, its rationale that Louisiana's efforts to ensure that the provision of school supplies were not diverted to religious uses implicitly acknowledged the existence of such a constitutional limitation. Justice O'Connor's separate concurrence, joined by Justice Breyer, on the other hand, explicitly acknowledged the Establishment Clause's strict prohibition of funding for core religious uses. *Id.* at 840 (O'Connor & Breyer, JJ., concurring). The Court's emphasis on indirect aid in both *Espinoza* and *Carson* further reinforces the notion that direct public aid presents unique constitutional concerns related to funding of religious uses. *See infra* note 302 and accompanying text.

because it reinforces the Establishment Clause's equality principle, which relies on the rationale that an entity's religious identity cannot be an accurate proxy for what it does because religious persons, institutions, and entities often do—and, in fact, must—engage in secular activities to function. In this way, the equality and separation principles of the Establishment Clause work in concert to reduce false reliance on "antiestablishment interests" that could result in Establishment Clause "bloat."[279]

But free exercise of religion often includes secular and sacral aspects, so how should courts determine where to draw the line between core religious uses and other conduct that should not implicate Establishment Clause concerns? Remember that "core religious uses" generally include exercise that primarily advances the objectives of spiritual and sacral belief by way of indoctrination, prayer, worship, or other inherently religious conduct.[280] To the extent that public aid[281] to a religious entity, including pervasively religious institutions such as houses of worship, may be diverted to core religious uses, the Establishment Clause should impose an *affirmative obligation* on government to take reasonable steps—without risking entanglement—to ensure that this does not happen.[282]

With these separate but reinforcing notions of the Establishment Clause in mind, we can better understand how religious identity and severability apply in practice. When the underlying conduct of a beneficiary that wishes to use public funds is predominately secular in nature, government must provide all beneficiaries with full substantive equality[283] regardless of their religious or secular identity. But when the conduct at issue implicates core religious uses, government can only

---

279. This was one of the concerns expressed by the 7-2 majority in *Trinity Lutheran*, which rejected Missouri's argument that a categorical prohibition on any public aid to religious entities satisfied the state's traditional "[anti]establishment concerns." Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2024 (2017) ("[Missouri] offers nothing more than [its policy] preference for skating as far as possible from religious establishment concerns. . . . The State has pursued its preferred policy to the point of expressly denying a qualified religious entity a public benefit solely because of its religious character." (citation omitted)).

280. *See supra* note 201 and accompanying text.

281. Government may also, under certain circumstances, limit the religious uses of indirect public aid not because it is required to do so by the Establishment Clause, but because government generally has discretion to decide how its public funds are to be used. *See supra* Part III.B.; *see also* Locke v. Davey, 540 U.S. 712, 719 (2004).

282. These steps can include oversight and auditing procedures, beneficiary guarantees, or other measures in line with the Court's opinion in *Mitchell*. According to Richard Fallon, the Court should adopt an intermediate scrutiny approach to Establishment Clause cases that involve material or financial support for religion. Fallon, *supra* note 254, at 99–105.

283. *See supra* note 112 and accompanying text.

provide formal equality[284] between religious and secular beneficiaries.[285] This is so even if we concede that restrictions imposed on the use of public funds for sacral purposes result in substantial burdens on the free exercise of religion, because such burdens are constitutionally required by the Establishment Clause's independent prohibition on government funding for core religious purposes. Any other approach would effectively gut the Establishment Clause and render it meaningless.[286]

This interpretation of the Establishment Clause's equality and separation principles can still support an understanding of the Religion Clauses that recognizes a "play in the joints" between the two clauses. While the right to religious identity imposes affirmative obligations on government that are reinforcing, there is also some tension that must be reconciled. On the one hand, governments must not categorically deny public funding based solely on the religious identity of beneficiaries. On the other, they must adopt monitoring and auditing measures to ensure that public funds are not diverted for core religious uses.[287] To the extent that inquiries regarding whether these constitutional requirements are satisfied is highly fact-specific, courts should allow for some government deference and discretion to decide whether—and how—to divert public funds to religious institutions in a manner that avoids excessively entangling church and state.[288] Some of this work can be done on the front-end: governments can make it explicitly clear that their funding schemes will

---

284. *See id.*

285. While a beneficiary deprived of using public aid for core religious uses may reasonably argue that the restrictions burden their free exercise rights, it is more difficult to establish that the restrictions impose *substantial* burdens on those rights because governments are not constitutionally required to fund the exercise of fundamental rights and the Establishment Clause's separation principle acts as a barrier to funding of religion. The same rationale does not apply for identity discrimination. *See also supra* note 244 and accompanying text; Part III.B.

286. *See* Ira C. Lupu & Robert Tuttle, Espinoza v. Montana Department of Revenue*–Requiem for the Establishment Clause?*, TAKE CARE (July 1, 2020), https://takecareblog.com/blog/espinoza-v-montana-department-of-revenue-requiem-for-the-establishment-clause [https://perma.cc/5LAE-7GQ9].

287. For a comprehensive and in-depth discussion of the complexities surrounding monitoring and auditing measures within the context of "faith-based initiatives," see Ira C. Lupu & Robert Tuttle, *The Faith-Based Initiative and the Constitution*, 55 DEPAUL L. REV. 1 (2005).

288. Note that this solution is not inconsistent with the Court's previous ruling that "achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution—is limited by the Free Exercise Clause." Widmar v. Vincent, 454 U.S. 263, 276 (1981). Interestingly, the majority opinion in *Carson* does raise entanglement as an Establishment Clause concern. But it does so as a way of undermining the notion that the clause imposes an affirmative obligation on government to determine whether public funds will be diverted for core religious purposes: "Any attempt to give effect to [the status-versus-use] distinction by scrutinizing whether and how a religious school pursues its educational mission would also raise serious concerns about state entanglement with religion . . . ." Carson v. Makin, 142 S. Ct. 1987, 2001 (2022).

not discriminate on the basis of religious or secular identity, but that they are also constitutionally required to ensure that public funds are not diverted to core religious uses such as worship, indoctrination, prayer, or worship.

## VI. APPLYING THE RIGHT TO RELIGIOUS IDENTITY TO RELIGIOUS EQUALITY CASES

This section will apply the "right to religious identity" framework to several religious equality claims discussed in this Article, recently adjudicated by the Court, or ones that the Court will likely address in the near future. The breadth and depth of the cases addressed below demonstrate that the "right to religious identity" has application across various issue areas and in both the burdens and benefits context.[289]

### *A. Direct Aid to Religious Entities (and Government Contracts)*

As previously discussed, this Article contends that while the Court's decisions to invalidate Missouri and Montana's no-aid constitutional provisions were legally sound, their reasoning was flawed.[290] The key takeaway from *Trinity Lutheran* and *Espinoza* should be that the Establishment Clause's "right to religious identity" strictly prohibits the categorical exclusion of religious persons, institutions, or entities from government support because it unlawfully *presumes* they will use public funds for core religious purposes such as indoctrination or worship. As previously shown, this presumption is flawed. However, categorical exclusions resulting from such presumptions do not automatically implicate free exercise concerns and, therefore, should not result in a violation of the Free Exercise Clause. One solution to avoiding per se constitutional violations of the Religion Clauses based on categorical exclusions of religious entities from direct benefits is to amend no-aid provisions so they only prohibit public funding of "core religious uses." As noted above, governments can make it explicitly clear that their funding schemes will not discriminate on the basis of religious or secular identity, but that they are constitutionally required to ensure that public funds are not diverted to core religious purposes such as worship, indoctrination, prayer, or worship.

---

289. *See supra* note 142 and accompanying text.

290. In this regard, each of the opinions written by the various justices in both cases had elements that were correct (e.g., religious identity discrimination is prohibited), and elements that were not (e.g., religious identity is neither unique nor legally severable from free exercise and, relatedly, that restrictions on religious use in the public benefits context violate the Free Exercise Clause).

A textual amendment to no-aid provisions will not, of course, automatically resolve the more difficult decisions governments (and courts) will need to make to determine how to apply the "core religious uses" standard.[291] While *Trinity Lutheran* suggests that pervasively religious entities such as houses of worship often use public funds for predominately secular purposes, it is not unreasonable to assume that such funds may be more easily diverted to core religious purposes when used by a church than by religious charities or schools such as those involved in *Espinoza* and *Carson*. This is because the latter interact more with the public-at-large and are, therefore, engaged in more substantial secular activities—including teaching curriculum that must, by law, satisfy the standards and requirements of a compulsory secular education set by the states—than pervasively religious entities.[292]

To make the stakes more concrete, we can circle back to the opening scenario that addressed the SBA's Payment Protection Program (PPP), which provided direct payroll relief to small businesses and, for the first time, nonprofits hit hard by the COVID-19 pandemic. These nonprofits included pervasively religious entities such as churches. It is clear that the right to religious identity espoused in this Article prohibits the federal government from categorically denying pervasively religious entities from participating in the PPP. But would SBA payments intended to support the employees of these houses of worship, including clergy who primarily carry out sacral responsibilities, violate the Establishment Clause?

The state can legitimately argue that its purpose here is purely secular; pervasively religious entities employ individuals, and are affected by the same economic consequences of the pandemic, as other small businesses and nonprofits. But do these direct payments have the primary effect of advancing religion and, more specifically, core religious uses? This is a tough question to answer. At the very least, the nature of the payments and the beneficiaries involved impose an affirmative obligation on the federal government to set up adequate auditing measures to prohibit diversion of funds to core religious uses.[293] The real issue—and this is

---

291. More specifically, this decision requires governments, and courts, to determine how best to navigate the secular-sacral divide.

292. It is arguably possible, and perhaps easier, to disaggregate the secular components of religious education from sacral ones because of the predominately secular nature of religious education. Nonetheless, the separation principle of the Establishment Clause would still require the state to ensure that public funds are not diverted to core religious purposes (and to do so in a way that does not unnecessarily entangle church and state). *See infra* Part VI.B.

293. In this regard, the Trump Administration's decision to waive the affiliation rules for faith-based organizations because it believed those rules would "substantially burden" groups that are

where the rubber hits the road—is whether it is possible to implement these measures in a way that does not unnecessarily entangle the state with the inner functions (e.g., autonomy) of religious organizations.[294] As noted above, a reasonable approach is to allow for some government deference and discretion to decide how best to disburse funds to both avoid diversion for sacral purposes and ensure that monitoring measures do not excessively entangle church and state.[295]

A related complication involves situations where religious entities are the direct recipient of public funds as government contractors and not beneficiaries. This is the situation the Court addressed in *Fulton*, where the city of Philadelphia had contracted with Catholic Social Services to administer the city's foster care program.[296] If we conceptualize the government's powers (and limitations on those powers) along a continuum where, on the one end, government is directly exercising its police powers and, on the other, it is acting as a benefactor by providing generally available public funds to private citizens, its collaboration with faith-based organizations as government contractors sits closer to the former.

From a constitutional perspective, this schematic has two important ramifications. First, government autonomy and discretionary power are at their greatest when it is directly exercising its regulatory or police powers. The existence of a government contractor deputized to act on its behalf to perform a public function does little to change this dynamic.[297] Second, as far as the Religion Clauses are concerned, the Establishment Clause's separation principle imposes far greater constraints on government when it is *itself* engaging in religious exercise than when it is endorsing or supporting the religious exercise of its citizens.[298] To the extent that faith-based organizations are government contractors performing a public function, their actions—including seeking religious exemptions as

---

religiously committed to hierarchical forms of organization is constitutionally flawed. *See supra* note 246 and accompanying text.

294. *See supra* note 282 and accompanying text.

295. *See supra* Part V.B.

296. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1875 (2021).

297. *See, e.g.*, Brief of Church-State Scholars in Support of Defendants-Appellees and Affirmance at 23–24, *Fulton*, 141 S. Ct. 1868 (No. 18-2574) (arguing that the contract at issue in *Fulton* between Catholic Social Services and the city of Philadelphia involved "the provision of a vital social service that only the government—and its agencies—may lawfully provide," and "while the City may contract with religious and secular agencies for the provision of services, it may not empower a religious entity to impose religious tests or enforce religious criteria on applicants for City programs").

298. *See, e.g.*, Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947) (noting that "the 'establishment of religion' clause of the First Amendment means *at least* this: Neither a state nor the federal government can set up a church" (emphasis added)).

Catholic Social Services did in *Fulton*—can easily be imputed to the government itself. This would plainly result in a violation of the Establishment Clause since government is strictly prohibited from engaging in religious exercise.[299] Even if courts reject the public function-imputation model when assessing the actions of government contractors like Catholic Social Services, however, there is at least a plausible argument that allowing a government contractor to opt out of their contractual obligations for religious reasons amounts to *direct* public funding of religious exercise.[300]

One final observation on the application of a "right to religious identity" in direct public aid cases: the Court's Religion Clause jurisprudence has traditionally recognized a legal distinction between direct public aid to religious persons or entities and indirect aid which is directed to such beneficiaries as the true private choice of individual beneficiaries. But, as noted above, the Court's decision in *Carson* casts serious doubt on whether this distinction matters anymore. If, as the majority opinion notes, the status-use distinction is conceptually unworkable and amounts to free exercise discrimination against the parents in the case (who are effectively direct beneficiaries), it is difficult to see how there are any constitutional limits on the *direct* public funding of religious uses.[301]

### *B. School Choice and Indirect Aid to Religious Entities*

The Court's decisions in *Espinoza* and *Carson* make it clear that so long as government decides to (indirectly) support private education via public funds, it must do so without imposing any restrictions on the use of those funds for religious education.[302] Any discrimination on the basis of the schools' religious identity *or* use, the Court explained, amounts to a violation of the Free Exercise Clause's nondiscrimination principle.[303]

---

299. *Id.*

300. On the other hand, there is an equally plausible counterargument that such religious exemptions do not amount to funding of core religious purposes such as worship, prayer, and indoctrination (and are, therefore, constitutionally insignificant).

301. *See supra* note 142 and accompanying text.

302. Carson v. Makin, 142 S. Ct. 1987, 2000 (2022) (noting that Maine "chose to allow some parents to direct state tuition payments to private schools," and that its "administration of that benefit is subject to the free exercise principles governing any such public benefit—including the prohibition on denying the benefit based on a recipient's religious exercise").

303. *Id.* at 2001. Tethering a fundamental rights claim, like free exercise, to equality concerns related to the government's treatment of secular entities further strengthens the notion that *Carson*, *Espinoza*, and *Trinity Lutheran* are—or should be—cases primarily focused on remedying religious

The underlying rationales driving the Court's conclusion in these cases are two-fold: (1) school choice cases do not implicate the Establishment Clause because it is the private choices of citizens, in these cases parents who want to enroll their children in private religious schools, that divert funds to religious organizations (who benefit indirectly from that aid); and (2) the status-versus-use distinction is practically and legally unworkable, and this is especially true in the context of education where (the families' and schools') sacral beliefs are intimately interwoven with, and thus inseparable from, the secular components of education that are on offer.[304]

Notwithstanding the problems referenced above regarding the utility of the direct versus indirect aid conceptual framework adopted by the Court in *Zelman*,[305] it is worthwhile to further interrogate the second rationale to determine whether it is really impossible to separate the sacral components of religious education from its secular parts. In fact, the education context poses both opportunities and challenges when it comes to teasing out severability issues. While there is no federal constitutional right to public education and governments may not force families to send their children to public schools, all states impose secular education requirements that their citizens must satisfy either through traditional or home schooling.[306] The right to religious identity framework proposed in this Article is particularly relevant here because it can help us determine whether it is possible to sever religious identity (e.g., status) from religious exercise (e.g., use).

We can explore the potential application of the right to religious identity in the education context by looking at a federal court decision handed down in connection with COVID school shutdown cases. In *Monclova Christian Academy v. Toledo-Lucas County Health Department*, the Toledo-Lucas County Health Department issued an order forcing all middle and high schools in the county to shutter for a period of a month or so during the Christmas and New Year holiday.[307] The order included a resolution that carved out an exemption for private religious

---

identity discrimination. *But see supra* note 149 and accompanying text. No such discrimination exists if the laws in question require public funds to only be used to subsidize public education. *See supra* note 273 and accompanying text (referencing the no-aid provisions of the Mississippi and South Carolina constitutions). Moreover, while restrictions imposed on the use of public funds for sacral purposes may arguably result in substantial burdens on the free exercise of religion, they are offset by the Establishment Clause's independent prohibition on government funding for core religious purposes. *See supra* note 285 and accompanying text.

304. *Id.*

305. *See supra* note 142 and accompanying text.

306. *See infra* notes 314–16 and accompanying text.

307. 984 F.3d 477, 479 (6th Cir. 2020).

schools allowing them to open for religious education classes and ceremonies.[308] Nonetheless, plaintiffs sought a preliminary injunction against the order because it was allegedly insufficiently protective of their religious liberty rights under the Free Exercise Clause. More specifically, they argued that "the exercise of their faith is not so neatly compartmentalized," that "their faith pervades each day of in-person schooling," and that "Catholic social teaching is interwoven into many secular subjects[.]"[309] Because Ohio's regulations allowed *some secular businesses* such as gyms, tanning salons, and office buildings to continue operations (despite allegations that they carry similar or greater risks of COVID transmission), they argued the county health department had to allow the religious private schools to open for in-person instruction as well.[310]

In its December 31, 2020 ruling, the Sixth Circuit agreed with plaintiffs' religious discrimination argument and enjoined the county health department from enforcing its shutdown order at plaintiffs' schools.[311] This meant that private religious schools in the county could resume in-person classes while public schools and secular private schools would remain closed.[312] Presumably, there was no legal impediment to the county health department ordering all schools to reopen. At the very least, this would have remedied the disparate treatment between secular and religious families' access to education. But, from the county's perspective, "leveling up" would have undermined the county's important public health objective of reducing the spread of COVID-19. The Sixth Circuit's ruling effectively compelled the department to make a choice to either: (a) limit access to a critically important public good—education—in a way that discriminates between religious and secular families, or (b) open all schools and run the risk of increasing transmission rates.

For the purposes of our severability inquiry, what is interesting about this case is the county health department's efforts to create an exemption that allowed parochial schools to open for religious education classes and ceremonies prior to ordering the shutdown of schools. By doing so, the department attempted to separate out, to the extent feasible, the religious

---

308. *Id.* at 479–80.

309. *Id.* at 480.

310. *But see* Amicus Curiae Brief of Church-State Scholars in Support of Appellee's Petition for Rehearing, *supra* note 89, at 6–7 (arguing that *Lukumi* was about "whether the nature and degree of under-inclusion is so 'substantial' that it suggests the regulation was 'drafted with care' to *target religious practice*" (emphasis added)).

311. *Monclova Christian Acad.*, 984 F.3d at 482.

312. *Id.*

aspects of parochial education from the secular components of general education that are mandated by state law. As noted above, plaintiffs argued that this was an impossible task. Nonetheless, there is a strong argument that the department's religious carve-out was a good faith—and constitutionally adequate—effort to limit the effects of the shutdown order's incidental burdens on religious adherents attending religious schools. After the department implemented its school shutdown order, the religious carve-out effectively "leveled the playing field" between religious and nonreligious families with regard to accessing education as a "vital public good."[313]

There are several reasons for this. First, while the Court has never recognized access to public education to be a fundamental right, it has refused to treat it "merely [as a] governmental 'benefit' indistinguishable from other forms of social welfare legislation."[314] Second, Ohio's constitution, like many others, requires the state to provide an "adequate system of public schools."[315] Third, while Ohio cannot require parents to send their children to public schools, it can—and has—imposed mandatory *secular* education requirements that everyone must satisfy, but it is up to parents to decide how to satisfy these requirements (e.g., via public school, secular private school, religious school, or home school).[316] Lastly, and perhaps most importantly, Ohio must ensure that it provides access to public education in a *nondiscriminatory manner* that does not violate antidiscrimination laws, including the Equal Protection Clause.[317]

In light of the foregoing, it is not unreasonable to conclude that the county health department's actions satisfy both the "compelling interest" and "least restrictive means" requirements of a RFRA-like test.[318] The department did this by promulgating a *temporary but neutral* shutdown order that (a) applied to all schools regardless of their religious or secular identity or status; (b) attempted to slow the rapid transmission of the aggressive coronavirus; and (c) created an exemption aimed at reducing

313. Amicus Curiae Brief of Church-State Scholars in Support of Appellee's Petition for Rehearing, *supra* note 89, at 7.

314. Plyler v. Doe, 457 U.S. 202, 221 (1982).

315. OHIO CONST. art. VI.

316. *See generally* Meyer v. Nebraska, 262 U.S. 390 (1923) (holding that undue government interference with the right of parents to raise their children as they see fit, including on matters of education, violates the Due Process Clause); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (holding that requiring parents to only send their children to public schools violates their liberty interests).

317. *See generally* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

318. The plaintiffs in *Monclova* actually brought a Free Exercise challenge, but the Sixth Circuit's finding that the shutdown order was not generally applicable triggered a compelling interest test under strict scrutiny that matches RFRA's "narrowly tailored" and "least restrictive means" requirements.

the effects of any incidental burdens on the free exercise of religion in parochial schools. The immediate effect of the Sixth Circuit's injunction was to both frustrate the department's public health efforts (at least in connection to plaintiffs' schools) and "unlevel the playing field" between religious and nonreligious families by creating a disparity in their access to the *secular components of education that are mandated by the state itself.* This is akin to the state limiting access to public education on the basis of religious identity in direct violation of the Establishment Clause's nondiscrimination principle.

So what does all this mean in terms of the applicability of the right to religious identity to school choice, and more broadly, indirect aid cases? The exercise above suggests that governments can, and in fact must, make a good faith effort to separate the secular components of a religious entity's actions from its sacral ones. More to the point, if it is possible to sever sacral and secular components, then granting a religious exemption is not constitutionally necessary and, in fact, may result in secular identity discrimination in violation of the Establishment Clause. If, on the other hand, the nature of the right at issue is such that it is difficult, if not impossible, to separate out sacral and secular components, then governments must decide whether to "accommodate" the religious exercise or not. The Establishment Clause's separation principle suggests that, in the benefits context, that accommodation could result in a constitutional violation.[319] In the burdens context, on the other hand, the calculations are different and there are equities to consider on both sides of the ledger.

### *C. The Trump Travel Ban*

The right to religious identity advanced in this Article also has application beyond the benefits context (and core religious uses) context. According to the view of the Establishment Clause espoused in this Article, the Court should have explicitly analyzed *Trump v. Hawaii* as one of religious (or denominational) identity discrimination that violates the

---

319. If it is difficult to separate these components from each other, then there must be a presumption that efforts to ensure public funds are not diverted to core religious uses will likely result in entanglement. If, on the other hand, severability is impossible, there is a presumption that public funds *will be* diverted to core religious uses. Both situations result in a violation of the Establishment Clause's separation principle. This is definitely the case in direct public aid cases, but arguably not in indirect ones where there is "true private choice" at play. *But see* Carson v. Makin, 142 S. Ct. 1987, 2001 (2022) (wherein the majority raises entanglement as an Establishment Clause concern but does so as a way of undermining the notion that the clause imposes an affirmative obligation on government to determine whether public funds will be diverted for core religious purposes).

clause's equality principle not to inhibit religion.[320] The history of the administration's travel ban executive orders clearly showed that they were motivated by the president's religious animus against Muslims.[321] There was little doubt, therefore, that the object and purpose of the travel bans was discriminatory despite the fact that its third (and final) iteration was "facially neutral." Based on this rationale, the Court should have adopted a heightened form of equal treatment review for the executive order instead of applying rational basis review.[322]

However, given the political branches' plenary powers over immigration and national security matters, it is at least plausible that the government can satisfy strict scrutiny review in this context. Its position is further strengthened by the fact that (a) equal protection cases involving identity-based discrimination do not consider discriminatory impacts as independent proof of disparate treatment, and (b) there is some legitimate concern regarding how long taint can hamper national security or immigration actions, especially when the government makes the necessary amendments to "cure" the law or regulation of its initial discriminatory purpose.[323]

After the *Trump v. Hawaii* ruling, some religious liberty advocates such as the Becket Fund argued that plaintiffs would have had a better chance had they relied on the Free Exercise Clause's nondiscrimination principle instead of the Establishment Clause. But this position is not convincing for several reasons. First, there is no tenable argument that the travel ban was aimed at, or resulted in, restrictions on the free exercise of religion. Although the same case can be made for plaintiffs in *Trinity Lutheran* and *Espinoza*, there is at least a somewhat plausible argument in those cases that plaintiffs were engaged in free exercise (however marginal) or that the categorical rule excluding religious persons or entities from generally available subsidies acted as a penalty on the free

---

320. 138 S. Ct. 2392 (2018); *see also supra* note 250 and accompanying text.

321. *See, e.g.*, Jessica A. Clarke, *Explicit Bias*, 113 NW. U. L. REV. 505, 510 (2018) (criticizing the Court's justifications regarding the Trump Administration's efforts to wash away the taint of explicit religious bias connected with the travel ban).

322. The Establishment Clause does not generally follow the tiered scrutiny approach seen in free exercise, free speech, and equal protection cases. *See generally* Fallon, *supra* note 254. Interestingly, in *Trump v. Hawaii*, the Court did engage in tiered rational basis review because of the unique nature of the Establishment Clause claim before it (which involved immigration/national security-related issues) and rejected the dissent's "reasonable observer" test from *McCreary County v. American Civil Liberties Union*, 545 U.S. 844, 866 (2005), used for passive religious displays or symbols. *Trump*, 138 S. Ct. at 2418–20 ("The case before us differs in numerous respects from the conventional Establishment Clause claim."); *see also supra* note 15 and accompanying text.

323. Murray, *supra* note 168, at 1266–67 (discussing the relevance of discriminatory taint and the passage of time).

exercise of religion. But those arguments were not available to plaintiffs in *Trump v. Hawaii* because they were outside the United States and were merely seeking entry into the country. They were neither engaged in exercising their religious liberty rights nor seeking to do so. Second, the Court has explicitly stated that, like the Free Exercise Clause, the Establishment Clause's nondiscrimination principle "extends beyond facial discrimination" in order to smoke out discriminatory intent or purpose.[324]

Although *Trump v. Hawaii*'s holding does not explicitly confirm, or acknowledge, a right to religious identity free from discrimination that the Court acknowledged existed in *Trinity Lutheran* and *Espinoza* (and to a lesser extent in *McDaniel* and *Locke*), its analysis of the Establishment Clause suggests that the majority may very well have gone in that direction were it not for the Court's view that admission and exclusion of foreign nationals is a decision appropriately left to Congress or the President.[325] The case also reinforces the notion that the "right to religious identity" is more appropriately grounded in the Establishment Clause than the Free Exercise Clause because neither plaintiffs' religious beliefs nor practices were at issue.[326]

### *D. Pastors in Execution Chambers*

Last but not least, the right to religious identity has important implications even in cases where government imposes substantial burdens on the free exercise of religion. In some ways, we can view both *Dunn v. Ray* and *Murphy v. Collier* as "religious equality" cases that operate at the intersection of the right to life and religious liberty concerns that directly implicate the Free Exercise Clause. Moreover, these cases highlight some of the aforementioned vulnerabilities of the right to religious identity, including the possibility that government will resolve the "religious equality problem" by simply "leveling down" as Texas did in *Murphy*.

---

324. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534 (1993).

325. *Trump*, 138 S. Ct. at 2418. More specifically, the majority was willing to "look behind the face of the Proclamation" to, at the very least, apply a rational basis test to the travel ban policy that allegedly disfavored or discriminated against Muslims. *Id.* at 2402.

326. In addition, there is a strong argument that secular identity can only really be protected via the Establishment, and not the Free Exercise, Clause. *See, e.g.*, Corbin, *supra* note 244, at 144 ("While the Free Exercise Clause serves as an Equal Protection Clause for believers, the Establishment Clause serves as an Equal Protection Clause for nonbelievers . . . [J]ust as *Trinity Lutheran* made clear that the Free Exercise Clause bars the government from penalizing someone because of their status as a religious believer, the Establishment Clause should bar it from penalizing someone because of their status as a nonbeliever.").

On the other hand, "religious equality" cases like *Ray* and *Murphy* highlight the critical connections between religious equality and other core religious freedom rights related to belief and practice. The religious equality arguments made by inmates like Murphy are not irrelevant to the compelling interest prong of the "substantial burden" inquiry under RLUIPA.[327] And although both Justices Kavanaugh and Alito have expressed doubts regarding whether inmates can succeed on their RLUIPA claims, there are a host of compelling reasons why they absolutely should.[328]

Recall that Justice Kavanaugh wrote that Domineque Ray had never made an "equal-treatment" argument and had instead only sought to have ADOC's Christian pastor removed from the execution chamber when the lethal injection was administered. And that once ADOC agreed to Ray's demand, his Establishment Clause argument became moot.[329] But Alabama's decision to prohibit a Christian pastor from entering the execution chamber did not actually resolve the discrimination issue because it was a one-off solution that otherwise preserved the policy of only allowing Christian pastors in execution chambers. On the other hand, a policy decision to "level down" across the board would have resolved the denominational discrimination problem. In fact, Alabama did eventually follow Texas' lead and barred the presence of all pastors in the execution chamber in order to avoid the "religious equality problem."[330]

In the case of pastors in the execution chamber, however, "leveling down" raises legitimate concerns regarding whether states have substantially burdened the free exercise rights of inmates. This argument is especially convincing in light of the fact that Alabama, Texas, and other states have found ways to allow *some* pastors in the execution chamber in the past. Considering the life-or-death stakes involved in these cases, it is unconvincing for states to argue that allowing some, but not all, pastors in the execution chamber protects a compelling state interest in ensuring the safety and security of employees involved in carrying out the executions.

---

327. For example, the fact that Texas has trained chaplains of different faiths to accompany inmates inside the chamber at the time of execution creates the strong presumption that the demands of other inmates can be accommodated. The relatively low number of executions that take place in any given calendar year, combined with the very high stakes involved (for the inmates), arguably lean towards a general rule of accommodation for all inmates who wish to have a chaplain of their faith by their side at the moment of execution.

328. I hope to explore these issues more in-depth in a future article.

329. *See supra* note 21 and accompanying text.

330. Adam Liptak, *Supreme Court Rebuffs Alabama's Effort to Bar Pastor from Execution Chamber*, N.Y. TIMES (Feb. 12, 2021, 7:37 PM), https://www.nytimes.com/2021/02/12/us/supreme-court-alabama-execution.html [https://perma.cc/9XZA-UZBZ].

Indeed, on February 11, 2021, almost exactly two years after Alabama executed Domineque Ray, the Court let an appellate court injunction against Alabama stand.[331] On April 21, 2021, Texas' TDCJ announced that it had "adopted a new execution protocol that allows those facing lethal injection to be with a spiritual adviser of their choosing when they die."[332] And, finally, on March 24, 2022, the Supreme Court went even further and granted a preliminary injunction of execution to a Texas death row inmate who argued that the state's prohibition on allowing his pastor to pray audibly and lay his hands on him at the time of execution violated his religious liberty rights under RLUIPA.[333]

In his concurring opinion, Justice Kavanaugh noted that this case was different than the "question of religious advisors in the execution room [that] came to this Court three years ago as a question of religious *equality*."[334] "In states that equally barred all advisors from the execution room, some inmates brought a religious *liberty* claim," Kavanaugh wrote, acknowledging that the Court has since ruled that this type of "leveling down" may resolve the equality claim, but not the liberty one.[335]

## VII. CONCLUSION

This Article seeks to reassess religious freedom doctrine, and particularly the Court's evolving notion of religious equality jurisprudence, by revisiting the basic constitutional rules surrounding equality and fundamental rights analysis. The main problem it identifies, and tackles, is the flaw behind the argument that the Free Exercise Clause requires equal treatment *between secular and sacral conduct* (e.g., free exercise of religion) in either the burdens or the benefits context. This is because free exercise of religion is constitutionally "special": it is afforded certain advantages vis-à-vis secular conduct in the form of religious exemptions in the burdens context, and certain disadvantages in the form of a prohibition on public funding of core religious activities in the benefits context. This specialness is rooted in the separation principle of the

---

331. Dunn v. Smith, 141 S. Ct. 725, 726 (2021) (denying application to vacate an injunction prohibiting Alabama from executing an inmate on the grounds that refusing him access to his pastor "at the moment the State puts him to death" violates his religious liberty rights).

332. Jolie McCullough, *Texas Prisons Reverse Course, Will Allow Religious Advisers in Execution Chamber*, TEX. TRIBUNE (Apr. 22, 2021, 4:00 PM), https://www.texastribune.org/2021/04/22/texas-executions-religious-adviser/ [https://perma.cc/RH5B-2LCR].

333. Ramirez v. Collier, 142 S. Ct. 1264, 1275 (2022).

334. *Id.* at 1285 (Kavanaugh, J., concurring).

335. *Id.* at 1286 (Kavanaugh, J., concurring). For support, Kavanaugh cited *Gutierrez v. Saenz*, 141 S. Ct. 127 (2020) and *Dunn v. Smith*, 141 S. Ct. 725 (2021).

Religion Clauses—and the Establishment Clause, specifically—which requires structural separation between church and state.

The same is not true for religious identity, which is not constitutionally "special" because it is distinct and legally severable from free exercise. It follows, therefore, that the "right to religious identity" (which is an equality or nondiscrimination right) should be housed in the Establishment Clause because this provision prohibits government from discriminating against religious identities based on the presumption that they will engage in religious conduct. It also forecloses disparate treatment by government when religious entities engage in similar *secular* conduct to nonreligious entities. The equal treatment remedy for violating the right to religious identity is always either "leveling up" *or* "leveling down" between the religious and secular identities. But this means that the Religion Clauses only require formal, not substantive, equality between religion and nonreligion when religious entities engage in *sacral* conduct that implicates free exercise rights.

*Trinity Lutheran*, *Espinoza*, and now, *Carson*, have clarified the gravity of the constitutional issues at stake: if there is no distinction between religious status and use, then the conceptual lines between (a) identity and free exercise; (b) regulatory burdens and benefits; and (c) equal treatment and fundamental rights analysis—which the Court has increasingly breached since *Smith*—will collapse entirely. The collapse will not only result in unfettered Free Exercise "bloat"—a process which is already well underway—but may also mean the end of the Establishment Clause as we know it. It is vitally important for the Court to unequivocally declare that the clause's structural neutrality mandate *does not* mean, and has never meant, full substantive equality between religion and nonreligion in all aspects and contexts. Without the Court's acknowledgment that the Establishment Clause strictly prohibits funding of core religious activities, reclaiming its relevance and vitality will be impossible.