Note

One Nation Subsidizing God: How the Implementation of the Paycheck Protection Program Revealed the Deteriorating Wall Between Church and State

Elliot Ergeson∗

INTRODUCTION

"The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach."[1] It has been seventy-five years since Justice Black wrote these words on behalf of the Supreme Court. In that time, however, the wall between church and state has eroded. Indeed, it is at risk of collapse.

When the COVID-19 pandemic effectively shut down the United States economy in March of 2020, countless businesses and nonprofits faced a dire economic situation.[2] Mask mandates, indoor capacity limits, stay-at-home orders, and many other restrictions promulgated by state and local governments[3] presaged seemingly certain financial doom. Accordingly, Congress sought to address their plight by passing

---

∗ Senior Articles Editor, *Minnesota Law Review*, Vol. 106. I would like to extend my thanks to Professor Nelson Tebbe for his selfless feedback; to my faculty advisor, Professor Myron Orfield, for his guidance; to the *Minnesota Law Review* staff members and editors for making this Note possible; and to my family and friends for their unwavering support. Copyright © 2022 by Elliot Ergeson.

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

2. *See* William Rogers & Chuck Collins, Opinion, *Large Nonprofits Are Endangered by COVID-19*, S.F. EXAM'R (May 6, 2020), https://www.sfexaminer.com/opinion/large-nonprofits-are-endangered-by-covid-19 [https://perma.cc/PVD9-4C57]; Gretchen Morgenson, Didi Martinez, Kenzi Abou-Sabe & Cynthia McFadden, *Misery on Main Street: COVID-19 Takes a Grim Toll on America's Small Businesses*, NBC NEWS (Sept. 23, 2020), https://www.nbcnews.com/business/economy/misery-main-street-covid-19-takes-grim-toll-america-s-n1239524 [https://perma.cc/HV3U-72JA].

3. Grace Hauck & Chris Woodyard, *New Coronavirus Restrictions: Here's What Your State Is Doing to Combat Rising Cases and Deaths*, USA TODAY (Dec. 8, 2020), https://www.usatoday.com/story/news/nation/2020/11/13/covid-restrictions-state-list-orders-lockdowns/3761230001 [https://perma.cc/7NQ9-XJ7T] (listing the restrictions implemented in each state).

the Coronavirus Aid, Relief, and Economic Security (CARES) Act.[4] The CARES Act included the Paycheck Protection Program (PPP),[5] which offered forgivable loans to small businesses and nonprofits to help them stay afloat. Notably, religious entities—although not initially eligible—received billions of dollars in PPP loans,[6] while many small businesses and nonprofits were unable to obtain them due to statutory requirements.[7] These PPP loans constituted direct funding from the federal government to houses of worship.

This direct funding of religious entities by the federal government stands in stark contrast to the Founders' understanding of the Establishment Clause.[8] James Madison, for instance, warned that "the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment."[9] Yet the PPP loans provided to religious entities did not just violate the Founders' intentions; they were also unconstitutional under existing Supreme Court precedent that prohibits actual diversion of government aid to religious indoctrination.[10] So, the question arises: Why were religious entities provided with substantial amounts of direct federal funding via

4. CARES Act, Pub. L. No. 116-136, 134 Stat. 281 (2020) (codified as amended in scattered sections of the U.S. Code).

5. 15 U.S.C. § 636(a)(36).

6. Tommy Beer, *U.S. Roman Catholic Church Received at Least $1.4 Billion in Taxpayer-Funded PPP Loans*, FORBES (July 10, 2020), https://www.forbes.com/sites/tommybeer/2020/07/10/us-roman-catholic-church-received-at-least-14-billion-in-taxpayer-funded-ppp-loans [https://perma.cc/E5ZP-4Q2P].

7. *See* Isaac Arnsdorf, *Thousands of Small Business Owners Have Not Gotten Disaster Loans the Government Promised Them*, PROPUBLICA (July 16, 2020), https://www.propublica.org/article/thousands-of-small-business-owners-have-not-gotten-disaster-loans-the-government-promised-them [https://perma.cc/LS6L-LF72].

8. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion."); *see, e.g.*, Letter from Thomas Jefferson to Danbury Baptists (Jan. 1, 1802), https://www.loc.gov/loc/lcib/9806/danpre.html [https://perma.cc/X76M-LSS5]. *See generally* Steven K. Green, *The Separation of Church and State in the United States*, OXFORD RSCH. ENCYCS. (Dec. 2, 2014), https://oxfordre.com/americanhistory/view/10.1093/acrefore/9780199329175.001.0001/acrefore-9780199329175-e-29?print=pdf [https://perma.cc/7R6T-QZXA] (examining the historical origins of the separation of church and state doctrine and how it evolved during the nineteenth century).

9. Everson v. Bd. of Educ., 330 U.S. 1, 65–66 (1947) (appendix to dissent of Rutledge, J.) (providing the text of James Madison's "Memorial and Remonstrance Against Religious Assessments").

10. *See* Mitchell v. Helms, 530 U.S. 793, 840 (2000) (O'Connor, J., concurring).

PPP loans? The answer—presuming that the Small Business Administration (SBA) was not merely trying to flout existing law—is that the new equal funding doctrine promulgated by the Supreme Court made the SBA mistakenly believe that it must offer PPP loans to religious institutions. Under this new doctrine, the government cannot exclude religious entities from "a public benefit for which [they are] otherwise qualified."[11] And, after *Espinoza v. Montana Department of Revenue*, the government may not exclude religious entities from public benefits, even when those benefits may be used for religious activities.[12] It is perhaps unsurprising, then, that the SBA mistakenly allowed religious entities to receive PPP loans. Importantly, however, the SBA also erred in its analysis under the new doctrine; many of the religious entities that received PPP loans did *not* qualify for them until the SBA provided an exemption for religious entities from the affiliation requirements.[13] This religious exemption went beyond the equal funding doctrine and, in effect, established a preferred funding regime for religious entities that is patently violative of the Establishment Clause. Due to recent developments in the Court's application of the Free Exercise Clause, however, it may be a harbinger of things to come.[14]

This Note analyzes the Court's new equal funding doctrine through the lens of the SBA's faith-based organization exemption from the PPP affiliation requirements and highlights the doctrine's propensity for devolving into a preferred treatment regime. Part I will discuss the history of the Supreme Court's First Amendment jurisprudence with respect to religious funding cases and the equal funding doctrine that the Court recently established. Part II will describe the CARES Act, the PPP's eligibility requirements, and how the SBA waived the affiliation rules for faith-based organizations. Part III will highlight the Establishment Clause concerns raised by the equal funding doctrine and the SBA's faith-based organization exemption. In so doing, it will assess how the PPP loans were allocated and how secular nonprofits were treated unequally. Part IV will argue that the SBA's faith-based

11. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2025 (2017).

12. *See* Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2256 (2020) ("Status-based discrimination remains status based even if one of its goals or effects is preventing religious organizations from putting aid to religious uses."); *id.* at 2281 (Breyer, J., dissenting) ("[The majority] holds that the Free Exercise Clause forbids a State to draw any distinction between secular and religious uses of government aid to private schools that is not required by the Establishment Clause.").

13. Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. 20,817 (Apr. 29, 2020) (codified at 13 C.F.R. pt. 121.103).

14. *See* Tandon v. Newsom, 141 S. Ct. 1294 (2021) (per curiam); *infra* Part III.B.2.

organization exemption is unconstitutional and that any other religious exemptions in funding cases will suffer from the same constitutional defects. Ultimately, this Note stresses that the Court must uphold what is left of the Establishment Clause and prevent the equal funding doctrine's slide into a preferred treatment regime for religious entities by reinforcing the rules set forth in *Mitchell v. Helms*[15] and in *Texas Monthly, Inc. v. Bullock*.[16]

I. THE SUPREME COURT'S RELIGION CLAUSE JURISPRUDENCE IN FUNDING CASES

The Religion Clauses of the First Amendment state: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[17] Notably, there is an inherent tension between these clauses; they prohibit both favoring and inhibiting religious exercise. But that is the point. The basic purpose of these clauses is "to promote and assure the fullest possible scope of religious liberty and tolerance for all and to nurture the conditions which secure the best hope of attainment of that end."[18] The clauses do so by ensuring that "no religion be sponsored or favored, none commanded, and none inhibited."[19] In other words, the Religion Clauses are intended to serve as checks on one another; governmental actions permitted by the Establishment Clause may be prohibited by the Free Exercise Clause and vice versa.

There are three main types of Religion Clause cases: funding cases, exemptions cases, and government speech cases.[20] The differences between these types of cases can be summarized as follows:

> The *funding* cases ask whether religious activities can or must receive funding from the government on equal terms with equivalent secular activities. The *exemptions* cases ask whether religiously motivated actors are entitled to receive exemptions from general laws that nonreligious individuals do not receive. And the *government speech* cases ask whether the government can make religious statements or give religious reasons for laws on the same basis as it makes nonreligious statements or gives secular reasons for laws.[21]

---

15. 530 U.S. 793 (2000) (plurality opinion).

16. 489 U.S. 1 (1989) (plurality opinion).

17. U.S. CONST. amend. I.

18. Sch. Dist. v. Schempp, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring).

19. Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970).

20. Richard Schragger & Micah Schwartzman, *Religious Antiliberalism and the First Amendment*, 104 MINN. L. REV. 1341, 1384 (2020). There are also discrimination cases. In these cases, the Court strikes down discriminatory laws entirely. *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993).

21. Schragger & Schwartzman, *supra* note 20 (footnotes omitted).

Notably, the SBA's faith-based organization exemption from the PPP affiliation requirements raises both funding case and exemption case issues. This Part examines the Supreme Court's Religion Clause jurisprudence in funding cases.

Throughout much of the twentieth century, the Court prohibited most kinds of direct funding to religious institutions.[22] Over time, however, the Court "has shifted course and allowed new forms of state aid to flow to religious organizations."[23] This shift in the Court's approach to funding cases paved the way for the equal funding doctrine that exists today.[24] Section A of this Part addresses the Court's initial Religion Clause jurisprudence. Section B analyzes the Court's shift away from a strong Establishment Clause. Finally, Section C analyzes the equal funding doctrine set forth in *Trinity Lutheran*[25] and expanded in *Espinoza*.[26]

A. THE SUPREME COURT'S INITIAL ESTABLISHMENT CLAUSE JURISPRUDENCE IN FUNDING CASES

Although the principle of separation of church and state is not explicitly found in the Constitution, the Founders believed that the Establishment Clause and the Free Exercise Clause established that principle.[27] Thomas Jefferson, for instance, stated that the Free Exercise and Establishment Clauses "[built] a wall of separation between Church & State."[28] Whether strict separationism was the Founders' intent is up for debate,[29] but when the Constitution was written, the notion that the government may not force a citizen to monetarily support religion was widely popular.[30] Accordingly, this principle appears in the Court's early funding cases.

---

22. *See id.* at 1385.

23. Nelson Tebbe, *Excluding Religion*, 156 U. PA. L. REV. 1263, 1265–66 (2008).

24. *See* Schragger & Schwartzman, *supra* note 20, at 1385.

25. 137 S. Ct. 2012, 2025 (2017).

26. 140 S. Ct. 2246, 2256 (2020).

27. *See* Letter from Thomas Jefferson to Danbury Baptists, *supra* note 8; Garrett Epps, *Constitutional Myth #4: The Constitution Doesn't Separate Church and State*, ATLANTIC (June 15, 2011), https://www.theatlantic.com/national/archive/2011/06/constitutional-myth-4-the-constitution-doesnt-separate-church-and-state/240481 [https://perma.cc/US5R-SBXG].

28. Letter from Thomas Jefferson to Danbury Baptists, *supra* note 8.

29. *See* Green, *supra* note 8 (highlighting the debate amongst scholars over whether strict separationism is what the Founders intended).

30. *Id.* at 9 (quoting THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 217 (1986)) ("By the time of the writing of the Constitution, 'the belief that government assistance to religion, especially in

The concept that the Religion Clauses established a separation of church and state was first promulgated by the Supreme Court in *Reynolds v. United States*.[31] Although this was not a funding case, the Court's statement that Thomas Jefferson's description of the First Amendment—i.e., that it erects a wall between church and state—"may be accepted almost as an authoritative declaration of the scope and effect of the amendment" foreshadowed the Court's initial prohibition of governmental aid flowing to religious activities and institutions.[32]

That prohibition was established in the Court's seminal funding case, *Everson v. Board of Education*.[33] In *Everson*, the Court upheld a resolution that provided for the transportation of students to both public and parochial schools on the ground that the transportation of students was "indisputably marked off from the religious function" of the parochial schools.[34] In so doing, the Court stressed that the Establishment Clause means, at least, that "[n]o tax . . . can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion"[35] and that the "wall between church and state . . . must be kept high and impregnable."[36]

The Court reinforced this interpretation of the Establishment Clause in *Illinois ex rel. McCollum v. Board of Education* when it struck down an optional program that allowed students in public schools to attend classes in religious education in the regular classrooms of the school.[37] The Court held that the use of public school buildings for religious education—as well as the "invaluable aid" the program provided sectarian groups—was impermissible.[38] Notably, this case stands as the first time entanglement was used as a test for determining an Establishment Clause violation.[39]

The entanglement test aims to maintain the separation of church and state by "preserv[ing] the autonomy and freedom of religious

---

the form of taxes, violated religious liberty had a long history.'").

31. 98 U.S. 145, 164 (1878).

32. *Id.*

33. 330 U.S. 1 (1947).

34. *Id.* at 18.

35. *Id.* at 15–16.

36. *Id.* at 18.

37. 333 U.S. 203 (1948).

38. *Id.* at 212.

39. *See id.* at 216–17 (Frankfurter, J., concurring); Stephanie H. Barclay, *Untangling Entanglement*, 97 WASH. U. L. REV. 1701, 1705 (2020).

bodies while avoiding any semblance of established religion."[40] In other words, the entanglement test limited the government's ability to control or pressure religious institutions and vice versa.[41] *Walz v. Tax Commission of the City of New York* demonstrates how the Supreme Court has employed the entanglement test to prevent excessive involvement between church and state.[42] In *Walz*, a realty owner challenged property tax exemptions granted to "religious organizations for religious properties used solely for religious worship."[43] After citing the historical and widespread practice of granting religious organizations property tax exemptions,[44] the Court upheld the exemption on the grounds that it limited government entanglement with religion, stating that "[i]t restricts the fiscal relationship between church and state, and tends to complement and reinforce the desired separation insulating each from the other."[45] Notably, the Court highlighted that the tax exemption was not a direct monetary subsidy, which "would be a relationship pregnant with involvement" between the church and state and would therefore be unconstitutional.[46] Central to this decision was the entanglement test's purpose of promoting "the autonomy and freedom of religious bodies"; the tax exemption furnished greater autonomy while the taxation of churches would diminish that autonomy.[47] Not all tax exemptions promote the separation of church and state, however. In *Texas Monthly, Inc. v. Bullock*, a plurality of the Court struck down a sales tax exemption for religious periodicals in part because it required the government to determine whether a periodical was religious, which produced greater entanglement.[48]

The entanglement test, as applied in *Walz*, was "inescapably one of degree" and lacked clear rules.[49] Yet just one year later, in *Lemon v. Kurtzman*, the Court provided a three-prong test for Establishment Clause cases: "[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . finally, the statute must not foster

40. Walz v. Tax Comm'n, 397 U.S. 664, 672 (1970).

41. *See* Barclay, *supra* note 39, at 1722.

42. 397 U.S. 664.

43. *Id.* at 666.

44. *Id.* at 676–78.

45. *Id.* at 676.

46. *Id.* at 675.

47. *See id.*

48. 489 U.S. 1, 20 (1989) (plurality opinion) ("[I]t appears, on its face, to produce greater state entanglement with religion than the denial of an exemption.").

49. 397 U.S. at 674.

'an excessive government entanglement with religion.'"[50] Applying this test, the Court invalidated two state statutes that provided aid to church-related schools, stating that the government must be "entirely excluded from the area of religious instruction."[51] In later cases, the Court adhered to this principle and invalidated programs that provided governmental funds for the salaries of public employees who taught in parochial schools[52] and that provided classes to students in nonpublic schools at public expense.[53] Moreover, the Court also invalidated programs that used federal funds to lend educational materials and equipment to religious schools both directly[54] and indirectly.[55] Central to each of these cases was the potentiality of such aid to be used for religious purposes and the entanglement that would inevitably occur if the government had to supervise how the funds were used.[56]

Importantly, during this era of strong Establishment Clause jurisprudence, the Court also employed two additional rules: the endorsement rule and the preference rule. These rules were used in *Bullock* to strike down Texas's tax exemption for religious periodicals.[57] A three Justice plurality employed the endorsement rule, along with the entanglement test, to strike down the tax exemption.[58] The endorsement rule states that:

> [W]hen government directs a subsidy exclusively to religious organizations that is not required by the Free Exercise Clause and that either burdens nonbeneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion . . . it "provide[s] unjustifiable awards of assistance to religious organizations" and cannot but

50. 403 U.S. 602, 612–13 (1971) (quoting *Walz*, 397 U.S. at 674).

51. *Id.* at 625.

52. Aguilar v. Felton, 473 U.S. 402 (1985).

53. Sch. Dist. v. Ball, 473 U.S. 373 (1985).

54. Meek v. Pittenger, 421 U.S. 349 (1975), *overruled by* Mitchell v. Helms, 530 U.S. 793 (2000).

55. Wolman v. Walter, 433 U.S. 229 (1977), *overruled by Mitchell*, 530 U.S. 793.

56. *See, e.g.*, *Meek*, 421 U.S. at 372 ("This potential for political entanglement, together with the administrative entanglement which would be necessary to ensure that auxiliary-services personnel remain strictly neutral and nonideological when functioning in church-related schools, compels the conclusion that [the] Act . . . violates the [Establishment Clause].").

57. Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 20 (1989) (plurality opinion) (endorsement rule); *id.* at 28 (Blackmun, J., concurring) (preference rule).

58. *Id.* at 20.

> "conve[y] a message of endorsement" to slighted members of the community.[59]

Justices Blackmun and O'Connor, on the other hand, relied on the preference test.[60] Under this test, a law violates the Establishment Clause if it amounts to "preferential support for the communication of religious messages."[61] The tax exemption in *Bullock* clearly failed the entanglement test, but the plurality went a step further and struck the exemption down under these rules because the exemption "seem[ed] a blatant endorsement of religion."[62] In fact, the plurality found that the exemption lacked any secular objective that could possibly justify it, such as "similar benefits for nonreligious publications or groups."[63] The Court's decision to strike down Texas's tax exemption under these rules is of central importance to this Note and will be discussed in Part IV.

Evidently, for much of American history, the Supreme Court took a strong stance against governmental action that created excessive entanglement or had the primary or principal effect of advancing religion. This strong Establishment Clause jurisprudence, however, began to erode in the late 1990s.

B. THE COURT'S SHIFT AWAY FROM A STRONG ESTABLISHMENT CLAUSE

Throughout the 1970s and '80s, the Supreme Court's strict approach to the Establishment Clause made it unconstitutional for the government to provide any form of aid to religious institutions that "[could] be diverted to religious purposes."[64] That all changed in 1997 when the Court decided *Agostini v. Felton*.[65] In *Agostini*, the Court abandoned the presumption that public employees placed on parochial school grounds would inevitably inculcate religion or that their presence constituted a symbolic union between government and religion.[66] Additionally, the Court abandoned the rule that all government

---

59. *Id.* at 15 (quoting Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 348 (1987) (O'Connor, J., concurring)).

60. *Id.* at 28 (Blackmun, J., concurring).

61. *Id.*

62. *Id.* at 20; *id.* at 28 (Blackmun, J., concurring) ("A statutory preference for the dissemination of religious ideas offends our most basic understanding of what the Establishment Clause is all about and hence is constitutionally intolerable.").

63. *Id.* at 17 (plurality opinion).

64. Meek v. Pittenger, 421 U.S. 349, 357 (1975).

65. 521 U.S. 203, 235–36 (1997). In *Agostini*, the Court overruled *Aguilar v. Felton*, 473 U.S. 402 (1985), and *School District of the City of Grand Rapids v. Ball*, 473 U.S. 373 (1985).

66. *Agostini*, 521 U.S. at 223–26.

aid that directly aids the educational function of religious schools is invalid.[67] This decision was the first major step towards tearing down the "high and impregnable" wall between church and state.[68]

Not long after *Agostini*, another chunk of the wall came down in *Mitchell v. Helms*.[69] In *Mitchell*, the Court held that state and local governmental agencies do not violate the Establishment Clause when they use federal funds to lend educational materials and equipment to public and private schools.[70] These cases marked the end of the Court's strict application of the excessive entanglement test[71] and, in *Mitchell*, the plurality's central concern was facial neutrality.[72] Facial neutrality, as described by the plurality, merely requires the aid's eligibility requirements to be neutral—without reference to or favoring religion—and for the aid to be content neutral—i.e., devoid of religious content.[73] Crucially, however, Justice O'Connor, in the controlling concurrence, remained committed to the principle that diversion of direct government aid to religious *uses* is unconstitutional and that neutrality is not enough to make funding constitutional.[74]

Despite Justice O'Connor's limiting concurrence in *Mitchell*, the plurality's focus on neutrality was a sign of things to come. Two years later, in *Zelman v. Simmons-Harris*,[75] the Court "simply reduced the entire *Lemon* test to a broad neutrality requirement."[76] In so doing, the

---

67. *See id.*

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

69. 530 U.S. 793 (2000) (plurality opinion). In *Mitchell*, the Court overruled two more decisions: *Meek v. Pittenger*, 421 U.S. 349 (1975), and *Wolman v. Walter*, 433 U.S. 229 (1977).

70. *Mitchell*, 530 U.S. at 835.

71. *See* Barclay, *supra* note 39, at 1713 (asserting that *Agostini* walked back the excessive entanglement test).

72. *See Mitchell*, 530 U.S. at 810 ("[I]f the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose . . . then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose." (citation omitted)); *id.* at 900 (Souter, J., dissenting) ("[The plurality] appears to take evenhandedness neutrality and in practical terms promote it to a single and sufficient test for the establishment constitutionality of school aid.").

73. *See id.* at 829–31 (plurality opinion).

74. *Id.* at 840 (O'Connor, J., concurring) (stating that actual diversion of government aid to religious indoctrination is unconstitutional).

75. 536 U.S. 639 (2002).

76. Steven G. Gey, *Reconciling the Supreme Court's Four Establishment Clauses*, 8 U. PA. J. CONST. L. 725, 732 (2006); *see Zelman*, 536 U.S. at 652 ("[W]here a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not

Court upheld an Ohio program that gave eligible students tuition vouchers that could be used at private schools, the vast majority of which were religious.[77] The indirect nature of the aid provided by the program at issue in *Zelman*—due to the student's choice of where to attend school—was a point of importance for the majority.[78] In short, the program was constitutional because secular and religious schools were permitted to participate in the program on the same terms; the fact that the majority of the participating schools were religious and the majority of students chose to attend those schools was immaterial.[79] Thus, after *Zelman*, the prohibition on diversion of government aid to religious uses no longer applies to *indirect* aid programs, but it does still apply to *direct* aid.[80]

The stark contrast between *Zelman* and *Everson*[81] is emblematic of the substantial shift in the Court's Establishment Clause jurisprudence. Ultimately, the Court moved away from the *Lemon* test and the distinction between status and use, towards a facial neutrality inquiry. Still, *Zelman* does not mark the end of the Court's shift away from strict separationism.

C. THE EQUAL FUNDING DOCTRINE

Following *Zelman*, the strength of the Establishment Clause in funding cases has further weakened due to the Court's application of a general nondiscrimination principle.[82] The nondiscrimination principle stems from the Free Speech Clause of the First Amendment and is most prevalent in public fora cases.[83] The principle prohibits the government from regulating speech—or the allocation of funding—"when the specific motivating ideology or the opinion or perspective

readily subject to challenge under the Establishment Clause.").

77. *See Zelman*, 536 U.S. at 643–47 (explaining the facts of the case).

78. *See id.* at 652.

79. *Id.* at 658 ("The constitutionality of a neutral educational aid program simply does not turn on whether and why . . . most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school."); *see also* Gey, *supra* note 76, at 772 (describing the constitutionality of indirect aid programs).

80. The fact that *Zelman* involved indirect aid is crucial because Justice O'Connor's concurrence in *Mitchell* is still the law for direct aid. *Compare* Mitchell v. Helms, 530 U.S. 793, 840 (2000) (O'Connor, J., concurring), *with Zelman*, 536 U.S. at 652.

81. Justice Souter's dissent in *Zelman* highlights the contrast between *Zelman* and *Everson* and poses the question: "How can a Court consistently leave *Everson* on the books and approve the Ohio vouchers?" 536 U.S. at 688 (Souter, J., dissenting).

82. *See* Schragger & Schwartzman, *supra* note 20, at 1385.

83. For a general overview of the various public fora, see R. George Wright, *Public Fora and the Problem of Too Much Speech*, 106 KY. L.J. 409, 414–19 (2017–2018).

of the speaker is the rationale for the restriction."[84] Notably, the nondiscrimination principle was first applied to funding cases in *Rosenberger v. Rector and Visitors of the University of Virginia*.[85] *Rosenberger* was a case at the intersection of the public forum doctrine and governmental funding of religious speech, in which the Court held that the University of Virginia could not deny a Christian magazine access to student funds that it would otherwise qualify for.[86] The decision in *Rosenberger*, combined with the decision in *Zelman*, laid the groundwork for the new equal funding doctrine.[87]

This new equal funding doctrine was established in *Trinity Lutheran Church of Columbia, Inc. v. Comer*.[88] At issue in *Trinity Lutheran* was the Missouri Department of Natural Resources' program that provided "reimbursement grants to qualifying nonprofit organizations that purchase playground surfaces made from recycled tires."[89] The Trinity Lutheran Church Child Learning Center qualified for a grant,[90] but was denied funding because the Missouri Constitution's "no-aid" provision prohibited the state from providing direct or indirect aid to churches.[91] This provision, as applied, according to the Court, "impose[d] a penalty on the free exercise of religion" because it "expressly discriminate[d] against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character."[92] As a result, the Court applied strict scrutiny.[93] "Under [this] standard, only a state interest 'of the highest order' [could] justify the

84. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995).

85. *Id.*; *see* Alan Trammell, Note, *The Cabining of Rosenberger:* Locke v. Davey *and the Broad Nondiscrimination Principle That Never Was*, 92 VA. L. REV. 1957, 1968 (2006) ("[T]he fact that the Court advanced this logic in a funding case, far beyond the context of a pure public forum, ultimately gives rise to the idea that *Rosenberger* announced a broad nondiscrimination principle.").

86. *Rosenberger*, 515 U.S. at 845–46.

87. Trammell, *supra* note 85, at 1975 ("[After *Zelman*,] [t]he Establishment Clause was no longer an impediment to the broad nondiscrimination principle announced by *Rosenberger*.").

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

89. *Id.* at 2017.

90. *Id.*

91. *Id.* ("That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship." (quoting MO. CONST. art. I, § 7)).

92. *Id.* at 2021.

93. *Id.* at 2024 ("[S]uch a condition imposes a penalty on the free exercise of religion that must be subjected to the 'most rigorous' scrutiny.").

Department's discriminatory policy."[94] Perhaps unsurprisingly, the Court—in a few brief sentences—found that the State's interest in avoiding establishment concerns did not qualify as compelling and that the policy violated the Free Exercise Clause.[95] Due to the Court's application of the nondiscrimination doctrine, the new equal funding regime was born: a church may not be excluded "from a public benefit for which it is otherwise qualified, solely because it is a church."[96]

Notably, the Court in *Trinity Lutheran* relied primarily on non-funding cases[97] and distinguished another funding case, *Locke v. Davey*.[98] In *Locke*, a student challenged a Washington State policy that prohibited students who received a scholarship through its Promise Scholarship Program—which provided scholarships to academically gifted students for postsecondary education expenses—from using the scholarship "at an institution where they are pursuing a degree in devotional theology."[99] The program, in other words, permitted students to attend accredited religious schools, but not to pursue a degree in devotional theology.[100] Accordingly, the Court upheld the policy, finding that the program did not suggest any animus toward religion and that "[t]he State's interest in not funding the pursuit of devotional degrees is substantial."[101] In *Trinity Lutheran* the Court distinguished *Locke* by emphasizing that "Davey was not denied a scholarship because of who he *was*; he was denied a scholarship because of what he proposed *to do*."[102] This status versus use distinction that the *Trinity Lutheran* and, seemingly, the *Locke* Court relied on is a fundamental component of nondiscrimination doctrine.[103] Thus, under

94. *Id.* (quoting McDaniel v. Paty, 435 U.S. 618, 628 (1978) (plurality opinion)).

95. *Id.* ("In the face of the clear infringement on free exercise before us, that interest cannot qualify as compelling.").

96. *Id.* at 2025.

97. *See, e.g.*, *McDaniel*, 435 U.S. 618 (involving a Baptist minister who was disqualified to serve as a delegate to a Tennessee constitutional convention); Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993) (challenging city ordinances prohibiting the ritual slaughter of animals); Widmar v. Vincent, 454 U.S. 263 (1981) (challenging the exclusion of religious groups from a university's open forum policy).

98. *Trinity Lutheran*, 137 S. Ct. at 2022–24 (distinguishing Locke v. Davey, 540 U.S. 712 (2004)).

99. *Locke*, 540 U.S. at 715.

100. *See id.* at 724.

101. *Id.* at 725.

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

103. Importantly, in the public forum context this distinction is referred to as content versus viewpoint. *See, e.g.*, Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1885–86

Trinity Lutheran, the government may not exclude religious entities from a generally available benefit based on their *status*, but it can exclude such benefits when they will go towards religious *uses*.[104] The strength of the status versus use distinction, however, is unclear after *Espinoza v. Montana Department of Revenue*.[105]

In *Espinoza*, parents of students who attended religiously affiliated private schools challenged the Montana Department of Revenue's policy prohibiting scholarships from a state scholarship program from being used at those schools.[106] Before the case arrived at the Supreme Court, the Montana Supreme Court invalidated the policy, but it also struck down the scholarship program under the Montana Constitution's "no-aid" provision.[107] This procedural history made some commentators[108]—and dissenting Justices[109]—believe that there was no religious discrimination because there was no scholarship program,[110] but the majority did not see it that way.[111] Instead,

---

(2018) (explaining that the government may impose content-based restrictions on speech but cannot discriminate based on viewpoint).

104. *See Trinity Lutheran*, 137 S. Ct. at 2023–24 ("The only thing he could not do was use the scholarship to pursue a degree in [Theology]."). In a footnote, the Court makes clear that Justice O'Connor's concurrence in *Mitchell v. Helms* is still the law. *See id.* at 2024 n.3 ("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."); Mitchell v. Helms, 530 U.S. 793, 840 (2000) (O'Connor, J., concurring) ("I also disagree with the plurality's conclusion that actual diversion of government aid to religious indoctrination is consistent with the Establishment Clause.").

105. *See* Michael Bindas, *The Status of Use-Based Exclusions & Educational Choice After* Espinoza, 21 FEDERALIST SOC'Y REV. 204, 215 (2020) ("[The *Espinoza*] holding makes clear that the religious status versus religious use question is not the binary inquiry that *Trinity Lutheran* might have suggested it is."); Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2256 (2020).

106. *Espinoza*, 140 S. Ct. at 2251–52.

107. *See* Espinoza v. Mont. Dep't of Revenue, 435 P.3d 603 (Mont. 2018), *rev'd*, 140 S. Ct. 2246 (2020); MONT. CONST. art. X, § 6. The Montana "no-aid" provision is substantially similar to Missouri's.

108. *See* Brooke Reczka, *The Wrong Choice to Address School Choice:* Espinoza v. Montana Department of Revenue, 15 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 237, 249 (2020) ("Petitioners' free exercise challenge must fail because they cannot show any 'prohibition' of their religious free exercise or any discrimination based on their religious beliefs, conduct, or status.").

109. *See, e.g.*, *Espinoza*, 140 S. Ct. at 2278–81 (Ginsburg, J., dissenting).

110. This procedural history leads to some important standing—and, potentially, federalism—questions, but those questions are outside the scope of this Note.

111. *Espinoza*, 140 S. Ct. at 2262 ("When the Court was called upon to apply a state law no-aid provision to exclude religious schools from the program, it was obligated by the Federal Constitution to reject the invitation.").

the majority believed that the Montana Supreme Court's application of the "no-aid" provision violated the Federal Constitution.[112] In reaching that conclusion, the Court asserted that this case was analogous to *Trinity Lutheran* and distinguishable from *Locke*: "This case . . . turns expressly on religious status and not religious use."[113] But the Court did not stop there; it went further, stating that "[s]tatus-based discrimination remains status based even if one of its goals or effects is preventing religious organizations from putting aid to religious uses."[114]

Evidently, under the *Espinoza* Court's view, a prohibition on funding religious organizations—even if the goal is to prevent the funding of religious *uses*—violates the Free Exercise Clause. Still, if a state were to craft a prohibition on funding that was aimed solely at religious uses, the Court states that too may be subject to strict scrutiny.[115] And, importantly, the Court signaled that the distinction between status and use may be meaningless: "Some Members of the Court . . . have questioned whether there is a meaningful distinction between discrimination based on use or conduct and that based on status."[116] In short, once a State decides to offer a public benefit, it may not exclude religious entities, even if the purpose of the exclusion is to avoid funding religious uses.[117]

The Court's Establishment Clause precedent has come a long way since *Everson*. The initial prohibition on government funds going to religious activities[118] has given way to the new equal funding doctrine promulgated in *Trinity Lutheran* and *Espinoza*. It remains to be seen how far this equal funding doctrine extends and whether it will be limited by the endorsement rule set forth in *Texas Monthly*[119] or by the distinction between status and use.[120] But one thing is clear; under the

112. *Id.*

113. *Id.* at 2256.

114. *Id.*

115. *Id.* at 2257 ("None of this is meant to suggest that we agree with the Department . . . that some lesser degree of scrutiny applies to discrimination against religious uses of government aid." (citation omitted)).

116. *Id.*

117. *See id.* at 2261 ("A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious.").

118. Everson v. Bd. of Educ., 330 U.S. 1, 15–16 (1947).

119. Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 20 (1989) (plurality opinion) (striking down Texas's religious sales tax exemption as a "blatant endorsement of religion").

120. *See, e.g.*, Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2023 (2017).

current doctrine, the government may not exclude religious entities from generally available benefits for which they otherwise qualify.[121] The implications of this new equal funding doctrine are exemplified by the SBA's implementation of the Paycheck Protection Program.

II. THE PAYCHECK PROTECTION PROGRAM

The COVID-19 pandemic has taken hundreds of thousands of American lives and the number of COVID-19 related deaths grows by the day.[122] In response to the pandemic, American cities, towns, states, and counties implemented various restrictions on public gatherings.[123] Among these restrictions are mask mandates, indoor capacity limits, and stay-at-home orders.[124] The Centers for Disease Control and Prevention (CDC) also promulgated social distancing guidelines that encouraged individuals to stay at least six feet apart in an effort to mitigate the spread of COVID-19.[125] All of these guidelines and restrictions, not to mention the widespread, pandemic induced anxiety,[126] resulted in small businesses and nonprofits receiving less business or having to shut down entirely, placing them in dire economic situations.[127] In response to the economic situation countless Americans faced, Congress passed the CARES Act,[128] which included the Paycheck Protection Program.[129] The intent of the PPP was to "provide relief to America's small businesses expeditiously."[130] The SBA—

121. *See id.* at 2023–24.

122. *See Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES (Apr. 12, 2022), https://www.nytimes.com/interactive/2021/us/covid-cases.html [https://perma.cc/MYX4-9YZX] (noting 984,464 reported deaths by April 12, 2022).

123. *See* Hauck & Woodyard, *supra* note 3.

124. *See id.*

125. *How to Protect Yourself & Others*, CTRS. DISEASE CONTROL & PREVENTION (Feb. 25, 2022), https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html [https://perma.cc/9NW3-6B5K].

126. *See* Jeffrey Kluger, *The Coronavirus Pandemic May Be Causing an Anxiety Pandemic*, TIME (Mar. 26, 2020), https://time.com/5808278/coronavirus-anxiety [https://perma.cc/J55H-WWMY] (noting that participation in one online anxiety help service had spiked 65% since the beginning of the pandemic).

127. *See* Rogers & Collins, *supra* note 2; Morgenson et al., *supra* note 2.

128. CARES Act, Pub. L. No. 116-136, 134 Stat. 281.

129. 15 U.S.C. § 636(a)(36). The $2 trillion CARES Act allocated $669 billion to the PPP. *See* Aaron Gregg, *The Post Among Five News Organizations Suing Small Business Administration for Access to Loan Data*, WASH. POST (May 12, 2020), https://www.washingtonpost.com/business/2020/05/12/sba-foia-lawsuit [https://perma.cc/C7BQ-GR76].

130. Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. 20,811, 20,813 (Apr. 15, 2020) (codified at 13 C.F.R. pt. 120).

the agency charged with administering the program—recognized that many faith-based organizations would be ineligible for PPP loans due to the affiliation requirements and promulgated a faith-based organization exemption from those requirements.[131] Section A of this Part will address the Paycheck Protection Program and its requirements. Then, Section B will explain the SBA's faith-based organization exemption.

A. THE PAYCHECK PROTECTION PROGRAM AND ITS REQUIREMENTS

The Paycheck Protection Program offered small businesses and nonprofits loans that would be forgiven if they were spent on the specific costs listed in the statute.[132] Among these are payroll costs, group health care benefits, payments of interests on mortgage obligations, and rent.[133] In order to qualify for a PPP loan, the small business or nonprofit organization must have fewer than 500 employees and satisfy the affiliation limitations.[134] In other words, if an organization has more than 500 employees or is "affiliated" under the relevant rules, it is ineligible for PPP loans. The focus of this Note is the affiliation limitations.

Under the relevant affiliation rules, "entities may be considered affiliates based on factors including stock ownership, overlapping management, and identity of interest."[135] Affiliation based on ownership applies if a "concern is an affiliate of an individual, concern, or entity that owns or has the power to control more than 50 percent of the concern's voting equity."[136] This also may include the CEO or a minority shareholder capable of preventing a quorum or otherwise blocking action.[137] Affiliation based on management arises where an individual, entity, or concern "also controls the management of one or

131. Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. 20,817 (Apr. 29, 2020) (codified at 13 C.F.R. pt. 121).

132. "[T]he borrower will not be responsible for any loan payment if the borrower uses all of the loan proceeds for forgiveable [sic] purposes . . . and employee and compensation levels are maintained." Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. 20,811, 20,813 (Apr. 15, 2020) (codified at 13 C.F.R. pt. 120). For a list of the forgivable costs, see 15 U.S.C. § 636(a)(36)(F).

133. 15 U.S.C. § 636(a)(36)(F).

134. *Id.* § 636(a)(36)(D)(i).

135. Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. 20,817 (Apr. 29, 2020) (codified at 13 C.F.R. pt. 121); *see also* 13 C.F.R. § 121.301(f) (2020).

136. *Id.* § 121.301(f)(1).

137. *Id.*

more other concerns."[138] Finally, affiliation based on identity of interest is triggered when "[i]ndividuals or firms . . . have identical or substantially identical business or economic interests."[139] This affiliation includes close relatives, common investments, and economic dependence.[140] Initially, these rules applied to all organizations, but, as the next Section points out, faith-based organizations were later exempted from these requirements.

B. THE SBA'S FAITH-BASED ORGANIZATION EXEMPTION

Many faith-based organizations, whether they are churches or nonprofits, are affiliated with other entities.[141] Take the Catholic Church, for example. The diocese is the most important organizational unit because the sole officer of the diocese, the bishop, manages the parishes in the diocese.[142] Notably, "each diocese is *also* a registered non-profit corporation."[143] And, even where each parish "is incorporated separately, it is still normal for the bishop to be the sole officer of that corporation, rather than the pastor."[144] Thus, parishes and dioceses, along with many other faith-based organizations, would be considered affiliates under the PPP requirements and therefore ineligible for PPP loans.[145] As a result, religious groups lobbied for an exemption from the affiliation limitations.[146]

---

138. *Id.* § 121.301(f)(3).

139. *Id.* § 121.301(f)(4).

140. *Id.*

141. *See, e.g.*, *Partners*, WORLD IMPACT, https://worldimpact.org/about-us/partners [https://perma.cc/HJC4-NC4F] (listing, for example, the various partners of one faith-based organization); *About*, EVANGELICAL LUTHERAN CHURCH IN AM., https://www.elca.org/About [https://perma.cc/ZY5L-96L6] (describing the Evangelical Lutheran Church in America's (ELCA) position that its member churches are encouraged to develop cultures and traditions independent from the ELCA); Paddy McLaughlin, *What the Catholic Church Won't Do*, STARTUP (Sept. 30, 2019), https://web.archive.org/web/20191003160334/https://medium.com/swlh/what-the-catholic-church-wont-do-dcaf5652293d (describing the organizational structure of the Catholic Church).

142. McLaughlin, *supra* note 141.

143. *Id.*

144. *Id.*

145. *See* Reese Dunklin & Michael Rezendes, *AP: Catholic Church Lobbied for Taxpayer Funds, Got $1.4B*, AP NEWS (July 10, 2020), https://apnews.com/article/dab8261c68c93f24c0bfc1876518b3f6 [https://perma.cc/7WNN-ZLXW] ("[M]any Catholic dioceses would [be] ineligible because—between their head offices, parishes and other affiliates—their employees exceed the 500-person cap.").

146. *See id.*

The Trump Administration and the SBA heeded their call and provided faith-based organizations with an exemption from the affiliation rules.[147] In its explanation for the exemption, the SBA asserted that the Religious Freedom Restoration Act (RFRA) "required, or at a minimum authorized," the exemption.[148] The RFRA provides that the "[g]overnment shall not substantially burden a person's exercise of religion" unless the government can demonstrate "that application of the burden to the person . . . is in furtherance of a compelling governmental interest; and . . . is the least restrictive means of furthering that compelling governmental interest."[149] A substantial burden occurs when the government compels an individual to violate their sincere religious beliefs through direct or indirect measures.[150] The SBA found that the affiliation rules would impose a substantial burden on faith-based organizations because they "would deny an important benefit (participation in a program for which they would otherwise be eligible under the CARES Act) because of the exercise of sincere religious belief (affiliation with other religious entities)."[151] Furthermore, the SBA Administrator concluded that "she [did] not have a compelling interest in denying emergency assistance to faith-based organizations."[152] As a result, the SBA asserted that it *must* grant the faith-based organization exemption.[153] Due to this exemption, many otherwise ineligible faith-based organizations were able to obtain PPP funding.[154]

---

147. *Id.*; *see* Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. 20,817, 20,819 (Apr. 15, 2020) (codified at 13 C.F.R. pt. 121).

148. Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. 20,817, 20,819 (Apr. 15, 2020) (codified at 13 C.F.R. pt. 121).

149. 42 U.S.C. § 2000bb-1.

150. *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 690–91, 726 (2014) (holding that the government cannot require corporations to provide contraceptive coverage as part of their employee health insurance plan when such coverage violates the corporation's religious beliefs); Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 718 (1981) (stating that "the compulsion may be indirect").

151. Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. 20,817, 20,819 (Apr. 15, 2020) (codified at 13 C.F.R. pt. 121).

152. *Id.* According to the Administrator, the SBA did not have a compelling interest in denying the emergency assistance because faith-based organizations were facing the same economic hardship as secular organizations and because the affiliation rules contain other exemptions. *Id.*

153. *See id.*

154. *See* Warren Cole Smith, *Ministries and Churches Receiving More than $1-M in Paycheck Protection Program Funds*, MINISTRY WATCH (Aug. 2, 2020), https://ministrywatch.com/ministries-and-churches-receiving-more-than-1-m-in-paycheck-protection-program-funds [https://perma.cc/SZ2J-5H9D] (listing evangelical ministries and churches that received at least $1 million from the PPP).

Importantly, in granting the faith-based organization exemption, the SBA relied on *exemptions* cases, not *funding* cases.[155] Recall that "[t]he *exemptions* cases ask whether religiously motivated actors are entitled to receive exemptions from general laws that nonreligious individuals do not receive."[156] In these cases, the Supreme Court asks whether the challenged government action burdens religion, and it has invalidated the application of laws ranging from contraceptive mandates to antidiscrimination laws.[157] Notably, the SBA relied heavily upon one exemption case: *Sherbert v. Verner*.[158] In *Sherbert*, the Supreme Court held that an unemployment compensation law was unconstitutional as applied to the plaintiff.[159] The law prohibited claimants from receiving compensation if they failed to accept suitable work when offered, without good cause, and the plaintiff—a member of the Seventh-day Adventist Church—was denied compensation after refusing work that required her to work on Saturdays, the Sabbath Day of her faith.[160] The Court asserted that "to condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties."[161]

Accordingly, the SBA reasoned that the affiliation rules for PPP loans, like the unemployment compensation law in *Sherbert*, placed a substantial burden on faith-based organizations due to their "affiliation with other entities as an aspect of their religious practice"; thus, an exemption was required.[162] The SBA's concern that the affiliation

155. *See, e.g.*, *Thomas*, 450 U.S. 707; *Hobby Lobby Stores, Inc.*, 573 U.S. 682; Sherbert v. Verner, 374 U.S. 398 (1963).

156. Schragger & Schwartzman, *supra* note 20, at 1384.

157. *See, e.g.*, *Hobby Lobby Stores, Inc.*, 573 U.S. 682 (providing an exemption from a contraceptive mandate); Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171 (2012) (establishing a broad ministerial exception, making churches largely immune from employment discrimination suits); Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018) (exempting a Christian baker who denied service to a gay couple from Colorado's antidiscrimination law).

158. 374 U.S. 398 (1963); *see* Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. 20,817, 20,819 (Apr. 15, 2020) (codified at 13 C.F.R. pt. 121) (taking *Sherbert* as the exemplary Supreme Court analysis for faith-based exemptions).

159. *Sherbert*, 374 U.S. at 410 ("Our holding today is only that South Carolina may not constitutionally apply the eligibility provisions so as to constrain a worker to abandon his religious convictions respecting the day of rest.").

160. *Id.* at 399–401.

161. *Id.* at 406.

162. Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. 20,817, 20,819 (Apr. 15, 2020) (codified at 13 C.F.R. pt. 121).

rules would place hierarchically organized religious entities at a disadvantage[163] and potentially incentivize them to organize in a non-hierarchical way is not misplaced. The Free Exercise Clause provides faith-based organizations the "power to decide for themselves, free from state interference, matters of church government."[164] And, for Catholics, the hierarchical structure of the Catholic Church is a fundamental aspect of their religion.[165]

Notably, however, there is a stark difference between the exemption from unemployment compensation requirements for the plaintiff in *Sherbert* and the SBA's faith-based organization exemption from loan eligibility requirements. The exemption provided in *Sherbert* did not implicate the Establishment Clause; an exemption from an unemployment compensation law that burdens an *individual's* religious liberty is solely a Free Exercise concern.[166] The SBA's faith-based *organization* exemption, on the other hand, is not solely a Free Exercise concern; when the government provides direct funding to religious organizations, the Establishment Clause is implicated.[167] This is evidenced by how the PPP loans were ultimately distributed.

The faith-based organization exemption allowed churches and other religious organizations to receive billions of dollars in PPP funding.[168] The Catholic Church alone received more than $3 billion in PPP loans, making it "the single largest beneficiary of the emergency aid program."[169] Additionally, "Baptist, Lutheran, Methodist, and Jewish

163. *See id.* at 20,820.

164. Kedroff v. Saint. Nicholas Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94, 116 (1952).

165. *See* McLaughlin, *supra* note 141.

166. *Sherbert*, 374 U.S. at 409.

167. *See supra* Part I.

168. *See, e.g.*, Beer, *supra* note 6 ("[T]he Roman Catholic [Church] collected between $1.4 billion and $3.5 billion."); Yonat Shimron, *Federal Loans for Small Businesses Went to Thousands of Churches and Other Religious Organizations*, WASH. POST (July 10, 2020), https://www.washingtonpost.com/religion/federal-loans-for-small-businesses-went-to-thousands-of-churches-and-other-religious-organizations/2020/07/10/da79ba8a-c244-11ea-9fdd-b7ac6b051dc8_story.html [https://perma.cc/5G5Q-WAEZ] ("Several Protestant denominations . . . received between $5 million and $10 million . . . ."); Benjamin Fearnow, *Religious Organizations Receive $7.3 Billion in PPP Loans, Megachurches Amass Millions*, NEWSWEEK (July 7, 2020), https://www.newsweek.com/religious-organizations-receive-73-billion-ppp-loans-megachurches-amass-millions-1515963 [https://perma.cc/N9W4-JRZZ] ("Religious organizations across the U.S. have received at least $7.3 billion in federal rescue package loans . . . ."). For a list of all of the evangelical Christian ministries and churches that received at least $1 million in PPP loans, see Smith, *supra* note 154.

169. Elliot Hannon, *The Catholic Church, with Billions in Reserve, Took More than $3 Billion in Taxpayer-Backed Pandemic Aid*, SLATE (Feb. 4, 2021), https://slate.com/

faith-based entities received at least $3 billion."[170] Meanwhile, secular nonprofits with similar affiliation structures, such as Goodwill, Boys and Girls Club, and Planned Parenthood, were ineligible for PPP loans under the affiliation rules.[171] If the SBA had not granted the faith-based organization exemption, religious entities that did not qualify for PPP loans under the affiliation rules would have been in the same situation as these nonprofits. Yet, thanks to the exemption, faith-based organizations received preferential treatment. As a result, the SBA's faith-based organization exemption raises substantial Establishment Clause concerns.

III. THE CONCERNS RAISED BY THE SBA'S FAITH-BASED ORGANIZATION EXEMPTION

By focusing solely on the Free Exercise questions raised by the PPP affiliation requirements, the SBA collapsed the Establishment Clause into the Free Exercise Clause. This interpretation of the Religion Clauses effectively tears down what is left of the wall between church and state. Although the SBA's faith-based organization exemption may appear similar to the Supreme Court's holding in *Trinity Lutheran* and *Espinoza*, in that Free Exercise concerns triumphed over Establishment Clause concerns, there is a vital difference between the two interpretations. In *Trinity Lutheran* and *Espinoza*, the Court employed the Free Exercise Clause to strike down laws that prohibited funding from going to churches on the grounds that those prohibitions amounted to religious discrimination.[172] The affiliation limitations, however, include no such discriminatory prohibition; they are neutral

news-and-politics/2021/02/catholic-church-usd3-billion-taxpayer-backed-pandemic-aid-ppp-paycheck-protection.html [https://perma.cc/62JU-242N].

170. *Id.*

171. *See* Rogers & Collins, *supra* note 2; Ruth McCambridge, *Large Nonprofits Argue Their Need for PPP-Type Relief*, NONPROFIT Q. (May 7, 2020), https://nonprofitquarterly.org/large-nonprofits-argue-their-need-for-ppp-type-relief [https://perma.cc/YK6A-BUWW]; Kate Smith, *Planned Parenthood Received $80 Million in PPP Loans, the SBA Wants It Back*, CBS NEWS (May 22, 2020), https://www.cbsnews.com/news/planned-parenthood-paycheck-protection-program-loan-controversy [https://perma.cc/EM8Y-AAYK] (describing the SBA's determination that local Planned Parenthood affiliates are ineligible for PPP loans). Still, despite their ineligibility, some local chapters of these nonprofits did receive PPP loans. *See* Oliver Cory, *Boys & Girls Club of the Redwoods Awarded Loan for Emergency COVID Program*, REDHEADED BLACKBELT (May 4, 2020), https://kymkemp.com/2020/05/04/boys-girls-club-of-the-redwoods-awarded-loan-for-emergency-covid-program [https://perma.cc/J8SZ-CBP5] (providing a press release from a local Boys & Girls Club chapter).

172. *See* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017); Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2020).

with respect to religion. Additionally, comparisons may be drawn to *Walz v. Tax Commission of New York*[173] because the faith-based organization exemption, like the property tax exemption, treated religious and secular entities differently, in an effort to promote free exercise.[174] But the faith-based organization exemption differentiates itself from *Walz* because it has no historical precedent[175] and its purpose was to support or subsidize religious entities, not to minimize entanglement between church and state.[176] These differences are critical, and they raise significant Establishment Clause concerns.

Section A of this Part will address the implications of the equal funding doctrine for the Establishment Clause, namely how it results in implicit preferred treatment for religious entities. Section B discusses how the faith-based organization exemption in the PPP resulted in the explicit preferred treatment of faith-based organizations. Section B also emphasizes how this preferred funding highlights the equal funding doctrine's potentiality for sliding into a preferred treatment regime.

A. THE DANGEROUS IMPLICATIONS OF THE EQUAL FUNDING DOCTRINE FOR THE ESTABLISHMENT CLAUSE

As addressed in Part I, the equal funding doctrine prevents the government from excluding religious entities from generally available benefits for which they otherwise qualify.[177] In the past, "[a] legislature might decline to facilitate religion for good reasons, such as promoting equal citizenship for members of minority faiths (or no faith at all), fostering community concord, or respecting taxpayers' freedom

173. 397 U.S. 664 (1970).

174. *See id.* at 700 (Douglas, J., dissenting) ("The question in the case therefore is whether believers—organized in church groups—can be made exempt from real estate taxes, merely because they are believers, while nonbelievers, whether organized or not, must pay the real estate taxes.").

175. *See id.* at 677 (majority opinion) ("It is significant that Congress, from its earliest days, has viewed the Religion Clauses of the Constitution as authorizing statutory real estate tax exemption to religious bodies.").

176. Central to the *Walz* Court's holding was the notion that "[t]he grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state." *Id.* at 675. The PPP, however, did require the government to transfer part of its revenue to churches.

177. *Trinity Lutheran*, 137 S. Ct. at 2023–24 (holding unconstitutional a state program which denied Trinity Lutheran a grant "simply because of what it [was]—a church").

of conscience."[178] Now, that is no longer an option. Accordingly, it is understandable that Congress did not explicitly prevent faith-based organizations from receiving PPP loans. In fact, there is merit to the argument that Congress may have been required to make faith-based organizations eligible to receive PPP loans.[179] In this context, however, the equal funding doctrine implicitly prefers religious entities over secular ones. This Section describes how religious entities have implicitly received preferred treatment and highlights additional concerns raised by the equal funding doctrine.

1. The Implicit Preferred Treatment of Faith-Based Organizations

The equal funding doctrine is a product of the Supreme Court's shift towards a broader Free Exercise doctrine and a narrower Establishment Clause.[180] Yet, the equal funding doctrine is not the only new development in Religion Clause jurisprudence. In the Free Exercise realm, there is an emerging principle that Nelson Tebbe dubs "equal value."[181] Unlike established Free Exercise precedent,[182] this principle does not require any showing of discriminatory purpose or a facial classification of the protected group.[183] Instead, the principle simply prohibits government actions that implicitly devalue members of the protected group.[184] Thus, if a protected activity is subject to a regulation while some unprotected activities are exempted, the government has devalued the protected activity, thereby triggering a presumption of invalidity.[185] The emergence of this principle, combined with the new equal funding doctrine, has resulted in an implicit preferred treatment of religious entities with respect to PPP funding.

178. Tebbe, *supra* note 23, at 1267.

179. *See supra* Part I.C. *But see* Mitchell v. Helms, 530 U.S. 793, 840 (2000) (O'Connor, J., concurring) ("I also disagree with the plurality's conclusion that actual diversion of government aid to religious indoctrination is consistent with the Establishment Clause.").

180. *See* Schragger & Schwartzman, *supra* note 20, at 1381–82 ("The general doctrinal pattern has been a narrowing of the Establishment Clause and a broadening of free exercise.").

181. Nelson Tebbe, *The Principle and Politics of Equal Value*, 121 COLUM. L. REV. 2397, 2389 (2021).

182. *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 537–38 (1993) (applying strict scrutiny to a law that singled out religious practice for discriminatory treatment); Emp. Div. v. Smith, 494 U.S. 872, 884–85 (1990) (holding that strict scrutiny does not apply to laws that are neutral and generally applicable).

183. Tebbe, *supra* note 181, at 2399–400.

184. *Id.* at 2398.

185. *Id.*

Roman Catholic Diocese of Brooklyn v. Cuomo[186] serves as the basis for this preferred treatment. In *Roman Catholic Diocese*, the Diocese and Agudath Israel—a synagogue—sought injunctive relief from an "Executive Order issued by the Governor of New York that impose[d] . . . restrictions on attendance at religious services" in specifically designated areas where COVID-19 transmission was highest, claiming that the restrictions violated the Free Exercise Clause.[187] In these zones, businesses categorized as essential could admit—in theory—an unlimited number of people, while houses of worship were limited to ten or twenty-five people, depending on the zone they were in.[188] The Court applied strict scrutiny after finding that the restrictions were not "'neutral' and of 'general applicability'"[189] and ultimately granted the injunction.[190] Central to the Court's finding that the restrictions were not neutral was their determination that allowing greater attendance at secular businesses, such as bus stations, airports, laundromats, and liquor stores, was discriminatory.[191] Yet, as Justice Sotomayor points out in dissent, New York's restrictions treated houses of worship the same as secular lectures and concerts, which are clearly more comparable to houses of worship than a laundromat or liquor store.[192]

Notably, despite grounding their opinion in attenuated comparisons to laundromats and liquor stores, the comparisons were not the driving force behind the opinion; they were merely required by Free Exercise precedent.[193] Rather, the driving force behind the Court's de-

186. 141 S. Ct. 63 (2020) (per curiam).

187. *Id.* at 65–66.

188. *Id.* at 66.

189. *Id.* at 67 (quoting Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 546 (1993)).

190. *Id.* at 69.

191. *See, e.g.*, *id.* at 69 (Gorsuch, J., concurring).

192. *Id.* at 79 (Sotomayor, J., dissenting).

193. Under the current Free Exercise framework, laws that are neutral and generally applicable—even if they burden religion—survive a Free Exercise challenge. *See* Emp. Div. v. Smith, 494 U.S. 872, 884–85 (1990) (holding that strict scrutiny does not apply to laws that are neutral and generally applicable). Laws that are shown to have a discriminatory purpose or make a facial classification of the protected group, on the other hand, are struck down. *See, e.g.*, *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 537–38 (applying strict scrutiny to a law that singled out religious practice for discriminatory treatment).

cision was a broad application of the emerging equal value principle.[194] Indeed, the Court made clear that it was applying this new principle when it decided *Tandon v. Newsom* just a few months later.[195]

Like *Roman Catholic Diocese*, *Tandon* involved a challenge to California's COVID-19 restrictions on the number of people who could gather in a home for religious exercise purposes.[196] In its decision granting injunctive relief, the Court stated that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise."[197] Moreover, the Court went on to emphasize that "[i]t is no answer that a State treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue."[198] Thus, since greater numbers of people were allowed to gather in secular entities like retail stores and hair salons, the applicants were likely to succeed on the merits of their free exercise claim and injunctive relief was granted.[199] In other words, strict scrutiny applied because religious exercise was devalued by the presence of exemptions for comparable secular activities.

But the comparisons drawn by the Court in *Tandon* are rather weak; the same restrictions also applied to secular gatherings in homes, and the evidence suggested that in-home gatherings were far more likely to result in the transmission of COVID-19 than, say, shopping for groceries.[200] The tenuous nature of this comparison is important because it means that the Court may continue applying this new principle broadly. As such, it is possible that *any* law that includes at least one secular exemption will require strict scrutiny review. It is, of course, much more likely that the Court limits its application of this

194. *See Smith*, 494 U.S. at 885.

195. 141 S. Ct. 1294, 1296 (2021) (per curiam).

196. Importantly, California's restrictions were the same for both secular and sectarian in-home gatherings. *Id.* at 1298 (Kagan, J., dissenting) ("[The State] has adopted a blanket restriction on at-home gatherings of all kinds, religious and secular alike."). *But see id.* at 1297 (majority opinion) ("California treats some comparable secular activities more favorably than at-home religious exercise, permitting hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants to bring together more than three households at a time.").

197. *Id.* at 1296.

198. *Id.*

199. *Id.* at 1297.

200. *Id.* at 1298 (Kagan, J., dissenting).

new "equal value" principle,[201] but the principle itself raises serious concerns that will be discussed later.[202] For now, it is important to understand what the application of this new principle meant for religious entities in practice.

These decisions placed houses of worship in a unique position. Just a few months prior, they were eligible to receive PPP loans, but they are now exempt from the public health restrictions that prompted the PPP in the first place.[203] Evidently, religion is special; religious organizations are treated equally in the funding context, but in the free exercise context, they can be exempt from otherwise generally applicable laws.[204] This specialness inevitably results in an implicit preferred treatment under the equal funding doctrine.

2. Additional Concerns Raised by the Equal Funding Doctrine

Aside from the implicit preferred treatment that religious organizations received, there are other significant Establishment Clause concerns raised by the equal funding doctrine. At the time of the founding, it was well established that government subsidization of religion violated religious liberty.[205] The equal funding doctrine, however, violates that principle. And, in the context of PPP loans, the violation is severe. The central purpose of the PPP loans was to provide

---

201. It is much more likely that the Court will limit its application of this new principle because a broad application would lead to absurd results. *See, e.g.*, Vikram David Amar & Alan E. Brownstein, *Exploring the Meaning of and Problems With the Supreme Court's (Apparent) Adoption of a "Most Favored Nation" Approach to Protecting Religious Liberty Under the Free Exercise Clause: Part One in a Series*, VERDICT (Apr. 30, 2021), https://verdict.justia.com/2021/04/30/exploring-the-meaning-of-and-problems-with-the-supreme-courts-apparent-adoption-of-a-most-favored-nation-approach-to-protecting-religious-liberty-under-the-free-exercise-c [https://perma.cc/6RSG-82LX].

202. *See infra* Part III.B.2.

203. *See* Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. 20,811, 20,811 (Apr. 15, 2020) (codified at 13 C.F.R. pt. 120) (describing the purpose of the PPP as providing economic relief to "small businesses nationwide adversely impacted under the Coronavirus Disease 2019 . . . Emergency Declaration"); 13 C.F.R. § 121.103(b)(10) (2021) (establishing an exception to affiliation coverage for faith-based organizations).

204. *See* Schragger & Schwartzman, *supra* note 20, at 1383–92 (describing religion's specialness). Although, under the "equal value" principle, the Covid-19 restrictions are not generally applicable in the sense that they implicitly devalue religious organizations. *See* Tebbe, *supra* note 181.

205. Green, *supra* note 8, at 9 ("By the time of the writing of the Constitution, 'the belief that government assistance to religion, especially in the form of taxes, violated religious liberty had a long history.'" (quoting THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 217 (1986))).

small businesses with loans that would be forgiven if they kept their employees on the payroll.[206] This means that the churches that received PPP loans were required to use the federal funds to pay *clergy salaries*. Such governmental funding of clergy salaries is antithetical to the Founders' understanding of the Establishment Clause.[207] Still, it is important to note that the funding of clergy salaries is a religious use that would ordinarily be impermissible.[208] However, since the status versus use test may no longer be relevant,[209] it is unclear whether the current Supreme Court would find this funding unconstitutional. Setting aside this question, the equal funding doctrine still obfuscates the real purpose of the Religion Clauses.

The inherent problem with the equal funding doctrine is that the dollars of a Muslim, Mormon, Jehovah's Witness, or atheist taxpayer could help fund the Catholic Church.[210] This mandatory funding of religious organizations by members of another or no faith is an affront to religious liberty[211] and arguably raises far more severe Free Exercise concerns than choosing to prohibit religious organizations from receiving governmental funding.[212] Moreover, there are also moral concerns at hand. For instance, in *Masterpiece Cakeshop* the Supreme Court invalidated the application of an antidiscrimination law to a baker who denied a same-sex couple service.[213] Should the tax dollars of the couple that was denied service go to the religion behind the discrimination they faced? Probably not. But that is the harsh reality of

206. "[A]t least 75 percent of the PPP loan proceeds shall be used for payroll costs." Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. 20,811, 20,814 (Apr. 15, 2020) (codified at 13 C.F.R. pt. 120).

207. *See supra* Part I.A.

208. *See, e.g.*, Mitchell v. Helms, 530 U.S. 793, 840 (2000) (O'Connor, J., concurring).

209. *See* Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2257 (2020) ("Some members of the Court . . . have questioned whether there is a meaningful distinction between discrimination based on use or conduct and that based on status.").

210. *See, e.g.*, Beer, *supra* note 6.

211. It may even violate "a cardinal principle" of an individual's faith. *Cf.* Sherbert v. Verner, 374 U.S. 398, 406 (1963). The Bible, for instance, calls on Christians to "go and make disciples of all nations, baptizing them in the name of the Father and of the Son and of the Holy Spirit . . . ." *Matthew* 28:19–20. Thus, it seems antithetical to the Christian belief to monetarily support other religions.

212. This point is merely meant to highlight the Free Exercise implications of the equal funding doctrine and not to make an argument for the unconstitutionality of the doctrine on Free Exercise grounds. The viability of such a challenge and, necessarily, the larger questions about taxpayer standing are beyond the scope of this Note.

213. Masterpiece Cakeshop v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018) (exempting a Christian baker who denied service to a gay couple from Colorado's antidiscrimination law).

the equal funding doctrine. Importantly, however, these concerns that arise from the equal funding doctrine pale in comparison to the explicit preferred treatment proffered by the SBA's faith-based organization exemption.

B. THE SBA'S FAITH-BASED ORGANIZATION EXEMPTION AND THE EQUAL FUNDING DOCTRINE'S POTENTIAL FOR DEVOLVING INTO AN EXPLICIT PREFERRED TREATMENT REGIME

Central to the Free Exercise Clause and the equal funding doctrine are the principles of neutrality and equality.[214] Yet, the faith-based organization exemption promulgated by the SBA did not avoid violating either of these principles.[215] The affiliation rules for PPP loans were neutral towards religion.[216] And the affiliation rules did not exclude religious entities from generally available benefits *for which they otherwise qualified*.[217] Simply put, the affiliation rules treated secular and faith-based organizations the same; they either satisfied the rules or they did not. Thus, the SBA's faith-based organization exemption did not establish "neutrality in the face of religious differences;"[218] it explicitly preferred faith-based organizations over comparable secular nonprofits. Nevertheless, the SBA felt compelled to grant the exemption, thereby making the affiliation rules only applicable to secular organizations.

1. The Disparate Treatment of Secular Organizations

Under the affiliation rules, secular nonprofits, such as Goodwill, Boys and Girls Club, and Planned Parenthood, were ineligible for PPP loans.[219] Churches and other religious organizations with similar affiliation structures, on the other hand, received billions of dollars in PPP

214. *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 537–38 (1993); Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2023–24 (2017).

215. In fact, it violated both principles. *See infra* Part IV.

216. *See* 13 C.F.R. § 121.301 (2020); Mitchell v. Helms, 530 U.S. 793, 810 (2000) (plurality opinion) (stating that a law is neutral if it "furthers some legitimate secular purpose" and "offers aid on the same terms, without regard to religion, to all who adequately further that purpose").

217. *See* 13 C.F.R. § 121.301; *Trinity Lutheran Church of Columbia, Inc.*, 137 S. Ct. at 2023–24.

218. Sherbert v. Verner, 374 U.S. 398, 409 (1963).

219. *See* Rogers & Collins, *supra* note 2; McCambridge, *supra* note 171. Still, despite their ineligibility, some local chapters of these nonprofits did receive PPP loans. *See* Cory, *supra* note 171.

funding thanks to the faith-based organization exemption.[220] Evidently, secular nonprofits were not treated equally. The unequal treatment of secular nonprofits is best exemplified by the plight Planned Parenthood affiliates faced when attempting to obtain PPP loans.[221] Planned Parenthood affiliates were seemingly ineligible under the affiliation rules, but "38 local Planned Parenthood centers requested and received federal loans totaling about $80 million."[222] Once the SBA realized that Planned Parenthood affiliates received PPP loans, however, they demanded that the loans be returned and threatened the affiliates with civil and criminal penalties.[223] The SBA alleged that Planned Parenthood affiliates were ineligible for PPP loans because Planned Parenthood requires local centers to be governed by specific bylaws and conform to affiliation mandates.[224]

Republican Senators and Congressional Representatives also took issue with the Planned Parenthood affiliates for requesting and receiving aid, calling for an investigation and for any misconduct to be "prosecuted to the fullest extent of the law."[225] On the other side of the aisle, Democratic Senators chastised the SBA for their "ideologically-driven action against Planned Parenthood organizations."[226] This partisan battle over Planned Parenthood centers receiving PPP loans is unsurprising, but it ignored the real issue. While the SBA demanded

---

220. *See, e.g.*, Shimron, *supra* note 168; Fearnow, *supra* note 168; Hannon, *supra* note 169.

221. *See* Micah Schwartzman, Richard Schragger & Nelson Tebbe, *The Separation of Church and State Is Breaking Down Under Trump*, ATLANTIC (June 29, 2020), https://www.theatlantic.com/ideas/archive/2020/06/breakdown-church-and-state/613498 [https://perma.cc/M5AH-7LDH] (describing how the SBA and Republican Senators responded to Planned Parenthood affiliates requesting and receiving aid).

222. *Id.*

223. Letter from William Manger, Assoc. Adm'r, SBA, to Dr. Laura Meyers, President & CEO, Planned Parenthood Metro. Wash. D.C. (May 19, 2020), https://assets.documentcloud.org/documents/6922122/SBA-Letter-Planned-Parenthood-DC.pdf [https://perma.cc/WHR9-Y5RY].

224. *Id.*

225. Letter from Marco Rubio, Chairman, Senate Comm. on Small Bus. & Entrepreneurship, to Jovita Carranza, Adm'r, SBA (May 22, 2020), https://www.rubio.senate.gov/public/_cache/files/9d64cdbe-b2a1-4fd9-8ad4-9828a72d996e/031942792F352A6A31240F2FC2822FF1.20.05.22-letter-to-administrator-carranza-re-planned-parenthood-investigation.pdf [https://perma.cc/8M54-PSJ2].

226. Letter from Charles E. Schumer, U.S. Sen., to Jovita Carranza, Adm'r, SBA (May 22, 2020), https://www.democrats.senate.gov/imo/media/doc/Letter%20to%20SBA-Treasury%20on%20PPP%20Eligibility%20for%20Nonprofits%2005.22.20%20FINAL.pdf [https://perma.cc/M657-BJNZ].

Planned Parenthood return their loans, comparable faith-based organizations obtained billions of dollars in PPP loans.[227] This disparate treatment of secular nonprofits, due to the faith-based organization exemption, is analogous to the laws in *Trinity Lutheran* and *Espinoza* that the Supreme Court invalidated.[228] Planned Parenthood was denied the opportunity to compete with sectarian organizations for PPP loans solely because it is a secular organization. In short, the SBA's faith-based organization exemption resulted in preferred treatment for religious organizations; to put it another way, the exemption amounted to *secular discrimination*.[229]

2. The Concerning Trend That Could Lead to an Explicit Preferred Treatment Regime

Importantly, the preferred treatment that faith-based organizations received here is part of a larger trend. Religious entities and the courts have been employing the RFRA to provide faith-based organizations with exemptions from various laws and regulations[230]—leading some legal commentators to describe this effort as "Free Exercise Lochnerism."[231] In fact, courts have interpreted the RFRA to wield so

---

227. *See, e.g.*, Shimron, *supra* note 168.

228. *Cf.* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017); Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2020).

229. Secular discrimination, as used here, is a play on words. In *Trinity Lutheran*, the Court stated "[t]he express discrimination against religious exercise here is not the denial of a grant, but rather the refusal to allow the Church—solely because it is a church—to compete with secular organizations for a grant." *Trinity Lutheran*, 137 S. Ct. at 2022. If you make minor changes to this quote, it aptly describes the situation created by the faith-based organization exemption. Thus, the express discrimination against secular organizations here is not the denial of a loan, but rather the refusal to allow secular organizations—solely because they are not religious—to compete with faith-based organizations for a loan.

230. *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014); U.S. Dep't of Just., Just. Manual § 1-15.000–.300 (2018) (describing department policy on respect for religious liberty including the RFRA); Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1465–71 (2015) (discussing the cases that have been brought by businesses seeking exemptions under the RFRA); Robin Knauer Maril, *The Religious Freedom Restoration Act,* Trinity Lutheran, *and Trumpism: Codifying Fiction with Administrative Gaslighting*, 16 NW. J.L. & SOC. POL'Y 1, 14–16 (2020) (describing the Trump administration's application of the RFRA).

231. Sepper, *supra* note 230, at 1455; *see* Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133. For context, "Free Exercise Lochnerism," as described by Sepper, is the phenomenon of "businesses, scholars, and courts . . . resurrect[ing] the ideal of private ordering and the resistance to redistribution that were at the heart of *Lochner*." Sepper, *supra* note 230, at 1455; *cf.* Lochner v. New York, 198 U.S. 45 (1905) (striking down a New York State law limiting the hours bakers could work as unconstitutional under the Contracts Clause).

much power that they "conflate constitutional Free Exercise and RFRA."[232] Even the Supreme Court, in an opinion written by Justice Gorsuch, went so far as to call the RFRA a "super statute."[233] Of course, the RFRA is not solely responsible for the general pattern towards a broadening of free exercise,[234] but it has served as a catalyst for that pattern. Accordingly, it is unsurprising that the SBA relied on the RFRA as a justification for the exemption. Yet, if the Court applies the new "equal value" principle set forth in *Tandon* to religious funding cases, the SBA may not have needed to cite to the RFRA at all.[235] Indeed, if that does occur, it appears that the SBA may have discriminated against religion if it had not provided an exemption for faith-based organizations.

Before delving into this frightening possibility, it is important to understand why the faith-based exemption promulgated by the SBA was deeply concerning. Central to the issue is the fact that the language of equal treatment is being employed in the context of funding, but it is not being employed in the context of free exercise.[236] The result is that "religious citizens receive more favorable treatment across the scope of government activities than do nonreligious citizens."[237] This favorable treatment is problematic in and of itself, but what the SBA did is much more insidious; it effectively collapsed religious funding doctrine with free exercise doctrine.[238] In other words, the SBA elevated Free Exercise Clause concerns above Establishment Clause concerns by emphasizing the purported burden on free exercise while ignoring the neutrality principles that are foundational to the separation of church and state. Such a "policy of favoring religious groups would turn the establishment clause completely on its head."[239] But, after *Tandon*, that policy may not be far off.

---

232. Sepper, *supra* note 230, at 1468 & n.71.

233. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1754 (2020).

234. Schragger & Schwartzman, *supra* note 20, at 1381–82 ("The general doctrinal pattern has been a narrowing of the Establishment Clause and a broadening of free exercise.").

235. Tebbe, *supra* note 181.

236. *See* Schragger & Schwartzman, *supra* note 20, at 1388 ("The language of equal treatment . . . has now been put to one-sided use, most obviously in the funding context."); *supra* Part III.A.

237. *Id.* at 1389.

238. *Compare* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017), *and* Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2020), *with* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014), *and* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018).

239. Schwartzman et al., *supra* note 221.

As addressed earlier, the tenuous nature of the comparisons made by the Court in *Tandon* raise questions as to how broadly the court will apply the new equal value principle. Since private in-home gatherings for religious exercise are comparable to going to the grocery store in the COVID-19 regulation context, it may be assumed that "comparable secular activity" will be interpreted broadly.[240] And, if that is the case, it appears that many laws that include at least one secular exemption will require strict scrutiny review. Accordingly, this raises grave Establishment Clause concerns given the possibility for this new equal value principle to seep into the funding context and replace the general nondiscrimination principle currently employed by the Court. The PPP provides a helpful example as to why.

The PPP loan eligibility requirements provided increased eligibility for certain small businesses, sole proprietors, independent contractors, and self-employed individuals.[241] This increased eligibility served as an exemption from the ordinary small business definition for certain businesses and individuals, but faith-based organizations did not receive an exemption—at least not until the SBA promulgated one. Accordingly, as long as one of the businesses or individuals benefitting from the increased eligibility is comparable to faith-based organizations, the PPP requirements would trigger strict scrutiny because they do not treat religious entities as favorably as secular entities. This comparison, mind you, need not be stronger than the one present in *Tandon*—i.e., the risk of transmitting COVID-19 during an in-home religious exercise compared to the risk of transmitting COVID-19 while grocery shopping.

Evidently, if challenged in court, it is quite possible that the PPP eligibility requirements would face strict scrutiny review and that a faith-based organization exemption would ultimately be required. Thus, the disparate treatment highlighted in Part III.B.1 would be constitutionally mandated; there would not be any obligation to provide an equivalent exemption to secular entities that do not meet the PPP loan eligibility requirements. And that would be the case with potentially *any* law that includes a secular exemption for a comparable secular entity. The inherent problem with the Court's application of this new equal value principle—particularly if it is applied in the funding context—is that it "places free exercise rights at the top of a hierarchy

240. *See* Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) (per curiam).

241. 15 U.S.C. § 636(a)(36)(D).

of protected rights; free exercise can never be treated worse, but can be treated better, than other fundamentally protected activities."[242]

Whether the new equal value principle will be applied as broadly as it was in *Tandon*—and whether it will be applied in the funding context—remains to be seen, but even if it is applied narrowly in the future, the threat it poses to the Establishment Clause will remain severe. The separation of church and state has already been eroded by the Court's application of nondiscrimination doctrine in the funding context, and this new test threatens to tear down what is left of the wall separating church and state. If the doctrinal shift towards a broadening of free exercise is allowed to seep further into the funding context, then the Establishment Clause will effectively be dead; neutrality in the face of religion will no longer satisfy the Free Exercise Clause and only equal, if not preferential, treatment will suffice. Thankfully, longstanding Establishment Clause principles still stand in the way, but they must be reinforced.

IV. THE UNCONSTITUTIONALITY OF RELIGIOUS EXEMPTIONS IN FUNDING CASES

Despite the Supreme Court's shift away from separationism and towards preferred treatment of religious entities,[243] the Court's neutrality requirement and the rules laid down in *Texas Monthly* make clear that the SBA's faith-based organization exemption was unconstitutional.[244] Likewise, if those rules are upheld, any similar exemptions for religious entities in funding cases will suffer the same constitutional defects. However, if they are not upheld and reinforced, there will be nothing to prevent future faith-based organization exemptions in funding cases. In fact, such exemptions may even be required if the *Tandon* equal value principle is applied in funding cases.

This Part argues that the SBA's faith-based organization exemption was unconstitutional, and that the Court must not continue chipping away at the Establishment Clause—it must uphold these longstanding Establishment Clause principles in funding cases. Section A describes how the SBA's faith-based organization exemption is unconstitutional under the neutrality requirement and how any such

242. Vikram David Amar & Alan E. Brownstein, *"Most Favored-Nation" ("MFN") Style Reasoning in Free Exercise Viewed Through the Lens of Constitutional Equality:*, VERDICT (May 21, 2021), https://verdict.justia.com/2021/05/21/most-favored-nation-mfn-style-reasoning-in-free-exercise-viewed-through-the-lens-of-constitutional-equality [https://perma.cc/VAN3-N8YN].

243. *See generally* Schragger & Schwartzman, *supra* note 20.

244. *See supra* Part I.

exemptions in funding cases must be declared unconstitutional. Section A also highlights how the receipt of PPP loans by faith-based organizations itself violated the Establishment Clause.[245] Section B emphasizes that exemptions in funding cases are specifically impermissible under the rules employed in *Texas Monthly, Inc. v. Bullock*.[246]

A. EXEMPTIONS IN FUNDING CASES VIOLATE THE NEUTRALITY REQUIREMENT

As the Supreme Court shifted away from its strong Establishment Clause jurisprudence, it began to rely on a broad neutrality requirement.[247] This requirement states that religious organizations may receive government aid that is secular in nature as long as the aid is "allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis."[248] Setting aside whether the PPP loans were secular in nature,[249] it is clear that the PPP affiliation requirements satisfied this requirement. They did not mention religion, nor did they favor or disfavor religion; a faith-based organization was eligible, or it was not, just like secular organizations.[250]

The exemption promulgated by the SBA, however, violated the neutrality requirement. The exemption, on its face, singles out religious entities for special treatment.[251] It does not "make a broad array of [organizations] eligible for aid without regard to their religious affiliations or lack thereof;" instead, it makes faith-based organizations, due to their religious affiliations, exempt from the affiliation rules.[252] The SBA's concerns that the affiliation limitations would privilege locally independent denominations and potentially incentivize houses

245. *See* Mitchell v. Helms, 530 U.S. 793, 840 (2000) (O'Connor, J., concurring) (stating that actual diversion of government aid to religious indoctrination is unconstitutional).

246. *See* 489 U.S. 1, 15 (1989) (plurality opinion) (quoting Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 348 (1987) (O'Connor, J., concurring)); *id.* at 28–29 (Blackmun, J., concurring).

247. *See supra* Part I.B.

248. Agostini v. Felton, 521 U.S. 203, 231 (1997).

249. The fact that the PPP loans were supposed to be spent on payroll—i.e., clergy salaries—makes this an interesting question.

250. *See* 13 C.F.R. § 121.301 (2021).

251. The exemption explicitly refers to faith-based organizations and uses their religious affiliations as a justification for the exemption. *See* Business Loan Program Temporary Changes: Paycheck Protection Program, 85 Fed. Reg. 20,817, 20,819 (Apr. 15, 2020) (codified at 13 C.F.R. pt. 121).

252. Mitchell v. Helms, 530 U.S. 793, 830 (2000) (plurality opinion).

of worship to organize in a non-hierarchical way do have merit and should not be downplayed. In fact, the Free Exercise Clause or the RFRA may well have required the SBA to grant faith-based organizations an exemption from the affiliation requirements.[253] But whether an exemption was required is immaterial. For, "if those dangers exist, they can be addressed by exempting all nonprofits from the affiliation rules—by treating all such employers equally."[254] Indeed, the Establishment Clause *required* the SBA to exempt all nonprofits from the affiliation rules if it wanted to avoid inhibiting religious freedom. The neutrality requirement demands nothing less.[255]

To further illustrate this point, the neutrality requirement's central purpose is the prohibition of aid programs that have the effect "of advancing or inhibiting religion."[256] This rule addresses the same concerns that the SBA had, but from the Establishment Clause side; it proscribes aid programs with eligibility criteria that "have the effect of advancing religion by creating a financial incentive to undertake religious indoctrination."[257] The SBA's faith-based organization exemption clearly created a financial incentive to undertake religious indoctrination. The exemption allowed some[258] faith-based organizations—because they are faith-based—to obtain PPP loans, while some secular organizations—because they are secular—were unable to.[259] As such, the ineligible secular organizations had a financial incentive to undertake religious indoctrination. Evidently, the faith-based organization exemption promulgated by the SBA was a blatant violation of the Establishment Clause's neutrality principle.

Yet, if the Supreme Court continues down its path of broadening the Free Exercise Clause and it applies the new equal value principle in the funding context, the neutrality requirement may no longer stand in the way of preferred treatment of religious entities in the funding context. For, as the Court made clear in *Tandon*, "[i]t is no answer that a State treats some comparable secular businesses or other activities as poorly or even less favorably than the religious exercise

253. *See* Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church, 344 U.S. 94, 123 (1952); 42 U.S.C. § 2000bb-1. *See generally supra* Part II.B.

254. Schwartzman et al., *supra* note 221.

255. *See, e.g.*, Agostini v. Felton, 521 U.S. 203, 231 (1997).

256. *Id.* at 223.

257. *Id.* at 231.

258. Faith-based organizations that satisfied the affiliation limitations would have been eligible without the exemption.

259. *See supra* Part III.B.1.

at issue."[260] Preferring religious exercise over comparable secular activities is explicitly allowed under *Tandon*; what is not allowed is treating religious exercise worse than *any* comparable secular activity. Accordingly, the Court should not flout the Establishment Clause; it should uphold the neutrality requirement and refrain from applying *Tandon* in the funding context.

Notably, simply providing faith-based organizations with PPP loans violated the Establishment Clause. The PPP loans constituted direct government aid which means Justice O'Connor's concurrence in *Mitchell v. Helms* applies.[261] Accordingly, the PPP loans could not be used to finance religious activities.[262] The purpose of the PPP, however, was to provide small businesses with loans that would be forgiven if they kept their employees on the payroll.[263] In other words, the churches that received PPP loans were required to use the federal funds to pay clergy salaries. It can hardly be argued that government aid that pays clergy salaries does not finance religious activities.[264] For, what is the purpose of paying clergy members, if not for them to indoctrinate religion? Paying the salary of clergy members can only have one purpose: to further religion. Thus, the provision of PPP loans to faith-based organizations itself violated the Establishment Clause.

Still, given the apparent willingness of some of the Justices to disregard the status versus use distinction,[265] the Court may adopt the rule employed by the *Mitchell v. Helms* plurality and overturn the prohibition on using direct government aid to fund religious activities.[266] If that were to occur, and if the new equal value principle is applied in the funding context, the inevitable result would be a landscape in which governmental aid is more openly available to faith-based organizations than secular ones. Such a result would be repugnant to both the Establishment and Free Exercise Clauses and should be

260. Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) (per curiam).

261. Mitchell v. Helms, 530 U.S. 793, 840 (2000) (O'Connor, J., concurring) (stating that actual diversion of government aid to religious indoctrination is unconstitutional).

262. *See id.*

263. "[A]t least 75 percent of the PPP loan proceeds shall be used for payroll costs." Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. 20,811, 20,814 (Apr. 15, 2020) (codified at 13 C.F.R. pt. 120).

264. *Mitchell*, 530 U.S. at 840 (O'Connor, J., concurring).

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

266. *See Mitchell*, 530 U.S. at 810 (plurality opinion) ("[I]f the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose . . . then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose.").

avoided at all costs. Still, there is one more safeguard against this potential devolution into a preferred funding regime: the rules set forth in *Texas Monthly, Inc. v. Bullock*.[267]

B. EXEMPTIONS IN FUNDING CASES VIOLATE THE RULES LAID DOWN IN TEXAS MONTHLY

Recall that in *Texas Monthly*, a plurality of the Court struck down Texas's tax exemption for religious periodicals on Establishment Clause grounds.[268] In so doing, a three Justice majority employed the endorsement rule, which states that the government cannot "direct[] a subsidy exclusively to religious organizations that is not required by the Free Exercise Clause and that either burdens nonbeneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion."[269] Justices Blackmun and O'Connor, on the other hand, relied on a much simpler preference test.[270] Under this test, a law violates the Establishment Clause if it amounts to "preferential support for the communication of religious messages."[271] The SBA's faith-based organization exemption fails both of these tests.

Importantly, the RFRA is *not* the Free Exercise Clause, despite the fact that some courts have conflated the two.[272] And it is difficult to conceive of a statute that proffers government aid to organizations based on neutral criteria[273] that could somehow violate the Free Exercise Clause absent an application of *Tandon* in a funding case.[274] The free exercise of religion does not, and cannot, depend on receiving government aid. When the eligibility criteria for government aid is neutral with respect to religious differences, like the PPP affiliation limitations are, an exemption "cannot reasonably be seen as removing

267. 489 U.S. 1 (1989).

268. *Id.*

269. *Id.* at 15 (quoting Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 348 (1987) (O'Connor, J., concurring)).

270. *Id.* at 28 (Blackmun, J., concurring).

271. *Id.*

272. *See* Sepper, *supra* note 230, at 1468 & n.71.

273. To be clear, government aid that is not neutral with respect to religious differences can violate the Free Exercise Clause. For instance, the unemployment compensation law at issue in *Sherbert* included an exception for claimants who were "conscientiously opposed to Sunday work," but not for claimants who were conscientiously opposed to Saturday work. *Sherbert v. Verner*, 374 U.S. 398, 406 (1963). Consequently, the unemployment compensation law amounted to "religious discrimination." *Id.*

274. Unless the Court has a change of heart and determines that the equal funding doctrine violates the Free Exercise Clause. *See supra* Part III.A.2.

a significant state-imposed deterrent to the free exercise of religion."[275] If that were not the case, then the government has been deterring the free exercise of religion for centuries because it has not been providing religious entities with governmental aid. Moreover, nonbeneficiaries were clearly burdened by the exemption.[276] Thus, the SBA's faith-based organization exemption—and, necessarily, any other potential future exemptions in the funding context—does not fall within the endorsement rule's exception.

That conclusion may not hold true, however, if *Tandon* is applied in funding cases. Under *Tandon*, the Free Exercise Clause may require the government to provide an exemption to religious entities if a comparable secular entity receives an exemption. Accordingly, the preference test is a better safeguard against a preferred funding regime.

The SBA's faith-based organization exemption clearly amounted to "preferential support for the communication of religious messages."[277] Due to the exemption, religious entities received billions of dollars of government aid while similarly structured nonprofits were left out.[278] Although the exemption was granted because of the SBA's concerns that the affiliation limitations would significantly burden hierarchically organized faith-based organizations, that does not justify privileging religious entities. A fear of treading on religious freedom cannot justify "granting religious groups an accommodation that enables federal funding while disadvantaging secular organizations that are similarly structured and that have been burdened by the same pandemic-related public-health regulations."[279] Any faith-based organization exemption in a funding case, at its core, is a "preference for the dissemination of religious ideas [and] offends our most basic understanding of what the Establishment Clause is all about and hence is constitutionally intolerable."[280] Accordingly, the preference test should be reinforced. The preference test prohibits the type of preferred treatment that was effectuated by the SBA's faith-based organization exemption, but it does not stop there. If *Tandon* is applied to funding cases in the future, the preference test could be employed to nullify the second half of the *Tandon* test and require that religious entities not be treated more favorably than secular entities. The Court

275. *Tex. Monthly*, 489 U.S. at 15.
276. *See supra* Part III.B.1.
277. *Tex. Monthly*, 489 U.S. at 28 (Blackmun, J., concurring).
278. *See supra* Part III.B.1.
279. Schwartzman et al., *supra* note 221.
280. *Tex. Monthly*, 489 U.S. at 28 (Blackmun, J., concurring).

needs to strike a better balance between the Religion Clauses and the preference test offers a clear path forward.

***

It is unlikely that the faith-based organization exemption promulgated by the SBA will be litigated, but if a similar exemption arrives in front of the Supreme Court, the Court must not sacrifice the Establishment Clause in the name of Free Exercise. The Religion Clauses operate in tandem to ensure that the freedom of religion[281] is protected, and the Court would be wise to strike down any future religious exemption in a funding case on the grounds that it is an impermissible endorsement of religion.

CONCLUSION

The Supreme Court's strong Establishment Clause jurisprudence of the past has been replaced by an equal funding doctrine.[282] This doctrine, on its own, raises significant Establishment Clause concerns, but, when coupled with the general doctrinal pattern of narrowing the Establishment Clause and broadening the Free Exercise Clause,[283] the potential for an explicit preferred funding regime looms large. Indeed, the SBA's faith-based organization exemption from the PPP affiliation requirements revealed what such a preferred funding regime could look like. Accordingly, the Court should ensure that such an exemption is not repeated. As Justice Gorsuch wrote in *Roman Catholic Diocese of Brooklyn*: "Even if the Constitution has taken a holiday during this pandemic, it cannot become a sabbatical."[284] The Supreme Court must uphold what is left of the Establishment Clause and invalidate any future religious exemption in a funding case, if one arises.

281. And, necessarily, secular belief, which also has spiritual roots. *See generally* MARTIN HÄGGLUND, THIS LIFE (2019) (critiquing religious existentialists and making the case for secular faith and spiritual freedom).

282. *See supra* Part I.

283. *See* Schragger & Schwartzman, *supra* note 20, at 1381–82.

284. Roman Cath. Diocese Brooklyn v. Cuomo, 141 S. Ct. 63, 70 (2020) (Gorsuch, J., concurring).