

THE CATHOLIC CHURCH AND THE PAYCHECK  
PROTECTION PROGRAM: ASSESSING  
NONDISCRIMINATION AFTER *TRINITY*  
*LUTHERAN* AND *ESPINOZA*

*Elizabeth Totzke\**

INTRODUCTION

In the middle of March 2020, as the world grappled with arguably the most serious public health crisis in recent history, economic and social activity came to a halt.<sup>1</sup> Faced with growing unemployment and an impending recession, the United States government enacted the Coronavirus Aid, Relief, and Economic Security (“CARES”) Act, a broad relief bill that included the Paycheck Protection Program (PPP).<sup>2</sup> The PPP was designed to assist with common costs like payroll and rent; it encouraged private lenders to issue loans to struggling organizations on favorable terms.<sup>3</sup> Coordinated through the Small Business Administration (SBA), the federal government promised to guarantee—and ultimately forgive—those private loans if used for an enumerated list of expenses.<sup>4</sup>

---

\* Candidate for Juris Doctor, Notre Dame Law School, 2022; Bachelor of Arts in Political Science and Business Administration, St. Norbert College, 2019. I would like to thank Professor Stephanie Barclay for her valuable feedback, as well as Professor Charles Jacobs for sparking my interest in this topic. Thank you to Carter Wietecha, Owen Toepfer, and the other members of the *Notre Dame Law Review* for their helpful comments and detailed edits. Finally, thank you to my family, friends, and, most especially, my husband-to-be, Hunter Van Asten, for their love and support. All mistakes belong solely to me.

1 See *Impact of Opening and Closing Decisions by State*, JOHNS HOPKINS UNIV. OF MED.: CORONAVIRUS RES. CTR., <https://coronavirus.jhu.edu/data/state-timeline/new-confirmed-cases/california> (last visited Dec. 31, 2020). For example, on March 11, 2020, California public health officials imposed a limit of 250 people on public gatherings. *Id.* By March 15, all bars and nightclubs were ordered closed, and those with health risks were urged to isolate. *Id.* And, by March 19, the Governor ordered all individuals to stay at their place of residence. *Id.*

2 Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (2020) (codified as amended at 15 U.S.C. §§ 9001–9080); 15 U.S.C.A. § 636(a)(36) (West 2021).

3 *Id.* § 636(a)(36)(F).

4 Paycheck Protection Program Flexibility Act of 2020, Pub. L. No. 116-142, § 3(b)(8), 134 Stat. 641, 642 (2020).

Despite its longstanding policy to the contrary, the SBA deemed principally religious organizations eligible for PPP loan consideration.<sup>5</sup> Accordingly, Catholic parishes, the focus of this Note, and other houses of worship applied for and received PPP assistance.<sup>6</sup> But, controversy quickly ensued. Some scholars viewed religious inclusion as merely an extension of an otherwise secular disaster relief plan that transcended obvious constitutional inquiry.<sup>7</sup> From this perspective, the minimization of the pandemic's overall economic impact required broad, all-encompassing employment protections.<sup>8</sup> A contingent of legal academics, however, penned a more fashionable response. Heeding concern that PPP funding could be used to directly maintain houses of worship and pay clergy salaries, these scholars decried the SBA's inclusionary policy and contended that such federally backed loans implicated and ran afoul of the Establishment Clause.<sup>9</sup> A piece in the *Associated Press*, which garnered national attention, assumed this argument.<sup>10</sup>

However, this Note argues the inclusion of houses of worship and the subsequent dispersal of PPP funds to the Catholic Church was *explicitly* constitutional. Applying the lens of the Supreme Court's recently announced non-discrimination principle, this Note considers the ramifications of the SBA's official policy and explores the constitutional justification for the SBA's ad hoc PPP policy. In fact, under the nondiscrimination principle, this Note concludes that the SBA's policy shift was not just constitutionally permissible, but probably constitutionally required.

Litigants have yet to challenge the inclusion of religious organizations in the PPP, but the "dust" of COVID-19 also has yet to settle. Instead, litigants are turning to the (virtual) courtroom to dispute limitations on public gatherings and the corresponding First Amendment implications. That, of

---

5 SBA, FREQUENTLY ASKED QUESTIONS REGARDING PARTICIPATION OF FAITH-BASED ORGANIZATIONS IN THE PAYCHECK PROTECTION PROGRAM (PPP) AND THE ECONOMIC INJURY DISASTER LOAN PROGRAM (EIDL) 1 (2020), <https://www.sba.gov/sites/default/files/2020-06/SBA%20Faith-Based%20FAQ%20Final-508.pdf>.

6 Tom Gjelten, *Many Houses of Worship Have Sought Government Aid, Surveys Show*, NPR (May 6, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/05/06/851666065/many-houses-of-worship-have-sought-government-aid-surveys-show>.

7 See, e.g., Peter J. Reilly, *Paycheck Protection, Churches and the Constitution—It's Complicated*, FORBES (June 9, 2020), <https://www.forbes.com/sites/peterjreilly/2020/06/09/paycheck-protection-churches-and-the-constitutionits-complicated/?sh=74e5eaab1006>.

8 See, e.g., Paul Krugman, Opinion, *Notes on the Coronacomma (Wonkish)*, N.Y. TIMES (Apr. 1, 2020), <https://www.nytimes.com/2020/04/01/opinion/notes-on-the-coronacomma-wonkish.html?searchResultPosition=4>.

9 See, e.g., Reese Dunklin & Michael Rezendes, *Catholic Church Lobbied for Taxpayer Funds, Got \$1.4B*, ASSOCIATED PRESS (July 10, 2020) <https://apnews.com/article/dab8261c68c93f24c0bfc1876518b3f6>; Nelson Tebbe, Micah Schwartzman & Richard Schragger, Opinion, *The Quiet Demise of the Separation of Church and State*, N.Y. TIMES (June 8, 2020), <https://www.nytimes.com/2020/06/08/opinion/us-constitution-church-state.html>; Letter from Afr. Am. Ministers Leadership Council et al. to Jovita Carranza, Adm'r, U.S. Small Bus. Admin. (Apr. 7, 2020), <https://www.au.org/sites/default/files/2020-04/CARES%20Act%20Loan%20Forgiveness%20SBA%20Letter.pdf>.

10 See Dunklin & Rezendes, *supra* note 9.

course, is the subject of another note.<sup>11</sup> This Note, however, raises broader questions than those merely surrounding COVID-19 and the PPP: though pandemics are rare, disasters are not. Assuredly, the government again will be called upon to respond to some future crisis, be it natural or man-made. The SBA, as well as other federal agencies, should now act to make permanent the administrative structure of the PPP for future government assistance programs. As Bishop Lawrence Persico of Erie, Pennsylvania noted: while “some people may react with surprise that government funding help[s] support faith-based schools, parishes[,] and dioceses, . . . [t]he separation of church and state does not mean that those motivated by their faith have no place in the public square.”<sup>12</sup>

The analysis of this Note proceeds in four parts. Part I provides a background of the COVID-19 pandemic, as well as an overview of the PPP. Part II examines the evolution of the Religion Clauses’ jurisprudence in the context of religious organizations’ receipt of government benefits, including the Court’s modern doctrine: nondiscrimination. Part III highlights other instances in which the Catholic Church and other religious organizations have been eligible for government assistance in periods of disaster. Finally, Part IV evaluates the constitutionality of the PPP under the First Amendment when applied to religious organizations and, more specifically, the Catholic Church. This Part also contemplates the permissibility of the PPP under the Equal Protection Clause, since this Clause is the most frequent basis for litigation involving discrimination.

## I. BACKGROUND

On March 11, 2020, the World Health Organization announced that it had categorized COVID-19 as a pandemic,<sup>13</sup> meaning the virus had crossed international boundaries and was “affecting a large number of people.”<sup>14</sup> Within a matter of days, public and private institutions closed their doors, Americans retreated to their homes, and economic activity collapsed.<sup>15</sup> Despite national and local leaders’ promises of quick containment and recovery, by the end of the year, the virus was anything but contained; the United

---

11 For recent discussion on the topic, however, see generally *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2603–04 (2020) (Alito, J., dissenting from denial of application for injunctive relief); *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (per curiam); *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief); Caroline Mala Corbin, *Religious Liberty in a Pandemic*, 70 DUKE L.J. ONLINE 1 (2020).

12 Dunklin & Rezendes, *supra* note 9.

13 *Virtual Press Conference on COVID-19*, WORLD HEALTH ORG. (Mar. 11, 2020), [https://www.who.int/docs/default-source/coronaviruse/transcripts/who-audio-emergencies-coronavirus-press-conference-full-and-final-11mar2020.pdf?sfvrsn=cb432bb3\\_2](https://www.who.int/docs/default-source/coronaviruse/transcripts/who-audio-emergencies-coronavirus-press-conference-full-and-final-11mar2020.pdf?sfvrsn=cb432bb3_2).

14 Heath Kelly, *The Classical Definition of a Pandemic Is Not Elusive*, 89 BULL. WORLD HEALTH ORG. 540, 540 (2011), <https://www.who.int/bulletin/volumes/89/7/11-088815.pdf> (quoting A DICTIONARY OF EPIDEMIOLOGY (John M. Last ed., 4th ed. 2001)).

15 See *supra* note 1.

States had surpassed nineteen million confirmed cases and 300,000 deaths.<sup>16</sup> Among the many tactics employed to “[s]low the [s]pread” of the virus,<sup>17</sup> experts especially urged limitations on large public gatherings deemed “superspreading events.”<sup>18</sup> In the religious context, these events earned a particularly infamous reputation after, for example, an infected pastor and his wife spread the virus to at least thirty church members, resulting in at least three deaths.<sup>19</sup> Thus, while restrictions fluctuated between capacity limitations and complete closures, churches, synagogues, mosques, and the like were, for the foreseeable future, unable to proceed with business—or worship—as usual.<sup>20</sup>

The Catholic Church—the focus of this Note—responded accordingly. The vast majority of parishes or, colloquially, churches, indefinitely suspended public Masses to comply with state and local government orders.<sup>21</sup> Though many transitioned to online services,<sup>22</sup> parishes lost a substantial source of revenue in the form of weekly collections.<sup>23</sup> Bishops, who supervise parishes within a defined ecclesiastical district (diocese), consequently reported concerns about paying the salaries and wages of parish staff, and the

16 *COVID-19 United States Cases by County*, JOHNS HOPKINS UNIVERSITY OF MED.: CORONAVIRUS RES. CTR., <https://coronavirus.jhu.edu/us-map> (last visited Dec. 31, 2020).

17 See CTRS. FOR DISEASE CONTROL AND PREVENTION, *SLOW THE SPREAD OF COVID-19* (2020), [https://www.cdc.gov/coronavirus/2019-ncov/downloads/Young\\_Mitigation\\_recommendations\\_and\\_resources\\_toolkit\\_03\\_COL.pdf](https://www.cdc.gov/coronavirus/2019-ncov/downloads/Young_Mitigation_recommendations_and_resources_toolkit_03_COL.pdf).

18 Christie Aschwanden, *How ‘Superspreading’ Events Drive Most COVID-19 Spread*, SCI. AM. (June 23, 2020), <https://www.scientificamerican.com/article/how-superspreading-events-drive-most-covid-19-spread/>.

19 *Id.*

20 See, e.g., Rachel Treisman, *West: Coronavirus-Related Restrictions by State*, NPR (Dec. 4, 2020), [npr.org/2020/05/01/847416108/west-coronavirus-related-restrictions-by-state](https://www.npr.org/2020/05/01/847416108/west-coronavirus-related-restrictions-by-state). In May, for example, places of worship in California were allowed to reopen with modifications; by July, closures were again ordered in thirty counties. *Id.*

21 Claire Gecewicz, *Few Americans Say Their House of Worship Is Open, But a Quarter Say Their Faith Has Grown Amid Pandemic*, PEW RSCH. CTR. (Apr. 30, 2020), <https://www.pewresearch.org/fact-tank/2020/04/30/few-americans-say-their-house-of-worship-is-open-but-a-quarter-say-their-religious-faith-has-grown-amid-pandemic/>.

22 *Id.*

23 See JONATHAN L. WIGGINS, ALOYSIA SEBUENG MAKORAE & THOMAS P. GAUNT, CTR. FOR APPLIED RSCH. IN THE APOSTOLATE, *MINISTRY IN THE MIDST OF PANDEMIC 2*, 13 (2020) (discussing a survey of bishops in the Spring of 2020, which revealed that the “most common area of concern is the missed weekend collections that the parishes have been unable to have due to not celebrating Masses publicly (or online only)”; see also MARK M. GRAY, THOMAS P. GAUNT, SJ & CAROLYNE SAUNDERS, CTR. FOR APPLIED RSCH. IN THE APOSTOLATE, *U.S. CATHOLIC ONLINE GIVING 21* (2013) (noting that, of recent reported parish donations, only thirty percent occurred online; sixty-seven percent occurred offline); FRANCIS X. ROCCA, *Pandemic Deepens Catholic Church’s Financial Crunch, From Vatican to Parishes*, WALL ST. J. (Apr. 24, 2020), <https://www.wsj.com/articles/pandemic-deepens-catholic-churchs-financial-crunch-from-vatican-to-parishes-11587736691> (noting that while “90% of the 17,000 Catholic parishes in the U.S. have some method of accepting online giving . . . 50% of parishes receive less than 10% of their annual donations online.”).

financial impact was felt on a diocesan level as well.<sup>24</sup> With COVID-19 affecting family incomes, bishops also worried that low future enrollments at Catholic schools would gradually reduce the schools' financial solvency.<sup>25</sup> The financial future for the Catholic Church was uncertain, but deteriorating.

Meanwhile, on March 27, 2020, President Trump signed into law the CARES Act.<sup>26</sup> Encompassing numerous financial relief measures, the CARES Act contained the PPP,<sup>27</sup> a loan administered through the SBA "designed to provide a direct incentive for small businesses to keep their workers on the payroll."<sup>28</sup> But, while administered through the SBA, the PPP actually entailed the issuance of loans from private lenders.<sup>29</sup> Any small business or nonprofit organization with fewer than five hundred employees was eligible.<sup>30</sup>

Through the PPP, small businesses were eligible for a loan amount derived from a multiplier of average monthly payroll costs, and the use of the funding was limited to select costs including payroll, health care benefits, salaries, mortgage interest, rent, and utilities.<sup>31</sup> These "loans" also were eligible for full forgiveness, so long as businesses used at least sixty percent of loan proceeds for payroll costs.<sup>32</sup> Such loans were thus, in practice, grants.<sup>33</sup> With such favorable terms, the PPP was open to a broad range of businesses, for a broad range of reasons. In fact, Senator Marco Rubio, one of the primary drafters of the CARES Act, noted that the PPP had been designed to "cover as many people as possible"; loans were not limited to typical "mom and pop"-type businesses.<sup>34</sup>

Despite the broad coverage of the PPP, the eligibility of religious institutions was not immediately clear. Traditionally, SBA regulation dictates that businesses "principally engaged in teaching, instructing, counseling or indoctrinating religion or religious beliefs"—churches—are ineligible for SBA bus-

24 See WIGGINS ET AL., *supra* note 23, at 13–14.

25 *Id.*

26 Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (2020) (codified as amended at 15 U.S.C. §§ 9001–9080).

27 15 U.S.C.A. § 636(a)(36) (West 2021).

28 *Paycheck Protection Program*, SBA, <https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program> (last visited Mar. 11, 2021) (website no longer using this language).

29 Thomas W. Joo & Alex Wheeler, *The "Small Business" Myth of the Paycheck Protection Program*, 54 U.C. DAVIS L. REV. ONLINE 21, 28 (2020).

30 15 U.S.C.A. § 636(a)(36)(D)(i).

31 *Id.* § 636(a)(36)(E), (F)(i).

32 See Paycheck Protection Program Flexibility Act of 2020, Pub. L. No. 116-142, § 3(b)(8), 134 Stat. 641, 642 (2020).

33 See, e.g., *In re Roman Cath. Church of the Archdiocese of Sante Fe*, 615 B.R. 644, 657 (Bankr. D.N.M. 2020) ("[T]he PPP is not a loan program. It is a grant or support program." (footnote omitted)).

34 Joo & Wheeler, *supra* note 29, at 32–33 (2020) (discussing the misconceptions that the PPP was designed only for small businesses, and large corporations exploited loopholes in order to receive funds).

iness loans.<sup>35</sup> In 1996, when this regulation was enacted, the SBA defended religious ineligibility on the basis of Establishment Clause concerns.<sup>36</sup> The narrative shifted for the PPP, however. Shortly after the passage of the CARES Act, the SBA posited that religious ineligibility (rather than eligibility) violated the Constitution and announced that faith-based organizations *were* eligible to receive loans.<sup>37</sup>

Importantly, the SBA did not accompany its decision with a new regulation. The SBA instead “hid the elephant in the mousehole” and inconspicuously noted its PPP policy in an FAQ publication.<sup>38</sup> This is not to imply that the SBA was hasty or deceitful; the SBA’s brevity was likely a reaction to external pressures for expediency as entities began loan applications. Yet, the SBA’s PPP policy promulgation remains problematically informal and temporary—the 1996 regulation is still the law for all instances but the PPP.<sup>39</sup>

The SBA also made clear that the Catholic Church, like most faith-based organizations, was exempt from the “affiliation rule.”<sup>40</sup> This rule generally groups affiliates, or those entities that share some aspect of control (like franchises), when ascertaining the number of employees within an organization.<sup>41</sup> Absent exemption, application of the affiliation rule to the hierarchical structure of the Catholic Church likely would group all dioceses within the United States as a single entity.<sup>42</sup> The ramifications are substantial. As of 2010, the average parish had an estimated staff count of only 9.5 members; slightly more than half occupied ministerial positions.<sup>43</sup> But, when com-

35 13 C.F.R. § 120.110(k) (2019).

36 VALERIE C. BRANNON, CONG. RSCH SERV., LSB10445, ELIGIBILITY OF RELIGIOUS ORGANIZATIONS FOR THE CARES ACT’S PAYCHECK PROTECTION PROGRAM 1 (2020).

37 SBA, *supra* note 5, at 1 (declining to enforce the applicable regulations that “impermissibly exclude some religious entities” because they “bar the participation of a class of potential recipients based solely on their religious status” and promising to amend those regulations to conform with the Constitution).

38 *See id.*

39 Notably, per its promise in the FAQ publication, the SBA proposed a regulation in December 2020 to make religious entities *permanently* eligible for loan consideration. Regulatory Reform Initiative: Streamlining and Modernizing the 7(a), Microloan, and 504 Loan Programs to Reduce Unnecessary Regulatory Burden, 85 Fed. Reg. 80,676, 80,677–78 (proposed Dec. 14, 2020) (to be codified at 13 C.F.R. pts. 120, 123).

40 *See, e.g.*, 13 e-C.F.R. § 121.103(b)(10)(i) (2021) (“The relationship of a faith-based organization to another organization is not considered an affiliation with the other organization . . . [if] the relationship is based on a religious teaching or belief. . . .”); Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. 20,817, 20,819 (Apr. 15, 2020) (to be codified at 13 C.F.R. pt. 121); SBA, *supra* note 5, at 4 (noting that the SBA will not assess a faith-based organization’s assertion of a religious exemption from the affiliation rules).

41 13 C.F.R. § 121.103(a) (2020).

42 *See* 1983 CODE c.331 (noting the Catholic Pope possesses “supreme, full, immediate, and universal ordinary power in the Church”); 1983 CODE c.368 (explaining that dioceses constitute “[p]articular churches” within the Catholic Church); 1983 CODE c.374, § 1 (“Every diocese or other particular church is to be divided into distinct parts or parishes.”).

43 MARK M. GRAY, MARY L. GAUTIER & MELISSA A. CIDADE, THE CHANGING FACE OF U.S. CATHOLIC PARISHES 1, 3, 60 (2011).

bined with all other parishes, the employee count of the Catholic Church in the United States totaled over 160,000 individuals.<sup>44</sup> Include employees of Catholic hospitals, schools, nursing homes, and other charitable institutions, and the number likely exceeded one million, well over the SBA's five hundred employee limit.<sup>45</sup> Thus, these dual exceptions—both specific to the PPP and long-standing—incentivized financially burdened dioceses to seek monetary assistance through the PPP.

Nearly all Catholic dioceses took advantage of the opportunity. In a survey of Catholic bishops, ninety-five percent reported they helped their parishes apply to federal or state assistance programs, like the PPP.<sup>46</sup> While federal data is limited, *The Associated Press* reported a generous response from the SBA: the Catholic Church likely received at least 3500 loans and \$1.4 billion in aid, which allowed the Church and its organizations to retain over 400,000 jobs.<sup>47</sup> This article, however, suggested a sort of malfeasance on the part of Catholic institutions that received funding, specifically noting the Church's large outstanding financial liabilities from ongoing clergy sexual abuse settlements.<sup>48</sup>

Legal experts quoted by the *Associated Press* also argued that a governmental "special dispensation" and "structural favoritism," coupled with the Catholic Church's lobbying efforts, led the Church to receive legislative exceptions and billions of dollars of taxpayer funding to which it was not otherwise entitled.<sup>49</sup> Such considerations, the experts urged, had "further eroded the wall between church and state provided in the First Amendment."<sup>50</sup> While gaining the most attention, *The Associated Press* article was merely a piece of a broader academic resistance rooted in the Religion Clauses. For example, a month earlier, Professors Tebbe, Schwartzman, and Schragger authored an opinion piece in the *New York Times* in which they referred to the PPP as a crucial moment in the "quiet demise of the already ailing separation of church and state."<sup>51</sup> Thus, the disdain for the SBA's PPP policy was acute and far-reaching.

## II. THE FIRST AMENDMENT'S RELIGION CLAUSES AND GOVERNMENT AID

### A. *The Theory of Separatism*

As described, the media backlash and cultural outcry that followed the Church's PPP aid explicitly relied on the once-controlling jurisprudential

---

44 *Id.*

45 Thomas J. Healey, *A Blueprint for Change*, AMERICA (Sept. 26, 2005); *see supra* note 30 and accompanying text.

46 WIGGINS ET AL., *supra* note 23, at 17.

47 Dunklin & Rezendes, *supra* note 9.

48 *Id.*

49 *Id.* (quoting Micah Schwartzman).

50 *Id.*

51 Tebbe et al., *supra* note 9.

norm of church and state separation. Much of this rhetoric stems from Thomas Jefferson's Letter to the Danbury Baptists, where he wrote that the American people had enacted the Religion Clauses, "thus building a wall of separation between Church [and] State."<sup>52</sup> Historians, however, continue to debate the meaning of Jefferson's phrase in context.<sup>53</sup> And, as the Supreme Court has wrestled with this topic over the past several decades, it has continually evolved its doctrine away from such a separatist stance. Accordingly, the concept of a "wall" separating the church and state is no longer the proper lens of analysis for questions such as these.

The Court's doctrinal evolution occurred over several distinct phases, each of which is represented by the adoption of a new jurisprudence. At the crux of this ongoing debate is an unclear relationship between the two religion clauses in the First Amendment: the Establishment Clause and the Free Exercise Clause. On the one hand, the Establishment Clause requires that "Congress shall make no law respecting an establishment of religion";<sup>54</sup> on the other hand, the Free Exercise Clause requires that "Congress shall make no law . . . prohibiting the free exercise thereof."<sup>55</sup> These two clauses, while expressing complementary values, "often exert conflicting pressures."<sup>56</sup> To resolve the apparent conflict between these directives, but with a special focus on establishment, the Court developed a principle of separatism in *Everson v. Board of Education*.<sup>57</sup> For the majority, Justice Black wrote:

Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . [T]he clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."<sup>58</sup>

---

52 Letter from Thomas Jefferson to the Danbury Baptists (Jan. 1, 1802), in James Hutson, 'A Wall of Separation': FBI Helps Restore Jefferson's Obliterated Draft, 57 LIBR. CONG. INFO. BULL. 136, 139 (1998).

53 See, e.g., Daniel L. Dreisbach, *Origins and Dangers of the "Wall of Separation" Between Church and State*, IMPRIMS, Oct. 2006, at 1, 2 ("[T]his wall had less to do with the separation between religion and *all* civil government than with the separation between the national and state governments on matters pertaining to religion . . ."). Jefferson reportedly believed the First Amendment imposed restrictions on the national government only. *Id.* at 2-3.

54 U.S. CONST. amend. I.

55 *Id.*

56 *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005).

57 330 U.S. 1 (1947).

58 *Id.* at 15-16 (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878)). Notably, some theorize the Founders actually designed this pair of constitutional freedoms to encourage multiple religious sects within the Christian Church and prevent the establishment of a national religion, rather than to erect such a wall of separation. See Wallace v. Jaffree, 472 U.S. 38, 99-100 (1985) (Rehnquist, J., dissenting); Robert C. Casad, *The Establishment Clause and the Ecumenical Movement*, 62 MICH. L. REV. 419, 420-21 (1964). For a discussion of this and other suggested interpretations of the Establishment Clause, see generally Stephanie H. Barclay, Brady Earley & Annika Boone, *Original Meaning and the Establishment Clause: A Corpus Linguistics Analysis*, 61 ARIZ. L. REV. 505 (2019).



At the same time, the Court tried to balance these striking proscriptions against free exercise, noting that states cannot exclude religious individuals from “receiving the benefits of public welfare legislation” because of their faith or lack thereof.<sup>59</sup> Yet, because the Court had been presented with a question of what a state *could* do (without invoking concerns of religious favor), the focus remained on the Establishment Clause; questions of what a state *must* do (to protect individuals’ rights) seemed more apt for analysis under a Free Exercise lens, as discussed in Section I.B, below.<sup>60</sup> Thus, applying these standards, the Court permitted New Jersey’s use of taxpayer funds for the bus fares of students attending religious schools, since the State also covered public school students’ fares.<sup>61</sup>

Though free exercise concerns ultimately persuaded the Court in *Everson*, the Court clung to separatism in future cases; it was especially prevalent in cases like *Lemon v. Kurtzman*, where the Court constructed a three-pronged paradigm designed to assess the religious motivations and benefits within government programs.<sup>62</sup> Arguably, separatism gained such traction in legal jurisprudence because of perceived hinderances caused by religion in the desired advancement of a secular society. At the time of its adoption, religious-based censorship of literature, movies, and contraception were garnering disfavor, as were religious exemptions from vaccinations, military service, and other civic obligations.<sup>63</sup> Yet, religious and secular communities jointly favored separatism, though on differing bases: for the former, as a safeguard of religious autonomy, and for the latter, as a restriction on religious funding.<sup>64</sup>

Following the Court’s hint in *Everson*, however, even strict applications of separatism did not warrant a complete denial of government benefits to religious organizations. While the Court invalidated programs, or features thereof, that directly or indirectly benefited religion, it allowed such aid to be used for secular purposes.<sup>65</sup> Justice Powell described the Court’s approach

---

59 *Everson*, 330 U.S. at 16.

60 See Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230, 255–56 (1994).

61 *Everson*, 330 U.S. at 17. The Court deemed such bus fare payments to be a “general government service [.]” *Id.* at 17–18.

62 403 U.S. 602, 612–13 (1971) (establishing three requisite criteria for upholding governmental aid for a religious organization: a “secular legislative purpose,” a “principal or primary effect” that neither “advances nor inhibits religion,” and a lack of “excessive government entanglement with religion” (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 674 (1970))).

63 See Steven K. Green, *The “Irrelevance” of Church-State Separation in the Twenty-First Century*, 69 SYRACUSE L. REV. 27, 48–49 (2019); see also *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 655 (1943) (Frankfurter, J., dissenting) (“The subjection of dissidents to the general requirement of saluting the flag, as a measure conducive to the training of children in good citizenship, is very far from being the first instance of exacting obedience to general laws that have offended deep religious scruples.”).

64 See Green, *supra* note 63, at 50.

65 For a discussion of the Court’s application of separatism in the context of government grants for the construction or improvement of religious real property, see Ira C.

as such: “[S]ome forms of aid may be channeled to the secular [educational functions at sectarian schools] without providing direct aid to the sectarian. But the channel is a narrow one . . . .”<sup>66</sup>

*Tilton v. Richardson* exemplifies the Court’s doctrine during this era.<sup>67</sup> There, the Court assessed the Higher Education Facilities Act of 1963, which authorized construction grants to church-related colleges for secular buildings and facilities.<sup>68</sup> The Court upheld the Act, finding the facilities were devoted “to the secular and not the religious function of the recipient institutions,” and the grants could not be used for “religious instruction, training, or worship.”<sup>69</sup> The Act also contained a provision that mandated repayment if such religious prohibitions were violated, but only within twenty years after completion of construction; the Court found this time period insufficient and severed it from the statute, so the time period for repayment would remain indefinite.<sup>70</sup>

If strict separatism was the modern touchstone for the Court’s jurisprudence regarding church and state relations, the visceral reaction to the Church’s receipt of PPP loans—the fear that the wall between church and state was eroding—may have been justified.<sup>71</sup> It is not clear, however, that the Burger Court saw the “channel” of permissible sectarian aid quite as narrowly as Justice Powell insinuated.<sup>72</sup> More importantly, the Court eventually grew to disfavor separatism; the Rehnquist Court strayed from the paradigm in favor of a neutrality approach after then-Associate Justice Rehnquist called for separatism’s abandonment.<sup>73</sup> Accordingly, in *Zelman v. Simmons-Harris*, the Court upheld an Ohio-sponsored tuition program that included both religious and nonreligious schools.<sup>74</sup> The Court found the program was “neutral in all respects toward religion,” especially since the tuition aid was distributed to parents who, in turn, independently chose the schools to

Lupu & Robert W. Tuttle, *Historic Preservation Grants to Houses of Worship: A Case Study in the Survival of Separationism*, 43 B.C. L. REV. 1139, 1142–46 (2002).

66 Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 775 (1973).

67 403 U.S. 672 (1971) (plurality opinion).

68 *Id.* at 674–76.

69 *Id.* at 679–80, 689.

70 *Id.* at 682–84.

71 See *supra* notes 50–51 and accompanying text.

72 For additional examples of the Court finding itself in the “narrow channel” of permissible secular aid, see *Waltz v. Tax Comm’n*, 397 U.S. 664, 669, 680 (1970), which found that there is “room for play in the joints productive of a benevolent neutrality” and held that church property tax exemptions did not violate the Religion Clauses, and *Hunt v. McNair*, 413 U.S. 734, 736, 741–49 (1973), which applied the *Lemon* test and upheld a South Carolina Act that authorized the issuance of bonds to assist institutions of higher education, both secular and non-secular, with non-religious construction projects.

73 See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 107 (1985) (Rehnquist, J., dissenting) (“The ‘wall of separation between church and State’ is a metaphor based on bad history . . . . It should be frankly and explicitly abandoned.”); Green, *supra* note 63, at 53–54.

74 536 U.S. 639, 643–45 (2002).

which they would send their children.<sup>75</sup> Then, in 2017 and again in 2020, the Court officially responded to Chief Justice Rehnquist's call in a pair of cases that not only repudiated separatism, but also embraced a new standard for government benefit programs: nondiscrimination.

### B. *The Move Toward Nondiscrimination*

As discussed in Section II.A, the doctrine of separatism largely emerged in cases involving the Establishment Clause and, more specifically, where the government had opted for a policy of inclusion, allowing religious organizations equal access to government benefit programs.<sup>76</sup> These cases dominated the Burger Court era, as eager plaintiffs—armed with favorable precedent—sought to halt religion-favoring programs.<sup>77</sup> But, with the Rehnquist Court's change in momentum, there came an explosion of litigation focused instead on the Free Exercise Clause.<sup>78</sup> Accordingly, the Court began to see the Religion Clauses work in tandem: the petitioner promoted the Free Exercise Clause, and the defendant used the Establishment Clause in rebuttal, or vice versa.

In *Locke v. Davey*, for example, the State of Washington had established a postsecondary scholarship program for high-achieving students.<sup>79</sup> The respondent, Davey, sought to pursue a theology degree and was denied a scholarship; he brought an action alleging that the denial violated, among other constitutional provisions, the Free Exercise Clause.<sup>80</sup> The Court, however, relied on the State's antiestablishment concerns and found the State's denial did not offend the Constitution.<sup>81</sup> In doing so, the Court confronted the interaction between the Religion Clauses: “[W]e have long said that

---

75 *Id.* at 652–53. For additional discussion of the Rehnquist Court's neutrality approach, see *Zobrest v. Catalina Foothills School District* 509 U.S. 1, 10 (1993) (“When the government offers a neutral service on the premises of a sectarian school as part of a general program that ‘is in no way skewed towards religion,’ . . . that service does not offend the Establishment Clause.” (quoting *Witters v. Wash. Dep’t of Servs. for the Blind*, 474 U.S. 481, 488 (1986))). See also *Agostini v. Felton*, 521 U.S. 203, 234–35 (1997) (finding as valid a federally funded program providing supplemental education to struggling students, even when given on the premises of sectarian schools by government employees); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 839 (1995) (“[T]he guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse.”); Richard W. Garnett & Jackson C. Blais, *Religious Freedom and Recycled Tires: The Meaning and Implications of Trinity Lutheran*, 2016 CATO SUP. CT. REV. 105, 106–07 (2017).

76 But see *Green*, *supra* note 63, at 32–33 (describing *Reynolds v. United States*, 98 U.S. 145 (1878), where the Court endorsed separatism in a free exercise case, though with a polygamous, theocratic backdrop that essentially lacked church-state separation).

77 See *Lupu*, *supra* note 60, at 243–44.

78 See *id.* at 250; Richard Schragger & Micah Schwartzman, *Religious Antiliberalism and the First Amendment*, 104 MINN. L. REV. 1341, 1381–83 (2020).

79 540 U.S. 712, 715 (2004).

80 *Id.* at 717–18.

81 *Id.* at 725.

‘there is room for play in the joints’ between [the Clauses]. In other words, there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause.”<sup>82</sup>

The Court’s two most recent cases on this topic have also highlighted this relationship between the Clauses—a relationship described by some as one of tension,<sup>83</sup> but by others as one of cooperation.<sup>84</sup> At the same time, the Court again shifted its doctrinal approach to government aid in favor of a broad nondiscrimination principle.<sup>85</sup>

In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, the Court assessed a Missouri scrap tire grant program, whereby schools and daycare centers could apply for grants to purchase rubber playground material made from recycled tires.<sup>86</sup> Trinity Lutheran Church, which operated a preschool and daycare center, applied for such a grant but was denied because the Missouri Department of Natural Resources had a policy excluding churches from consideration.<sup>87</sup> The State argued that its own constitution, which included a more expansive version of the federal Establishment Clause, compelled this exclusionary policy.<sup>88</sup> Instead, the Court found the exclusion—or discrimination—unconstitutional: “The Department’s policy expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character. . . . [S]uch a policy imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny.”<sup>89</sup> The majority applied the Free Exercise Clause as a protection, in this context, against a forced surrender of one’s religious status in order to

82 *Id.* at 718–19 (citation omitted) (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 669 (1970)).

83 *See id.* at 718; Anthony Joseph, *Down But Not Out: Trinity Lutheran’s Implications for State No-Aid Provisions*, 21 J. CONST. L. ONLINE 1, 2 (2018); Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555, 569–70 (1991) (“The tension arises at the boundary between religion and nonreligion; the Free Exercise Clause suggests the privileging of religion over nonreligion, whereas the Establishment Clause suggests the normative equality of the two.”).

84 *See* Carl H. Esbeck, *Religion and the First Amendment: Some Causes of the Recent Confusion*, 42 WM. & MARY L. REV. 883, 887 (2001) (“Given that the Establishment Clause restrains government and government alone, not private individuals, this ‘clash-of-the-Clauses’ argument is completely nonsensical.”); Michael Stokes Paulsen, *The Priority of God: A Theory of Religious Liberty*, 39 PEPP. L. REV. 1159, 1219 (2013) (describing the Establishment Clause and the Free Exercise Clause as “two sides of the same coin,” together forbidding government proscription and prescription of religious exercise).

85 *See* Edward Correia, *Trinity Lutheran Church v. Comer: An Unfortunate New Anti-Discrimination Principle*, 18 RUTGERS J. L. & RELIGION 280, 280 (2017).

86 137 S. Ct. 2012, 2017 (2017).

87 *Id.*

88 *Id.*

89 *Id.* at 2021 (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993)).

receive public benefits.<sup>90</sup> “Discrimination” was the Court’s term of choice; it characterized Missouri’s exclusion as an “express discrimination against religious exercise,” and a “discriminatory policy.”<sup>91</sup> And, it highlighted prior cases, such as *McDaniel v. Paty* and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, where the Court had struck down a discriminatory state statute and local ordinance, respectively.<sup>92</sup>

The Court, however, was still stuck with the precedent from *Locke*, a case with facts that seemed almost squarely on point. Accordingly, the Court preserved its decisions in both *Locke* and *Trinity Lutheran* with a distinction between use and status: “Davey was not denied a scholarship because of who he *was*; he was denied a scholarship because of what he proposed *to do*.”<sup>93</sup> *Trinity Lutheran Church*, meanwhile, was denied a grant simply because of its status as a church.<sup>94</sup> Justice Gorsuch disputed the necessity of this distinction in his concurring opinion, offering instead that the Court was merely righting a previous wrong.<sup>95</sup> Or, as he and others have pointed out, perhaps the correct distinction rests on the *specific* use of government funds in *Locke*—training of clergy—with a long history of condemnation under the First Amendment.<sup>96</sup>

Altogether, these signals establish a new principle: nondiscrimination. While not announced explicitly, the Court seemed to suggest that “once the government offers a benefit that is permitted by the Establishment Clause, the Free Exercise Clause requires that it be offered to religious and non-religious entities in the same way.”<sup>97</sup> Nonetheless, the Court attempted to constrain its holding to the specific facts of the case in footnote three, which Justices Thomas and Gorsuch, members of the majority, refused to join: “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.”<sup>98</sup> But legal scholars called the Court’s

90 *Id.* at 2022. “[T]he Department’s policy puts Trinity Lutheran to a choice: It may participate in an otherwise available benefit program or remain a religious institution.” *Id.* at 2021–22.

91 *Id.* at 2022, 2024; *see also* Correia, *supra* note 85, at 288.

92 *See Trinity Lutheran Church*, 137 S. Ct. at 2020–21; *see also Lukumi*, 508 U.S. at 526, 534, 547 (finding local animal cruelty ordinances contrary to the Free Exercise Clause, since suppression of Santeria worship services, which involve animal sacrifice, was the “object of the ordinances”); *McDaniel v. Paty*, 435 U.S. 618, 622, 629 (1978) (finding a Tennessee law that disqualified clergy from legislative office to be in violation of the First Amendment).

93 *Trinity Lutheran Church*, 137 S. Ct. at 2023.

94 *Id.*

95 *Id.* at 2026 (Gorsuch, J., concurring in part) (“But can it really matter whether the restriction in *Locke* was phrased in terms of use instead of status . . . ?”).

96 *See id.* (“If that case can be correct and distinguished, it seems it might be only because of the opinion’s claim of a long tradition against the use of public funds for training of the clergy, a tradition the Court correctly explains has no analogue here.”); *see also* Garnett & Blais, *supra* note 75, at 129.

97 Correia, *supra* note 85, at 290.

98 *Trinity Lutheran Church*, 137 S. Ct. at 2024 n.3, 2026 (emphasis added).

bluff, arguing that the footnote lacked much significance.<sup>99</sup> In a concurring opinion, Justice Gorsuch criticized the inclusion of the footnote; while recognizing its soundness, he anticipated a restrictive perception of what the Court had designed to be a generally applicable nondiscrimination principle.<sup>100</sup>

Notwithstanding footnote three, and despite Justice Gorsuch's concerns, the Court followed its own lead and extended the nondiscrimination principle in *Espinoza v. Montana Department of Revenue*.<sup>101</sup> The State of Montana had enacted a program to provide tuition assistance, in the form of tax credits, to parents of children who attended private schools.<sup>102</sup> In order to be eligible, the taxpayer had to donate to a scholarship organization, which used donated funds to award tuition scholarships to families facing hardship.<sup>103</sup> Nearly all private schools, including those religiously affiliated, qualified for the program.<sup>104</sup> However, in accordance with a no-aid provision of the Montana Constitution, an administrative rule prohibited the scholarships' use at religious schools.<sup>105</sup> Petitioners, three mothers, all had children attending a Christian school, and one child had already received a tuition scholarship.<sup>106</sup>

The Court relied explicitly on *Trinity Lutheran*. Responding to *Trinity Lutheran's* use and status distinction, the State argued *Locke* ought to reign over its decision to exclude religious schools.<sup>107</sup> The Court disagreed: "This case also turns expressly on religious status and not religious use."<sup>108</sup> Like in *Trinity Lutheran*, the State provision barred religious schools from generally available public benefits solely because of their religious character.<sup>109</sup> In

---

99 Correia, *supra* note 85, at 291 ("[I]t is hard to see how the opinion can be limited in the way the footnote suggests in light of the sweeping statements in the opinion."); Garnett & Blais, *supra* note 75, at 124 ("Footnote [three] is not part of the Court's opinion." The majority opinion "does indeed speak in terms of general, and generally applicable, nondiscrimination principles."); Joseph, *supra* note 83, at 16 ("[F]ootnote three is unlikely to have [the] practical effect [of limiting the reach of the decision]."); Richard S. Myers, *The Significance of Trinity Lutheran*, 17 AVE MARIA L. REV. 1, 14 (2019) ("The logic of [Chief Justice Roberts's] opinion, though, seems to support a much broader principle of nondiscrimination . . .").

100 *Trinity Lutheran Church*, 137 S. Ct. at 2026 (Gorsuch, J., concurring in part) ("I worry that some might mistakenly read [the footnote] to suggest that only 'playground resurfacing' cases, or only those with some association with children's safety or health, or perhaps some other social good we find sufficiently worthy, are governed by . . . the Court's opinion").

101 140 S. Ct. 2246 (2020).

102 *Id.* at 2251.

103 *Id.*

104 *Id.*

105 *Id.* at 2252.

106 *Id.*

107 See *id.* at 2257. The State argued the "provision applies not because of the religious character of the recipients, but because of how the funds would be used—for 'religious education.'" *Id.* at 2255 (quoting Brief for Respondents at 38, *Espinoza*, 140 S. Ct. at 2246 (No. 18-1195)).

108 *Id.* at 2256.

109 *Id.* at 2255.

doing so, the Court expanded the meaning of “status” within the paradigm. The State also had tried to differentiate *Trinity Lutheran* with a concession that funds for rubber playground resurfacing could only be characterized as nonreligious, whereas general school aid, in the form of scholarships, “could be used for religious ends.”<sup>110</sup> Again the Court disagreed; instead of relying on the State’s characterization of the ultimate *end* of government funding, the Court looked only at the State’s criteria for exclusion: the school’s status.<sup>111</sup> Such status-based discrimination, the Court wrote, encompasses all exclusions based on status “even if one of its goals or effects” is restricting the direction of government funds toward religious uses.<sup>112</sup> Accordingly, the Court held the Montana program violated the Free Exercise Clause: “[O]nce a State decides to [subsidize private education], it cannot disqualify some private schools solely because they are religious.”<sup>113</sup>

While *Espinoza* further clarified the meaning of status within the Court’s nondiscrimination paradigm, the Court generally left “use” issues untouched, but with a few hints that, for some hopeful members of the Court, *Locke* may be precedent soon forgotten. Importantly, the Court did not overrule *Locke*, yet the Court suggested that cases involving “use” may not warrant a totally different analysis.<sup>114</sup> Justice Gorsuch’s *Trinity Lutheran* concurrence also received a nod of approval, with the Court acknowledging that some of its members question whether a use and status distinction is meaningful.<sup>115</sup> Still, the Court gave no *real* answers: “We acknowledge the point but need not examine it here.”<sup>116</sup>

Due to its recency, the implications of *Espinoza* remain unclear. Following the decision, the Court granted a petition for writ of certiorari in a Seventh Circuit case, *St. Augustine School v. Evers*, involving the provision of transportation to religious schools.<sup>117</sup> The Circuit Court had held as valid a Wisconsin statute that limited the State’s obligation to bus private-school students to only one school “affiliated with the same religious denomination”

110 *Id.* at 2256.

111 *See id.* (noting that the State’s basis for applying the provision hinged “solely on religious status”).

112 *Id.*

113 *Id.* at 2261.

114 *Id.* at 2257 (“None of this is meant to suggest that . . . some lesser degree of scrutiny applies to discrimination against religious uses of government aid.”). *But see* Stephanie H. Barclay, *Untangling Entanglement*, 97 WASH. U. L. REV. 1701, 1714 (2020) (“The Court left open some possibility that government might restrict funds that were being put to a religious ‘use.’”).

115 *See Espinoza*, 140 S. Ct. at 2257; *supra* notes 95–96 and accompanying text; *see also Espinoza*, 140 S. Ct. at 2275–76 (Gorsuch, J., concurring) (“[A]ny jurisprudence grounded on a status-use distinction seems destined to yield more questions than answers. . . . Most importantly, though, it is not as if the First Amendment cares.”).

116 *Espinoza*, 140 S. Ct. at 2257.

117 *See St. Augustine Sch. v. Evers*, 906 F.3d 591 (7th Cir. 2018), *vacated sub nom.* *St. Augustine Sch. v. Taylor*, 141 S. Ct. 186 (mem.) (U.S. July 2, 2020) (No. 18-1151).

within a designated region.<sup>118</sup> Thus, while two Catholic schools were located in the same vicinity, the State only provided bussing to one.<sup>119</sup> Upon granting the certiorari petition, the Court immediately vacated the Seventh Circuit decision and remanded for consideration in light of *Espinoza*.<sup>120</sup> A remand, of course, does not guarantee a reversal of the Seventh Circuit's original holding. But, the Court's move does raise the possibility of broader reaches for *Espinoza*—particularly, that nondiscrimination applies not only to the status dichotomy of secular and sectarian, but also to entities *within* a particular sectarian status (e.g., Catholic schools). At the same time, this Seventh Circuit case was another example of discriminatory state action involving religious schools. While the Court has never suggested that its nondiscrimination rule applies only in an educational context, the possibility remains that a “historic exclusion,” as the Court noted in *Locke*, may stand in the way of the rule's extension to those entities, like churches, with a less attenuated affiliation with religion.<sup>121</sup>

### III. GOVERNMENT AID WHEN DISASTER STRIKES

While none of the aforementioned cases have addressed questions of religious organizations' receipt of government aid in the form of disaster relief, the topic has not gone unaddressed. In fact, the federal government has acknowledged that the Establishment Clause is not a barrier to the neutral provision of disaster aid—even when distributed directly to churches.

#### A. *Seattle Hebrew Academy and the Nisqually Earthquake*

In February 2001, the Nisqually Earthquake, a magnitude 6.8, occurred near Seattle, Washington.<sup>122</sup> Hundreds of buildings required inspection, and the City of Seattle estimated building damage losses amounting to nearly forty million dollars.<sup>123</sup> The Seattle Hebrew Academy, a Jewish school, occupied a century-old building that sustained extensive damage in the earthquake.<sup>124</sup> Accordingly, the Academy applied for disaster assistance through the Federal Emergency Management Agency (FEMA).<sup>125</sup> The Stafford Disaster Relief and Emergency Assistance Act authorizes the President to make contributions to a private nonprofit facility “damaged or destroyed by a major disaster for the repair, restoration, reconstruction, or replacement of

118 *Id.* at 593–94 (quoting Wis. Stat. § 121.51 (2021)).

119 *Id.* at 594.

120 *St. Augustine Sch.*, 141 S. Ct. at 186.

121 *See supra* notes 93, 96 and accompanying text.

122 NISQUALLY EARTHQUAKE CLEARINGHOUSE GRP., THE NISQUALLY EARTHQUAKE OF 28 FEBRUARY 2001 PRELIMINARY RECONNAISSANCE REPORT 1 (2001).

123 *Id.* at 10.

124 *History*, SEATTLE HEBREW ACAD., <https://seattlehebrewacademy.org/about-us/history/> (last visited Mar. 5, 2021).

125 Authority of FEMA to Provide Disaster Assistance to Seattle Hebrew Academy, 26 Op. O.L.C. 114, 114 (2002).



the facility and for associated expenses.”<sup>126</sup> The President subsequently delegated this authority to FEMA.<sup>127</sup>

FEMA denied the Academy’s application; it also denied its subsequent appeal.<sup>128</sup> FEMA’s general counsel then sought an opinion from the Office of Legal Counsel (“OLC”) as to, among other things, whether the Academy’s selective, faith-based admission process disqualified it from FEMA funding.<sup>129</sup> The OLC concluded that the Establishment Clause did not bar the distribution of aid to the Academy, since the aid was available “on the basis of neutral criteria to an unusually broad class of beneficiaries defined without reference to religion.”<sup>130</sup> The program’s design also did not permit significant administrative discretion, such that FEMA was precluded from using its funding powers arbitrarily to favor religion.<sup>131</sup> Accordingly, the opinion qualified the FEMA grants as “general government services,” which broadly encompassed a wide variety of institutions—religious and secular alike.<sup>132</sup> The OLC notably dismissed concerns that funding would be used to advance its religious purpose. It analogized to cases where the Court held the government cannot deny religious groups equal access to the government’s own property, which, in this instance, took the form of disaster aid.<sup>133</sup>

This opinion certainly strayed from the Court’s strict separatism approach, which was not unsurprising given the Rehnquist neutrality formula, which governed at the time. The Court’s prior decision regarding religious construction grants was not repudiated, and the opinion is not precedential, but it does suggest that the federal understanding of the Establishment Clause had inched in favor of religion. In the 1971 *Tilton* decision, the Court had withheld their veto on the construction grants largely because the grants could not be used for religious purposes.<sup>134</sup> But, Seattle Hebrew Academy was a Jewish school; religious instruction and worship inevitably occurred within its classrooms. Between 1971 and 2002, the Religion Clauses had not changed, but the makeup of the Court *had* changed. The Office of Legal Counsel noted this explicitly: “[F]our members of the Supreme Court have made clear that they would sustain any program of aid that provides

---

126 42 U.S.C. §§ 5121, 5172(a)(1)(B) (2018). Major disasters are generally limited to natural catastrophes, fires, floods, and explosions. *Id.* § 5122(2).

127 See Exec. Order No. 12,148, 3 C.F.R. § 412, 417 (1980); Authority of FEMA to Provide Disaster Assistance to Seattle Hebrew Academy, *supra* note 125, at 114.

128 See Authority of FEMA to Provide Disaster Assistance to Seattle Hebrew Academy, *supra* note 125, at 114.

129 *Id.* at 115.

130 *Id.* at 122.

131 *Id.*

132 *Id.* at 124.

133 *Id.* at 129; see also *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 842 (1995) (noting a public university may grant general access to its facilities on a religion-neutral basis).

134 See *supra* note 69 and accompanying text.

secular assistance, on the basis of neutral criteria.”<sup>135</sup> Following the clues provided in the opinion, numerous federal agencies (including FEMA) subsequently announced changes in policy—they now would finance the “construction, rehabilitation, and maintenance of real property” belonging to both secular and religious institutions.<sup>136</sup>

### B. *Harvest Family Church and Hurricane Harvey*

Though FEMA and other agencies broadened the scope of permissible distribution of disaster aid, one important category—houses of worship—remained excluded.<sup>137</sup> Accordingly, when Hurricane Sandy devastated the East Coast in 2013, and churches applied for FEMA grants, the simple answer was “[n]o.”<sup>138</sup> Churches, synagogues, and other houses of worship were thus forced to turn to private donors to cover the hundreds of thousands, and sometimes millions, of dollars in damage.<sup>139</sup> In 2017, the arrival of the Trump administration, coupled with the emergence of *Trinity Lutheran’s* use and status distinction, changed that answer to a “yes.”

At the end of that year, Hurricane Harvey hit the southeastern coast of Texas, resulting in severe wind and flood damage.<sup>140</sup> As Hi-Way Tabernacle sat in three feet of water, it filed suit against FEMA, arguing that its exclusionary policy was unconstitutional.<sup>141</sup> Specifically, Hi-Way, along with its co-plaintiffs Harvest Family Church and Rockport First Assembly of God, alleged the status-based policy violated the Free Exercise Clause under *Trinity Lutheran*.<sup>142</sup> Within a few months, the plaintiffs had moved for a preliminary injunction and a temporary restraining order, and the district court denied

135 Authority of FEMA to Provide Disaster Assistance to Seattle Hebrew Academy, *supra* note 125, at 132. The Assistant Attorney General cited *Mitchell v. Helms*, 530 U.S. 793 (2000), where the majority opinion consisted of Chief Justice Rehnquist, as well as Justices Thomas, Scalia, and Kennedy. *Id.* The three Associate Justices’ appointments, as well as Justice Rehnquist’s promotion to Chief Justice, all occurred within a five-year period. See *Justices 1789 to Present*, U.S. SUP. CT., [https://www.supremecourt.gov/about/members\\_text.aspx](https://www.supremecourt.gov/about/members_text.aspx) (last visited Mar. 5, 2021).

136 Ira C. Lupu & Robert W. Tuttle, *The Faith-Based Initiative and the Constitution*, 55 DEPAUL L. REV. 1, 12–13, 13 n.51 (2005).

137 FEMA, POLICY REFERENCE MANUAL: DISASTER ASSISTANCE POLICY § 9521.1(VII)(C)(1) (2008) (“A facility . . . primarily established or used as a religious institution or place of worship would be ineligible.”).

138 Sharon Otterman, *Houses of Worship Seeking FEMA Grants Face Constitutional Barrier*, N.Y. TIMES (Jan. 3, 2013), [nytimes.com/2013/01/04/nyregion/houses-of-worship-seeking-fema-grants-face-constitutional-barrier.html](https://www.nytimes.com/2013/01/04/nyregion/houses-of-worship-seeking-fema-grants-face-constitutional-barrier.html).

139 *Id.*

140 Emma Green, *Will Trump Direct FEMA to Fund Churches Hit by Hurricanes?*, THE ATLANTIC (Sept. 11, 2017), <https://www.theatlantic.com/politics/archive/2017/09/hurricane-harvey-faith-based-organizations-fema-trump/539346/>.

141 *Id.*

142 Complaint at 1, 3, *Harvest Fam. Church v. Fed. Emergency Mgmt. Agency* (No. 4:17-cv-02662) 2017 WL 6060107 (S.D. Tex. Dec. 7, 2017), *appeal dismissed*, 2018 WL 386192 (5th Cir. Jan. 10, 2018).

them both.<sup>143</sup> The court reasoned that, even under the *Trinity Lutheran* paradigm, the plaintiffs could not show a substantial likelihood of success on the merits to warrant a preliminary injunction.<sup>144</sup> Moreover, the court found *Trinity Lutheran* inapplicable; because the federal aid would be directed to Texas churches, and such funding be put to religious uses, *Locke* was the proper precedent.<sup>145</sup> The government interest in avoiding the use of public funds for religion reigned supreme.<sup>146</sup>

The plaintiffs' attorneys quickly sought appeal in the Fifth Circuit, which was again denied.<sup>147</sup> Focus then turned to the Supreme Court and, more specifically, Justice Alito, as the assigned Circuit Justice.<sup>148</sup> Rather than an immediate denial, the Justice requested a response from the Solicitor General's Office, a somewhat uncommon result of an emergency application.<sup>149</sup> Instead of issuing a response, FEMA changed its position. Less than a month after Justice Alito's referral, FEMA announced that houses of worship would be eligible for disaster assistance "without regard to their secular or religious nature."<sup>150</sup> With both parties in agreement, the Fifth Circuit dismissed the case as moot and vacated the district court's previous ruling.<sup>151</sup> Congress subsequently codified FEMA's new policy; the law now requires that houses of worship are eligible for FEMA grants without consideration of their religious character.<sup>152</sup>

Because neither the Fifth Circuit nor the Supreme Court, through Justice Alito, ultimately commented on the constitutionality of the change in grant eligibility, this legal progression's precedential significance is limited to that of an anecdotal effect of *Trinity Lutheran*. That being said, the voluntary

143 *Harvest Fam. Church*, 2017 WL 6060107, at \*1.

144 *See id.* at \*3; FED. R. CIV. P. 65.

145 *Harvest Fam. Church*, 2017 WL 6060107, at \*3–4. The Court noted the specific projects planned by the churches, including "repairs to church sanctuaries, a church steeple, and a fellowship hall." *Id.* at \*4.

146 *Id.* at \*4.

147 *See* Order Denying Motion for Injunction Pending Appeal, *Harvest Fam. Church v. Fed. Emergency Mgmt. Agency*, No. 17-20768 (5th Cir. Jan. 10, 2018).

148 Emergency Application for Temporary Injunction Pending Appeal at 1, *Harvest Fam. Church v. Fed. Emergency Mgmt. Agency*, No. 17-20768 (U.S. Dec. 15, 2017). Plaintiffs had to act quickly because of the dilemmatic structure of FEMA grants, which required pre-approval before any expenditures could occur. *See* Eric Rassbach, *Religious Liberty and Disaster Relief for Houses of Worship*, 23 TEX. REV. L. & POL. 345, 346–47 (2018) ("I had clients who had rotting dry wall that they had to figure out whether to yank out or not.").

149 *See* Rassbach, *supra* note 148, at 347.

150 *See FEMA Expands Public Assistance Eligibility to Include Houses of Worship*, FEMA (Jan. 2, 2018), <https://www.fema.gov/news-release/20200220/fema-expande-la-elegibilidad-al-programa-de-asistencia-publica-para-incluir#:~:text=WASHINGTON%20%E2%80%93%20The%20Federal%20Emergency%20Management,their%20secular%20or%20religious%20nature.>

151 *Harvest Fam. Church v. FEMA*, No. 17-20768, 2018 WL 386192, at \*1 (5th Cir. Jan. 10, 2018) (finding that "in light of FEMA'S recent actions, 'the government has removed the reasons for this appeal'").

152 42 U.S.C. § 5172(a)(3)(C) (2018).

reversal by FEMA and subsequent codification by Congress does bode well for the future of other programs that currently exclude religious organizations.<sup>153</sup> This is especially true because, unlike administrative guidelines subject to future revision, the statutory modifications ensure much greater permanence to the 2017 disaster relief structure. But, the structure is limited to just that—disaster relief—and with an impending change in administration, further regulatory changes to include religion may be put on hold.

#### IV. ASSESSING THE PAYCHECK PROTECTION PROGRAM

While the SBA did not openly confront its decision to include religious organizations in the PPP, outsiders have read between the lines and assumed that *Trinity Lutheran* was a likely catalyst.<sup>154</sup> In support of this theory, the SBA had previously cited Establishment Clause concerns when it initially excluded religious entities.<sup>155</sup> But, an agency's own declaration certainly cannot make an otherwise unconstitutional program pass constitutional muster. Thus, the question remains: Was the SBA correct in extending the PPP to religious organizations and, in particular, houses of worship?

##### A. *The Religion Clauses*

*Trinity Lutheran* and its progeny—the focus of this Note—is the first and most fruitful place to look for guidance. Because the SBA voluntarily opted to include religious entities, however, the issue of PPP distributions presents the reverse scenario of those examined in *Trinity Lutheran* and *Espinoza*. Nonetheless, this Note argues that the PPP and, in particular, the distribution of funding to employers affiliated with the Catholic Church *was* constitutional under both the nondiscrimination paradigm and the prior neutrality paradigm. At the very least, this issue seems to constitute an instance of the “play in the joints” recognized in *Locke*—an instance permitted by the Establishment Clause, but not necessarily required by the Free Exercise Clause.<sup>156</sup>

The first step is evaluating the likely result if the SBA had, as the critics preferred, maintained its official policy and excluded religious organizations from receiving PPP loans. Importantly, the SBA never altered its official policy surrounding loans; it merely adopted a policy of non-enforcement for the PPP context.<sup>157</sup> Assuming *Trinity Lutheran's* status and use distinction

---

153 It is important, however, not to overstate the voluntariness of FEMA's policy shift. As a federal agency under President Trump's authority, he had the power to direct FEMA to expand religious organizations' eligibility, and he tweeted his support for such expansion. See Green, *supra* note 140; @realDonaldTrump, TWITTER (Sept. 8, 2017, 8:56 PM), <https://twitter.com/realDonaldTrump/status/906320446882271232>.

154 See BRANNON, *supra* note 36, at 5 (noting that SBA's acknowledgement that its own regulations excluded a class of participants based on religious status likely implies that “the SBA ha[d] similar *Trinity Lutheran*-based concerns”); see also *supra* note 37 and accompanying text.

155 See *supra* note 36 and accompanying text.

156 See *supra* note 82 and accompanying text.

157 See *supra* notes 37–39 and accompanying text.

remains good law, the SBA's general exclusionary policy falls squarely within the category of status discrimination in violation of the Free Exercise Clause. As it stands, all entities principally engaged in religious activities are ineligible to receive SBA loans, regardless of how the funds would be used.<sup>158</sup> Even if the SBA was concerned that government funding could be used for religious ends, *Espinoza* made clear that such motivations are irrelevant; the inquiry ends at the policy itself.<sup>159</sup> Moreover, the Court's decision to vacate the Seventh Circuit decision in *Evers* suggests the SBA also would be precluded from allowing only certain religious entities—for example, those churches in greatest financial need—from receiving PPP loans.<sup>160</sup>

Of course, as noted at the end of Part II, the Court has not addressed, post-*Trinity Lutheran*, the receipt of government funds by houses of worship. While Trinity Lutheran Church is, of course, a church, the Court there considered the dispersal of funds to its preschool and daycare center; *Espinoza* similarly involved a school tuition program.<sup>161</sup> However, *Trinity Lutheran* and *Espinoza* imply that this is merely a distinction without a difference. The Court distinguished *Locke* from both cases on the basis of *use* alone.<sup>162</sup> Though Justice Gorsuch subsequently made reference to the historic exclusion of funding clergy at issue in *Locke*, this was not a factor the Court considered in either of its two most recent cases.<sup>163</sup> Additionally, the progression of FEMA's policy after Hurricane Harvey toward one including houses of worship signals a general understanding, at least within the executive branch, that the *Trinity Lutheran* nondiscrimination approach has greater reaches than merely the educational context.<sup>164</sup>

The analysis could end here, with a finding that the SBA's decision not to enforce its official policy when administering the PPP was proper, even if only to avoid constitutional clashes with the Court's understanding, in *Trinity Lutheran* and *Espinoza*, of the Free Exercise Clause. But, a court could also reason that the SBA's decision to deviate from its longstanding policy must be considered independently, with the "new" policy reviewed on its own merit. If so, the Establishment Clause would govern. Notably, by the time *Trinity Lutheran* arrived at the Supreme Court, the State had conceded that the Establishment Clause did not bar the dispersal of funds for playground resurfacing.<sup>165</sup> *Zelman v. Simmons Harris* also indicates a similar finding of constitutionality. There, the Court emphasized the program's neutrality as well as the fact that the government was not *directly* funding religious schools; parents acted as an intermediary, dictating which schools would receive

---

158 See *supra* note 35 and accompanying text.

159 See *supra* notes 111–12 and accompanying text.

160 See *supra* note 120 and accompanying text.

161 See *supra* Section II.B.

162 See *supra* notes 93–94 and accompanying text.

163 See *supra* Section II.B.

164 See *supra* Section III.B.

165 *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017).

funds.<sup>166</sup> The PPP program operates similarly. First, *all* small businesses are eligible for PPP loans in a neutral fashion—religious institutions receive no preferences or favors.<sup>167</sup> Secondly, since the loans are issued by private lenders, the SBA does not actually distribute any government funds.<sup>168</sup> Thus, even under a neutrality paradigm, the distribution of PPP funds to the Catholic Church faces no constitutional barriers.

A final question, and likely the most uncertain, involves use. Nothing from *Trinity Lutheran* or *Espinoza* precludes the SBA from prohibiting the use of PPP funds for religious purposes. If it did so, multiple scenarios are plausible. On the one hand, the Court seemed ready in *Espinoza* to embrace Justice Gorsuch’s position that use discrimination should be subject to the same level of scrutiny as status discrimination. On the other hand, even he recognized that *Locke’s* holding, which upheld the denial of a scholarship for a theology degree, stemmed from a historic proscription of government funding of church clergy.<sup>169</sup> Undoubtedly, the distribution of PPP loans to the Catholic Church has involved funding the salaries of clergy and other ministerial staff. The SBA and, subsequently, Congress mandated that a minimum of sixty percent of received funds be used for payroll costs, and ministerial employees comprise just over half of parish staff.<sup>170</sup> The Court’s jurisprudence appears too unsettled, post-*Trinity Lutheran* and *Espinoza*, to answer how the Court would respond to a policy of use discrimination, but the Court’s gradual trend toward greater generosity for religious institutions bodes well for potential litigants. For now, this question need not be answered; the SBA’s official policy, even if not guiding the issuance of PPP loans, remains one involving status discrimination, wholly impermissible under *Espinoza*.<sup>171</sup>

### B. *The Equal Protection Clause*

An alternative theory rests on the Equal Protection Clause of the Fourteenth Amendment.<sup>172</sup> Though initially enacted in response to racial discrimination, the Clause’s terms are sufficiently broad to include religious discrimination as well.<sup>173</sup> Professor Eugene Volokh has suggested, in the context of school tuition programs, that the Constitution “requires—and cer-

---

166 See *supra* note 75 and accompanying text.

167 See *supra* notes 30–34 and accompanying text.

168 See *supra* note 29 and accompanying text.

169 See *supra* note 96 and accompanying text.

170 See *supra* notes 32, 43 and accompanying text.

171 See *supra* notes 111–13 and accompanying text.

172 For a detailed discussion of this topic, see generally Michael J. Berger, Note, *The Wholesale Exclusion of Religion from Public Benefits Programs: Why the First Amendment Religion Clauses Must Take a Backseat to Equal Protection*, 33 *TOURO L. REV.* 633 (2017).

173 U.S. CONST. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

tainly allows—equal treatment of religion, not discrimination against it.”<sup>174</sup> Examination of this theory, while a departure from the Court’s precedent regarding the Religion Clauses, is appropriate given the Court’s embrace of a discrimination standard in *Trinity Lutheran*. Such a standard, in fact, seems to align more closely with themes of equal treatment than the establishment or exercise of religion. Moreover, while not gaining enough support to garner a majority, members of the Court have recommended the Equal Protection Clause as a better approach even before *Trinity Lutheran*, like Justice White did in *McDaniel v. Paty*, particularly when religious interference was minimal or unclear.<sup>175</sup>

While certainly not the focus of this Note, the Court’s Equal Protection jurisprudence makes clear that a state’s interest in discriminatory legislation is subject to some level of court review, ranging from mere rational basis to strict scrutiny.<sup>176</sup> Notably, strict scrutiny parallels Chief Justice Roberts’s application in *Trinity Lutheran* of “exacting scrutiny” when states discriminate against religion.<sup>177</sup> The Court has also applied this standard to the Free Exercise challenge in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, which involved local ordinances that targeted the Santeria religion.<sup>178</sup> There, the Court noted that laws that discriminate against religion “will survive strict scrutiny only in rare cases.”<sup>179</sup>

Given this precedent, a doctrinal embrace of an Equal Protection analysis, either exclusively or in addition to a First Amendment analysis, may be a feasible way to promote predictability within the murky Religion Clauses framework. If so, Justice White’s concurrence in *McDaniel* proposes a possible analysis.<sup>180</sup> First, the government imposing a religious exclusion would have to demonstrate an interest driving the exclusion; this is almost certain to be a desire to maintain the separation between church and state.<sup>181</sup> *Trinity Lutheran* and *Espinoza* further require that the state interest is “of the highest order,” as constrained by the Free Exercise Clause.<sup>182</sup> The court would then

174 Eugene Volokh, *Equal Treatment Is Not Establishment*, 13 NOTRE DAME J.L. ETHICS & PUB. POL’Y 341, 347 (1999).

175 See 435 U.S. 618, 643–44 (1978) (White, J., concurring) (arguing that a Tennessee statute that excluded clergy from the state legislature did not deny petitioner’s ability to exercise his religion, but it did deny him equal protection of the laws).

176 See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 451 (1985) (Stevens, J., concurring) (“[O]ur cases reflect a continuum of judgmental responses to differing classifications . . . .”). The varying levels of scrutiny present intricacies and ongoing debates that, for purposes of this Note, are only minimally discussed.

177 See *supra* note 89 and accompanying text; see also *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 161 (1994) (Scalia, J., dissenting) (suggesting that religious belief would be subject to heightened scrutiny).

178 508 U.S. 520, 545–46 (1993).

179 *Id.*

180 See *McDaniel*, 435 U.S. at 643–46; Borger, *supra* note 172, at 667–68.

181 *McDaniel*, 435 U.S. at 645.

182 *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2024 (2017) (quoting *McDaniel*, 435 U.S. at 628); *Espinoza v. Mont. Dep’t Revenue*, 140 S. Ct. 2246, 2260 (2020) (quoting *McDaniel*, 435 U.S. at 628).

apply strict scrutiny, examining both whether the exclusion *actually* serves the government's alleged interest and whether the exclusion is either overinclusive or underinclusive.<sup>183</sup> This paradigm would comport with *Espinoza's* passing suggestion that both status and use discrimination deserve heightened scrutiny.<sup>184</sup>

If applied to the PPP, an Equal Protection analysis leads to the conclusion that the SBA was correct in adopting an inclusionary policy and allowing the distribution of funds to houses of worship. Otherwise, if the SBA opted to apply its official policy, it would predictably argue—as in the past—that the policy serves an interest in separating church and state.<sup>185</sup> But, such a policy is unlikely to withstand strict scrutiny. Not only does the SBA's official policy violate the Free Exercise Clause, as discussed above in Section IV.A, but it also is undoubtedly overinclusive. At a minimum, recipients of PPP loans must use sixty percent of funds for payroll costs, and almost half of Catholic Church employees occupy nonministerial (nonreligious) positions.<sup>186</sup> A broad exclusionary policy, thus, would have precluded the use of government funds to cover the salaries of janitors, bookkeepers, secretaries, and the like—all of whom serve secular functions.

Meanwhile, such a policy would also be underinclusive; the prior policy excluded only those entities *principally* engaged in religious activities.<sup>187</sup> A for-profit business, hypothetically, that designs secular clothing with the occasional feature of a Bible verse or religious depiction *would*, in all likelihood, remain eligible. Accordingly, while Justice White's paradigm cannot establish, for certain, the constitutionality of the SBA's PPP policy, it does demonstrate that the alternative would likely violate the Equal Protection Clause.<sup>188</sup>

---

183 *McDaniel*, 435 U.S. at 645. For example, Justice White observed the following factors that weighed against the State: while all states have an interest in maintaining a separation between church and state, only Tennessee imposed a clergy restriction; the disqualification applied only to legislative positions; and it applied even to those ministers whose church duties would not interfere with government service. *Id.*

184 *See supra* note 114 and accompanying text.

185 *See supra* note 36 and accompanying text.

186 *See supra* note 32, 43 and accompanying text.

187 *See supra* note 35 and accompanying text.

188 For an interesting, though certainly unconventional, third approach to the constitutionality of the PPP, a few business owners have argued that the stay-at-home and maximum capacity orders constitute takings under the Takings Clause of the Fifth Amendment, with the PPP and other grants defended as their requisite compensation. Courts and legal scholars, however, have generally dismissed these arguments as implausible at best. *See, e.g.,* *Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 879, 893, 895–96 (Pa. 2020), *cert. denied*, 140 S. Ct. 2758 (mem.) (U.S. May 6, 2020) (No. 19A1032) (finding the exercise of State police powers generally does not raise Takings concerns); SEAN M. STIFF, CONG. RSCH. SERV., LSB10434, COVID-19 RESPONSE: CONSTITUTIONAL PROTECTIONS FOR PRIVATE PROPERTY 4–5 (2020); *Grover Norquist Explains Why His Foundation Took PPP Money From Government*, CNBC (July 13, 2020), <https://www.cnbc.com/video/2020/07/13/grover-norquist-explains-why-his-foundation-took-ppp-money-from-government.html> (featuring an interview with Grover Norquist, where he uses the Takings Clause as justification for applying for PPP loans); Stephen E. Shay, *Turning to the Government (for PPP Money) in Time of Need*,



## CONCLUSION

Despite the heated response to the Catholic Church's receipt of government funding, the SBA adopted the constitutionally correct standard when it deemed the Catholic Church, as well as other houses of worship, eligible for PPP loans. Although American culture and media continue to cling to the traditional notion of the "wall of separation between church and state," the Court has long abandoned such a paradigm. Most recently, in *Trinity Lutheran* and again in *Espinoza*, the Court has embraced a principle of non-discrimination, which prohibits the government from excluding religious entities based on status alone.<sup>189</sup> Moreover, the legal "writing on the wall" suggests this new principle is part of a larger trend, with several members of the Court willing to continue to expand this doctrine in favor of religion. Because the SBA's official policy, which remains in force, relies on a prohibited status-based discrimination, the SBA should, as FEMA did in 2017, officially adopt its inclusive PPP policy.<sup>190</sup> And, other federal agencies should do the same. Such policies not only better align with the Court's First and Fourteenth Amendment jurisprudence, but it also ensures religious entities—as well as those who they employ—are not disadvantaged when the next disaster inevitably strikes. The Free Exercise Clause requires nothing less, and the Establishment Clause requires nothing more.

---

168 TAX NOTES FED. 841, 845–46 (2020) (offering a specific response to Grover Norquist's compensation claims).

189 See *supra* Section II.B.

190 See *supra* Section III.B. In mid-December 2020, the SBA initiated the process for such an amendment with a proposed rule that eliminates the broad exclusion of houses of worship from SBA loan consideration. Regulatory Reform Initiative: Streamlining and Modernizing the 7(a), Microloan, and 504 Loan Programs to Reduce Unnecessary Regulatory Burden, 85 Fed. Reg. 80,676, 80,677–78 (proposed Dec. 14, 2020) (to be codified at 13 C.F.R. pts. 120, 123). The SBA explicitly noted that its prior 1996 regulation was "not consistent with current Supreme Court jurisprudence in that it focuses on the nature of the business . . . instead of on how the loan proceeds . . . will be used." *Id.* at 80,677–78. The SBA has now shifted its focus to assuring that the use of loan proceeds comports with the Establishment Clause, but it has not specified the manner by which it intends to do so. *Id.* at 80,678.

