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ARTICLES

TWO QUESTIONS FOR SCHOOL-CHOICE FUNDING AFTER *CARSON*

Nicole Stelle Garnett[1*] & John A. Meiser[2**]

ABSTRACT

In a series of recent cases, the Supreme Court of the United States has made clear that the First Amendment's Free Exercise Clause prohibits religious discrimination in public benefit programs. That is, when the government creates a public benefit program, the Free Exercise Clause prohibits it from excluding private entities from participating because of their religious character or status or because they engage in religious conduct. This essay addresses two questions left unresolved by these cases and flags a third. The first question is what is private?[3] The religious nondiscrimination principle applies only when the government aids private conduct. But the line between governmental and private conduct is not always clear in the public benefit context. The second question is whether the nondiscrimination principle applies with equal force when the government directly funds private conduct, rather than when government funding flows to religious organizations as the result of an intervening private choice. The final question, which we flag but do not attempt to answer, is about the permissible range or regulations that can be imposed upon religious organizations as a condition of participating in public programs.

INTRODUCTION

In a series of recent cases—*Trinity Lutheran Church and School v. Comer*,[4] *Espinoza v. Montana Department of Revenue*,[5] and *Carson v. Makin*[6]—the Supreme Court of the United States clarified that the First Amendment's Free Exercise Clause prohibits religious discrimination in public benefit programs. That is to say, when the government establishes programs that engage private actors to advance public goals, including

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[2**] Associate Clinical Professor of Law and Director, Lindsay and Matt Moroun Religious Liberty Clinic, Notre Dame Law School. The author, and Notre Dame Law School's Religious Liberty Clinic, represented St. Isidore Catholic Virtual School in the litigation discussed in this Article, but writes here in a personal, scholarly capacity. The views expressed herein are the author's alone and do not necessarily reflect the views of the St. Isidore school or its founders.

[3] *See infra* Part I.

[4] 582 U.S. 449 (2017).

[5] 591 U.S. 464 (2020).

[6] 596 U.S. 767 (2022).

to this nondiscrimination principle throughout this article as the "*Carson* principle."

To understand the significance of the *Carson* principle, it is necessary to step back and view the legal arc of the Court's First Amendment jurisprudence addressing the question of whether and when the government can—and must—fund private religious conduct. In the latter half of the twentieth century, the Court issued several opinions that called into question the constitutionality of programs that extended government benefits to religious institutions.[7] But in the 1990s and early 2000s, the Court signaled an important course correction and made clear that such programs were by and large constitutionally permissible. At the heart of the contemporary approach to such programs is the Court's 2002 decision *Zelman v. Simmons-Harris*.[8] In *Zelman*, the Court rejected an Establishment Clause challenge to a publicly funded school voucher program that enabled disadvantaged children in Cleveland to attend private schools.[9] The Court upheld the program because it was neutral toward religion, inviting both secular and religious schools to participate, and because public funds flowed to religious schools only as the result of an intervening private choice.[10]

While *Zelman* rejected the argument that the Establishment Clause required the exclusion of religious organizations from such programs, it was silent as to whether the First Amendment's neutrality mandate *required* their inclusion.[11] That question was answered in *Trinity Lutheran, Espinoza*, and *Carson*. In *Trinity Lutheran*, the Court held that Missouri unconstitutionally excluded a faith-based preschool from receiving state grants to fund playground improvements.[12] Chief Justice John Roberts's opinion for the Court concluded that Missouri's policy put the Lutheran preschool to an unconstitutional choice: "It may participate in an otherwise

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[7] Nicole Stelle Garnett, *The Legal Arc of School Choice*, in FIGHTING FOR THE FREEDOM TO LEARN: EXAMINING AMERICA'S CENTURIES OLD SCHOOL CHOICE MOVEMENT (James V. Shuls & Neal P. McCluskey, eds. 2025).
[8] 536 U.S. 639 (2002).
[9] *See id.* at 643–44.
[10] *See id.* at 652.
[11] *See generally id.* at 644 ("The question presented is whether this program offends the Establishment Clause of the United States Constitution. We hold that it does not.").
[12] *See* Trinity Lutheran Church v. Comer, 582 U.S. 449, 453-54, 467 (2017).

available benefit program or remain a religious institution."[13] In *Espinoza*, the Court concluded that the Montana Supreme Court unconstitutionally invalidated a private-school-choice program because it included faith-based schools.[149] Writing again for the Court, Roberts observed, "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."[15]

Finally, *Carson* answered a question about the scope of the First Amendment's religious nondiscrimination mandate that was left open in *Trinity Lutheran* and *Espinoza*.[16] In both cases, the Court concluded that the challenged policies discriminated against recipients based on their religious *character* (or status) and declined to say whether a state could refuse to provide funds in order to avoid them being *used* to support religious *conduct* (for example, religious instruction).[17] In *Carson*, the Court rejected this so-called status/use distinction.[18] The case concerned a free-exercise challenge to Maine's private-school-choice program, which allowed rural students to use the public funds allocated for their secondary education at any school, public or private, as long as the education it offered was "nonsectarian."[19] Maine contended that the exclusion was not religious discrimination but rather necessary to avoid funding religious instruction.[20] The Court rejected these arguments, holding that such "use-based" discrimination against religious conduct was just as offensive to the First Amendment as discrimination based upon the religious status, or character, of the recipient.[21] After all, as the Court observed in another opinion penned by Chief Justice Roberts, "[e]ducating young

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[13] *Id.* at 462.
[14] *See* 591 U.S. 464, 488–89 (2020).
[15] *Id* at 487.
[16] *See generally* Carson v. Makin, 596 U.S. 767, 787 (2022) ("In *Trinity Lutheran* and *Espinoza*, we held that the Free Exercise Clause forbids discrimination on the basis of religious status. But those decisions never suggested that use-based discrimination is any less offensive to the Free Exercise Clause.").
[17] *See generally Trinity Lutheran Church,* 582 U.S. 448; *see generally* Espinoza v. Mont. Dep't of Revenue, 591 U.S. 464 (2020).
[18] *See* Carson, 596 U.S. at 787 ("In *Trinity Lutheran* and *Espinoza*, we held that the Free Exercise Clause forbids discrimination on the basis of religious status. But those decisions never suggested that use-based discrimination is any less offensive to the Free Exercise Clause.").
[19] *See id.* at 772–73.
[20] *See id.* at 786–87.
[21] *See id.* at 788.

people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school."[22]

Carson answered what is arguably the most important question about the scope of the religious-equality mandate, but it left several others unanswered. This article addresses two of them, and flags a third. All three have played a role in important cases following *Carson*. *First*, what is private?[23] The *Carson* principle applies only when the government aids *private* conduct. But the line between governmental and private conduct is not always clear in the public-benefit context. For example, are charter schools, which are privately operated but called "public schools," private actors or government ones? What about other government contractors and recipients of public assistance, especially those that are closely regulated? This question is important because the government funds and regulates a wide swath of privately provided services. In the charter-school context, it is the pivotal question. If charter schools are effectively private schools, then laws prohibiting them from being religious are unconstitutional; but if they are government schools, then permitting them to be religious would, under current doctrine, violate the Establishment Clause.[24] The Supreme Court recently considered this question in a recent case challenging Oklahoma's prohibition on religious charter schools, *St. Isidore of Seville Catholic Virtual School v. Drummond*.[25] The Court did not answer the question, however, as the Justices deadlocked, 4-4, with Justice Barrett recusing.[26] The Court therefore affirmed a lower court decision concluding that Oklahoma charter schools are government actors, but with no written opinion, it left the question itself unresolved.[27] This article addresses this important question, which has implications

[22] Carson v. Makin, 596 U.S. 767, 769 (2022).
[23] *See infra* Part I.
[24] *See* S. Ernie Walton, *Charter Schools and State Action: An Analysis Through the Lens of Agency Law*, 77 OKLA. L. REV. 915, 927 (2025) ("If charter schools are state actors, then religious charter schools violate the Establishment Clause. If charter schools are not state actors, then refusing to approve religious charter schools likely violates the Free Exercise Clause.").
[25] 605 U.S. 165 (2025).
[26] *See id.* at 166.
[27] *See generally id.* ("The judgment is affirmed by an equally divided Court. Justice Barrett took no part in the consideration or decision of these cases.").

beyond the schools context because the government funds an enormous amount of private conduct and regulates even more.[28]

Second, what is the status of the supposed distinction between "direct" and "indirect" funding programs that seemed to play an important role in the Court's decision to uphold the voucher program at issue in *Zelman*?[29] In the *Drummond* litigation, the respondents also argued that—even if the St. Isidore charter school were private—funding it was constitutionally prohibited because charter schools are *direct funding* programs.[30] We dispute this characterization. Charter schools, at least in Oklahoma, are properly understood as programs of private choice because state funding only flows to charter schools based on the number of children whose parents independently choose to enroll them there.[31] But we also reject the underlying premise that the *Carson* principle applies only in so-called programs of "true private choice."[32] Rather, the Supreme Court's recent cases in this area leave *Zelman*'s previous distinction between direct and indirect funding programs on shaky ground. Today, the Court has signaled an understanding of the Establishment Clause that does not turn on the *specific method* of state funding but instead on the question of whether that funding has been offered in an *evenhanded* way with respect to religion.

Finally, we close with a brief reflection on a third category of questions raised by regulations that might be imposed as a *condition* of participating in a public benefit program, including charter-school programs. We leave those important questions to one side here, other than to acknowledge that the resolution of the two questions discussed here will not resolve all questions about religious charter schools (or for that matter, other kinds of public benefit programs). These many questions are already being litigated across the country in regard to a wide variety of public benefits programs and will surely make their way to the Court to resolve, whether in the charter-school context or otherwise.

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[28] *See* Brief for Jewish Coalition for Religious Liberty et al. as Amici Curiae Supporting Petitioners, Charter Day Sch., Inc. v. Peltier, 143 S.Ct. 2657 (2023) (No. 22-238), 2022 WL 11239359 (providing a fuller description of the broad implication of this public-private question).

[29] *See infra* Part II.

[30] *See* Brief for Respondent at 46–49, Okla. Statewide Charter Sch. Bd. v. Drummond, 606 U.S. 165 (2025) (No. 24-394).

[31] *See infra* Part II.

[32] Zelman v. Simmons-Harris, 536 U.S. 639, 649 (2002).

I. WHAT IS "PRIVATE"?

The Supreme Court has made clear that the *Carson* principle applies only when the government creates a program that provides public benefits—monetary or otherwise—to *private* organizations. As the Court observed in *Espinoza*, 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."[33] This makes sense, of course, as the First Amendment guarantees free exercise rights to private individuals, not the government itself. The government can—under current Establishment Clause doctrine, generally must—limit its own activities to "secular" ones. In *Carson*, Maine therefore sought to justify the exclusion of "sectarian" schools from its voucher program by characterizing the "public benefit" it offered as providing rural students "'the rough equivalent of [a Maine] *public school* education,' an education that cannot include sectarian instruction."[34] The Court rejected this argument, reasoning that "the differences between private schools eligible to receive tuition assistance under Maine's program and a Maine public school are numerous and important."[35] But the Court did not directly address what kinds of government funding programs might fall on the other side of the public-private divide.

Carson had few immediate implications for existing private-school-choice programs. According to the parental-choice advocacy and research group EdChoice, thirty-five states, D.C., and Puerto Rico each have one or more programs that subsidizes private educational options, including tuition at private schools.[36] Only two states—Maine and Vermont—ever excluded religious schools from participating. Longer term, *Carson*'s implications for K-12 education policy outside the private-school-choice context are significant. Depending upon which side of the public-private line charter schools fall, *Carson* could open the door to (and has already prompted litigation about) religious charter schools in the forty-five states (and the

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[33] Espinoza v. Mont. Dep't of Revenue, 591 U.S. 464, 487 (2020).
[34] Carson v. Makin, 596 U.S. 767, 782 (2022) (emphasis added).
[35] *Id.* at 783 (observing that private schools do not have to accept all students, are exempted from state curricular requirements, may hire non-state-certified teachers, and can be single sex).
[36] *School Choice Facts & Statistics*, EDCHOICE, https://www.edchoice.org/school-choice/fast-facts (last visited Feb. 13, 2026).

District of Columbia) that currently authorize charter schools. According to the National Alliance for Public Charter Schools, there are 8,140 charter schools in the United States, which educate over 3.8 million students.[37] All states require that charter schools be "secular"; many also prohibit religious institutions from operating them at all.[38] Opening the legal door to religious charter schools would extend the public funds through charter programs to faith-based schools, which would mark a significant change in the K-12 educational landscape.[39]

Understanding the potential for religious charter schools to receive public funding requires a closer look at the unique legal and operational structure of charter schools, which blurs the line between private initiative and government action. Charter schools present an interesting puzzle for the question of what kinds of activity are "governmental." Charter schools are privately designed and operated but universally designated by law to be "public schools." They operate by virtue of a contract (a "charter") between a charter-school authorizer (usually a school district or state agency, although in some states, colleges and nonprofits—including religious ones—act as authorizers)

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[37] *Fast Facts*, NAT'L ALLIANCE FOR PUBLIC CHARTER SCHOOLS, https://data.publiccharters.org/ (last visited Mar. 1, 2026).

[38] Nicole Stelle Garnett, *The Supreme Court Opens the Door to Religious Charter Schools*, EDUCATION NEXT, Spring 2023, at 11.

[39] That said, as the private-school-choice movement gains momentum, the on-the-ground impact of the answer diminishes in practical significance because alternative public funding mechanisms are available. Nicole Stelle Garnett, *What Would Religious Charter Schools Mean for Education Choice?*, EDUCATION NEXT, Summer 2025, at 76. All told, 34 states have at least one private school choice program that enables parents to use public funds to send their children to private schools or educate them at home. Nicole Stelle Garnett, *Parental Rights are on the Move*, NATIONAL REVIEW (Aug. 21, 2025, at 15:07 EST), https://www.nationalreview.com/magazine/2025/10/parental-rights-are-on-the-move. Eighteen states now extend eligibility to participate to all children. *Id*. Over fifty percent of K-12 age children are eligible to participate in a private school program, and about 1.5 million currently do. *Id*; *See* EdChoice, *supra* note 36. The number of participants is expected to grow in the near term, especially because Texas's universal Education Savings Account program will launch in the fall of 2026. *States with and without Universal School Choice Programs*, BALLOTPEDIA, https://ballotpedia.org/States_with_and_without_universal_school_choice_programs. Additionally, the inclusion of the first ever private-school-choice program in the "Big Beautiful Bill" has the potential to bring choice to all states in 2027. Frederick Hess, *What Could the New Federal Tuition Tax Credit Mean for School Choice?*, EDUCATION WEEK, (Oct. 8, 2025), https://www.aei.org/op-eds/what-could-the-new-federal-tuition-tax-credit-mean-for-school-choice.

and a school operator (mostly private nonprofits, although a few states allow for-profit charter schools). In order to foster pluralism and educational opportunity, these schools are, by design, freed from many of the regulations governing traditional public schools, which are operated by school districts. And, they are schools of choice: Children only attend charter schools when their parents choose to enroll them.[40] The actions of private individuals and organizations usually remain "private" even when the government funds and regulates them, and those private groups retain their constitutional rights, including the First Amendment right to be free from religious discrimination. But, as discussed below, in a minority of cases, the actions of private groups may be treated as the government's own—and thus unprotected by the Free Exercise Clause and bound by the Establishment Clause—based upon its exercise of extensive control over those actions.

The constitutionality of laws prohibiting religious charter schools was in question even before *Carson*.[41] Indeed, Justice Breyer flagged the issue in his dissent in *Espinoza* asking, "What about charter schools?"[42] He reiterated his question in his *Carson* dissent: "What happens once 'may' becomes 'must'? . . . Does it mean that . . . charter schools must pay equivalent funds to parents who wish to give their children a religious education?"[43] *Carson* itself does not provide an answer,[44] but Justice Breyer's

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[40] *See* Nicole Stelle Garnett, *Religious Charter Schools: Legally Permissible? Constitutionally Required?*, MANHATTAN INSTITUTE (Dec. 2020), https://media4.manhattan-institute.org/sites/default/files/religious-charter-schools-legally-permissible-NSG.pdf [hereinafter Garnett, *Religious Charter Schools*].

[41] *Id.*; *see* Nicole Stelle Garnett, *Sector Agnosticism and the Coming Transformation of Education Law*, 70 VAND. L. REV. 1, 43 (2017); *see* Stephen Sugarman, *Is It Unconstitutional to Prohibit Faith-Based Schools from Becoming Charter Schools?* 32 J.L. & RELIGION, 227 (2017); Aaron J. Saiger, *Charter Schools, the Establishment Clause, and the Neoliberal Turn in Public Education*, 34 CARDOZO L. REV. 1163 (2013).

[42] 591 U.S. 464, 537 (2020) (Breyer, J., dissenting).

[43] 596 U.S. 767, 795 (2022) (Breyer, J., dissenting).

[44] *See* Justin Driver, *Three Hail Marys:* Carson*,* Kennedy*, and the Fractured Détente over Religion and Education*, 136 HARV. L. REV. 208, 230–31 (2022) ("What light, if any, does *Carson* shed on this burgeoning debate over whether charter schools will be classified as public or private, bearing in mind all that this classification entails for both the Religion Clauses and the future of American education? An honest answer must acknowledge that *Carson* is ambiguous on this score, as evidence can be placed in both the

query turns on two related questions. The first is whether charter schools are governmental entities—that is to say, they *are part of the government*, even if operated by private organizations.[45] The second is whether, even if they are private entities, charter schools nevertheless perform "state action." The Supreme Court has long cautioned that "a private entity can qualify as a state actor" only "in a few limited circumstances."[46] Under the state-action doctrine, privately operated entities are not bound by the federal Constitution except when they are so pervasively controlled by, or intertwined with, the government that their actions are effectively the government's actions.[47] These questions are pivotal because the Supreme Court has made clear that the Establishment Clause requires the government, including government schools, to be secular. Thus, if charter schools are governmental entities, or if otherwise private entities perform "state action" by operating such schools, then laws requiring charter schools to avoid religious instruction may not be only constitutionally permissible, but constitutionally required.[48] On the other hand, if charter schools are private actors, then states with charter-school programs not only *may* permit religious charter schools but—after *Carson*—*must* permit them. That is to say, if charter schools are, for federal constitutional purposes, private schools, then states cannot prohibit religious schools from participating in programs to operate them.[49]

These questions were at the center of the litigation over Oklahoma's approval of the nation's first religious charter school, St. Isidore of Seville Catholic Virtual School. In late

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public and the private columns. In perhaps the most crucial passage of Chief Justice Roberts's opinion for the Court, he identified 'numerous and important' 'differences between private schools eligible to receive tuition assistance under Maine's program and a Maine public school.'").

[45] Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 391 (1995) (holding that, despite a law designating it a "private" entity, AMTRAK was a governmental entity created by virtue of a special Congressional statute).

[46] Manhattan Cmty. Access Corp. v. Halleck, 587 U.S. 802, 809 (2019).

[47] *See generally* Garnett, *Religious Charter Schools*, *supra* note 40; s*ee also* Allen Rostron, *Saints, Satanists, and Religious Public Charter Schools*, 59 TULSA L. REV. 451, 471–72 (2024) ("[T]here are two ways for something to be state action. The first prong relates to the character of the violation of constitutional rights. It's about what happened, and whether it emanates from the government. The second prong is about who did it and whether that party has a sufficiently close connection to the government.").

[48] *See* Garnett, *Religious Charter Schools*, *supra* note 40.

[49] *See* Garnett, *supra* note 38.

2022, then–Oklahoma Attorney General John O'Connor issued an opinion advising the Statewide Virtual Charter School Board that the U.S. Constitution requires it to allow religious schools to participate in the charter-school program because Oklahoma charter schools "are not state actors." [50] Rather, he concluded, the State "has decided to let private organizations establish and operate charter schools."[51] "And once qualified private entities are invited into the program, Oklahoma cannot disqualify some private persons or organizations 'solely because they are religious.'"[52] This opinion cleared the way for St. Isidore—a joint project of the Archdiocese of Oklahoma City and the Diocese of Tulsa, which sought to deliver a high-quality Catholic education virtually across a large rural state—to apply to operate a Catholic charter school in Oklahoma. In June 2023, the Board voted to approve the application and thereafter executed a contract with the school.[53] That contract reaffirmed that the St. Isidore charter school "is a privately operated religious non-profit organization" that "has the right to freely exercise its religious beliefs and practices consistent with its religious protections."[54]

Soon after the Board entered into the contract with St. Isidore, Oklahoma Attorney General Gentner Drummond, who had replaced O'Connor and revoked his opinion letter,[55] sought a writ of mandamus from the Oklahoma Supreme Court to cancel St. Isidore's contract. He argued that permitting a religious charter school would violate the Establishment Clause and two related provisions of the Oklahoma Constitution.[56] The court agreed with Drummond and ordered the Board to terminate its contract with St. Isidore. The majority rejected St. Isidore's argument that provisions of Oklahoma law prohibiting religious charter schools violated the First Amendment. According to the court, the Supreme Court's recent free exercise precedents did not apply because, by virtue of its contract with the Board, St. Isidore had become "a governmental entity and

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[50] OKLAHOMA ATTORNEY GENERAL, OK AG OPINION 2022-7, at 13 (2022).
[51] *Id.* at 14.
[52] *Id.* at 6.
[53] *See* Drummond v. Okla. Statewide Virtual Charter Sch., 558 P.3d 1, 6 (Okla. 2024).
[54] *Id.* at 7.
[55] *Drummond Withdraws Opinion Enabling State-Funded Religious Schools*, OKLA. OFF. OF THE ATT'Y GEN. (Feb. 23, 2023), https://oklahoma.gov/oag/news/newsroom/2023/february/drummond-withdraws-opinion-enabling-state-funded-religious-schoo.html.
[56] *See Drummond*, 558 P.3d at 6.

state actor" that "will be acting as a surrogate of the State in providing free public education."[57] Based on these conclusions, the court held that funding St. Isidore would violate the federal Establishment Clause and Oklahoma Constitution.[58] In January 2025, the Supreme Court of the United States granted *certiorari* in the case, but following argument, the opinion below was affirmed—without opinion—by an equally divided court, leaving these questions unresolved.[59]

A. Are Charter Schools Governmental Entities?

Before the Supreme Court of the United States, Attorney General Drummond focused his argument primarily on the idea that charter schools in Oklahoma are themselves "governmental entities"—that is, they are instrumentalities of the State of Oklahoma itself.[60] One point is undisputed: The private nonprofit organization that conceived of the school and applied to operate it was a "private religious institution"—namely, St. Isidore of Seville Virtual Charter School, Inc., an entity formed by Oklahoma's two Catholic dioceses. [61] Nevertheless, Drummond argued that this organization was a "distinct entity" from the charter school that it proposed to form and operate.[62] That school, he reasoned, was created by virtue of the contract between the Board and the nonprofit organization because "[b]efore a contract is validly executed, no 'charter school' exists."[63] And, as a governmental entity, all of St. Isidore Catholic Virtual School's operations were bound by the U.S. Constitution, including the Establishment Clause.

This argument is flawed for two related reasons. The first is that St. Isidore did not splinter into a second entity when it contracted with the government. Indeed, the contract made clear that St. Isidore, the school, and St. Isidore, the private organization that applied to operate that school, were one and the same, composed of the same private governing board and

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[57] *Id.* at 10–11.
[58] *See id.* at 15.
[59] *See* Okla. Statewide Virtual Charter Sch. Bd. v. Drummond, 605 U.S. 165, 166 (2025).
[60] *See* Brief for Respondent, *supra* note 30, at 8; *see also Drummond*, 558 P.3d at 11–13.
[61] *See* Brief for Petitioners at 1, Okla. Statewide Charter Sch. Bd. v. Drummond, 605 U.S. 165 (2025) (No. 24-394); *see* Brief for Respondent, *supra* note 30, at *13–15.
[62] *See* Brief for Respondent, *supra* note 30, at *35.
[63] *Id.* at *8.

subject to the same private organizational structure and bylaws.[64] Charter schools in Oklahoma—and we leave to one side the myriad complexities of other states' charter-school programs—are no different than other government contractors, many of which are publicly funded, licensed and closely regulated. As the Supreme Court has made clear, where an organization falls on the private/governmental line is a question of substance, not semantics: Although the language of "creation" frequently is employed when discussing the charter-authorization process, that language does not mean that the applicant becomes a separate legal entity—let alone a governmental entity—when it is approved to operate a charter school.

The second reason is that, even if charter schools are in some sense "created" when an authorizer and operator enter into a contract enabling the latter to operate a school, that does not make charter schools governmental in nature. That has been settled for over two centuries.[65] *All* corporations—including St. Isidore, which was a private, not-for-profit Oklahoma corporation—are creatures of state law, receive a "charter" from the government, and are thus arguably "created" by the government, as Justice Gorsuch pointed out in the oral argument.[66] Indeed, the Supreme Court has previously observed that "[a]ll corporations act under charters granted by a government, usually by a State," and rejected the argument that "[t]hey . . . thereby lose their essentially private character."[67] Nor does the fact that a private corporation *contracts* with the government somehow transform that corporation's essential nature. Moreover, in some states (including Oklahoma), private organizations are empowered to act as charter school authorizers that approve charter-school applications, enter into contracts with operators, and supervise charter schools. It strains credulity, in our view, that a private entity's choice to enter into a

[64] *See* Reply Brief for Petitioners at 7–9, Drummond v. Okla. Statewide Virtual Charter Sch. Bd., 558 P.3d 1 (Okla. 2024) (No. 24-394).
[65] *See, e.g.*, Bank of U.S. v. Planters' Bank of Ga., 22 U.S. (9 Wheat.) 904, 907 (1824); Reg'l Rail Reorganization Act Cases, 419 U.S. 102, 152 (1974).
[66] Transcript of Oral Argument at 97, Drummond v. Okla. Statewide Virtual Charter Sch. Bd., 558 P.3d 1 (Okla. 2024) (No. 24-394); Garnett, *supra* note 38, at 9.
[67] S.F. Arts & Ath., Inc. v. U.S. Olympic Comm., 483 U.S. 522, 543–44 (1987).

contract—particularly a contract with another private entity—somehow "creates" a government entity.[68]

St. Isidore did not bear either of the hallmarks of a government entity as articulated by the Supreme Court. These are (1) "creat[ion] by an enabling statute," and (2) "manage[ment] by a board selected by the government."[69] St. Isidore was not created by an "enabling statute" or special legislation,[70] but instead through the private initiative of a "privately operated religious non-profit organization" formed by two Catholic dioceses. Moreover, even government creation does not make an entity part of the government.[71] An entity does not become part of the State even if "it is erected by the sanction of public authority" and has "objects and operations [that] partake of a public nature."[72] Instead, "[t]he main distinction between public and private corporations is, that over the former," the government has "exclusive and unrestrained control" to "create," "modify," and "destroy" the entity.[73] For example, the Supreme Court has held that the U.S. Olympic Committee (USOC) was "not a governmental actor,"[74] even though Congress "'established'" the USOC through special legislation and "granted the USOC a corporate charter."[75] Congress also "imposed certain requirements on the USOC," mandated that the "federally created" entity "report on its operations and expenditures of grant moneys to Congress each year," and provided the USOC funding "through direct grants."[76] Still, the Supreme Court held that the USOC did not lose its "essentially private character" because it lacked "the additional element of governmental control."[77]

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[68] *See State of Authorizers Report: Who Authorizes*, NAT'L ASS'N OF CHARTER SCH. AUTHORIZERS, https://qualitycharters.org/authorizing-who-authorizes/, (last visited Mar. 1, 2026, at 17:08 EST).
[69] First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba, 462 U.S. 611, 624 (1983).
[70] *See* Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 392 (1995) (holding that, despite a law designating it a "private" entity, AMTRAK was a governmental entity created by virtue of a special Congressional statute).
[71] *See, e.g.*, *Bank of U.S.*, 22 U.S. (9 Wheat.) at 907; *Reg'l Rail Reorganization Act Cases*, 419 U.S. at 152.
[72] JOSEPH K. ANGELL & SAMUEL AMES, TREATISE ON THE LAW OF PRIVATE CORPORATIONS AGGREGATE 25 (11th ed. 1882).
[73] *Id.* at 23.
[74] S.F. Arts & Ath., Inc. v. U.S. Olympic Comm., 483 U.S. 522, 547 (1987).
[75] *Id.* at 543 (citation omitted); *see* 36 U.S.C. § 220501 (2020).
[76] *S.F. Arts*, 483 U.S. at 543 & nn. 23–24.
[77] *Id.* at 544, 545 n.27.

Oklahoma exercises even less control over charter schools. Indeed, had St. Isidore opened, the State would not have appointed or "control[ed] its Board," nor have "define[d] its mission" or dictated its "day-to-day operations."[78] Those matters and control over the school's educational initiatives would have remained with St. Isidore's private leadership. Not a single member of St. Isidore's controlling board, nor any employee that board might have hired, was a government official or publicly appointed. And Oklahoma law tellingly does not vest "political power" or any other "duties which flow from the sovereign authority" in its charter schools.[79]

The extent of control needed to transform a privately operated school into a state or government actor in the charter-school context was left unanswered in the *St. Isidore* case. Lower courts will continue to confront the issue. For example, the Ninth Circuit recently held that *Carson* did not apply to two California charter schools that run independent-study programs for homeschooling parents, which are prohibited by state law from including religious content in their curricular programs. The court concluded that the schools are controlled to such an extent as to be public schools in the traditional sense—which is to say that they are formally state and government entities.[80] In making this conclusion the court relied upon several factors that it believed distinguished California's charter schools from the private schools at issue in *Carson*, including the fact that their curricula must align with state standards and the students must be supervised by state-certified teachers.[81] Before the Supreme Court in the *St. Isidore* case, Attorney General Drummond raised a similar argument. He pointed to certain "factors" that he argued the Supreme Court expressed in *Carson* to distinguish "public" schools from "private" schools.[82] We have serious doubts about the relevance of those factors to the question at issue here. In *Carson*, the Court did not address the state-action question and its opinion does not analyze—let alone declare a test to determine—whether a school is public or private for such

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[78] Dep't of Transp. v. Ass'n of Am. R.R., 575 U.S. 43, 55 (2015); *see also Lebron*, 513 U.S. at 390.
[79] Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 634 (1819).
[80] *See* Woolard v. Thurmond, 152 F.4th 1050 (9th Cir. 2025).
[81] *Id.* at 1055–56.
[82] *See* Brief for Petitioners at 26, Okla. Statewide Charter Sch. Bd. v. Drummond, 605 U.S. 165 (2025) (No. 24-394).

purposes. Instead, the Court merely addressed Maine's argument that it had chosen to fund only certain private schools that were the "rough equivalent" of Maine's publicly operated schools. The Court listed a number of ways that private schools receiving voucher money in Maine differed from Maine's traditional public schools to reject that argument—not to provide a new constitutional standard for distinguishing a "private" school from a "governmental" one.[83] Regardless, the recent Ninth Circuit litigation underscores the point that lower courts will continue to confront (and likely struggle with) questions like these until additional guidance is given by the Supreme Court.

B. Is Operating a Charter School "State Action"?

Even if charter schools are private entities, that leaves the question whether the operation of such schools is, nevertheless, state action attributable to the government in some way. Charter schools are, by design, quite distinct from traditional public schools, which are operated by special purpose local governments called "school districts." Most importantly, they are privately operated and exempt from many public-school regulations. But are they similar enough to district schools to be treated, for federal constitutional purposes, as effectively performing similar state functions?

The Supreme Court's state-action precedents are something of a mess, and the Court has articulated a number of factors to determine whether a privately operated institution is performing state action.[84] These include whether the private actor is performing a function that has been "traditionally the exclusive prerogative of the State";[85] whether the government controls the private actor to such an extent that it is effectively a governmental agent;[86] and the degree of interdependence (or "entwinement") between the government and the private actor.[87] The overarching inquiry is whether there is a sufficiently "close

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[83] *See Carson*, 596 U.S. at 782–84.

[84] *See*, *e.g.*, Martha Minow, *Alternatives to the State Action Doctrine in the Era of Privatization, and the Internet: Directing Law to Serve Human Needs*, 52 HARV. C.R.-C.L. L. REV. 145 (2017); *see also* Michael L. Wells, *Identifying State Actors in Constitutional Litigation: Reviving the Role of Substantive Context*, 26 CARDOZO L. REV. 99 (2004).

[85] Jackson v. Metro. Edison Co., 419 U.S. 345, 353 (1974) (holding that a pervasively regulated public utility was not a state actor).

[86] *See* Blum v. Yaretsky, 457 U.S. 991 (1982).

[87] *See* Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288 (2001).

nexus between the state and the challenged action" to attribute the action to the government.[88] As the Supreme Court has observed, "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State."[89]

Federal courts are divided over whether charter schools engage in state action. In 2010, in *Caviness v. Horizon Learning Center*, the U.S. Court of Appeals for the Ninth Circuit held that an Arizona charter school's employment decisions were not state action, dismissing a lawsuit that alleged that a teacher's termination violated the Fourteenth Amendment's Due Process Clause. The court rejected the teacher's assertion that the law designating charter schools as "public schools" controlled the state-action question. It also rejected the claim that the school was a state actor because it was performing a traditional state function (public education). And it found an insufficient nexus between the state and the school's decision to fire the teacher to characterize that choice as the government's own—even though Arizona initially reviewed and approved the school's charter application, which included the self-created personnel policies at issue. In light of these factors, the court concluded, that general oversight and approval did not convert the termination into governmental conduct.[90]

Relying on *Caviness*, two federal district courts have separately ruled that California charter schools are not state actors. Most recently, in *I.H. v. Oakland School for the Arts*, a judge in the Northern District of California dismissed a student's equal protection claim after finding that the student failed to establish that the school was a state actor. The court explicitly rejected the argument that the charter school was a state actor because California law designated charter schools "public schools."[91] In an earlier decision, *Sufi v. Leadership High School*, another judge in the same district dismissed a teacher's First Amendment claim against a California charter school. The judge reasoned that, although the charter school's dismissal of a teacher (allegedly for

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[88] *Id.* at 295 (citations omitted).
[89] *Blum*, 457 U.S. at 1004; *see also* Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 52 (1999) (collecting cases).
[90] *See* Caviness v. Horizon Cmty. Learning Ctr., Inc., 590 F.3d 806 (9th Cir. 2010).
[91] *See* I.H. v. Oakland Sch. for the Arts, 234 F. Supp. 3d 987 (N.D. Cal. 2017).

speaking out about the unfair distribution of health benefits) was enabled in some way by the state law authorizing the creation of charter schools, the connection between the decision to authorize the school and the school's dismissal decision was too attenuated to be fairly classified as "state action."[92]

In contrast, the U.S. Court of Appeals for the Fourth Circuit held that North Carolina charter schools are state actors in a case alleging that a classical charter school's dress code, which requires girls to wear skirts, violates the Fourteenth Amendment's Equal Protection Clause. The majority's opinion turned on several factors—the degree of public funding, the fact that North Carolina law calls charter schools "public schools," and its conclusion that the state had delegated part of its constitutional obligation to provide public education to charter schools.[93] Several judges vigorously dissented, objecting that the majority had adopted an expansive definition of state action that is inconsistent Supreme Court precedent.[94] Other federal district courts have similarly held that charter schools are state actors because they are designated as public schools by state law or because public education is a traditional function of state governments.[95]

In our view, the approach in *Caviness* is correct. It is easier to explain which attributes of charter schools do not signal state action than to identify ones which might: The first is the fact that they are *schools*. After all, education clearly is not "traditionally . . . the exclusive prerogative of the state" since millions of children are—and have long been—educated in private schools or homeschooled.[96] States routinely engage private schools to

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[92] *See* Sufi v. Leadership High Sch., No. C-13-01598(EDL), 2013 WL 3339441, at *9 (N.D. Cal. July 1, 2013).
[93] *See* Peltier v. Charter Day Sch., Inc., 37 F.4th 104 (4th Cir. 2022) (en banc).
[94] *Id.* at 137–150 (Quattlebaum, J., concurring in part) (dissenting in Court's ruling that charter school was a state actor, joined by Judges Richardson, Rushing, Wilkinson, Niemeyer, and Agee).
[95] *See* Jordan v. N. Kane Educ. Corp., No. 08 C 4477, 2009 WL 509744, at *3 (N.D. Ill. Mar. 2, 2009); *see* Matwijko v. Bd. of Trs. of Glob. Concepts Charter Sch., No. 04-CV-663A, 2006 WL 2466868, at *1 (W.D.N.Y. Aug. 24, 2006); Riester v. Riverside Cmty. Sch., 257 F. Supp. 2d 968, 972 (2002).
[96] *See* Drummond v. Okla. Statewide Virtual Charter Sch., 558 P.3d 1, 17 (Okla. 2024) (Kuehn, J., dissenting) (asserting that "[i]t may be the State's prerogative to create a new, hybrid class of educational institutions called 'charter schools,' but that is not the same as claiming that education itself has traditionally been the exclusive prerogative of the State" (emphasis omitted)). The respondents in *Drummond* avoided the fact that operating a

help educate children, and the fact of such public-private cooperation does not signal that a school performs governmental activity. The second is charter schools' legal designation as "public." The Supreme Court has held that legal categorization of an entity as public or private is not dispositive of the state action question. The Supreme Court has long held that federal constitutional rights do not depend on "state law labels."[97] Were it otherwise, States could manipulate their laws to defeat federal guarantees. Thus, the Supreme Court has always trained its "focus on substance" when adjudicating constitutional questions.[98] The third is the fact that charter schools are regulated and funded by the government. In *Rendell-Baker v. Kohn*, the Supreme Court held that a private school was not a state actor even though it was heavily regulated by, and received more than 90 percent of its funds from, the government. "The school," the Court observed, "is not fundamentally different from many private corporations whose business depends on [government] contracts. . . . Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts."[99]

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school is not traditionally a sign of governmental activity by instead embracing the circular argument that, because providing so-called "public" education is a traditional prerogative of the government, charter schools must be state actors because they are "public" schools. That, of course, only begs the question to be decided—whether charter schools *are* government-run "public" schools in this same sense.

[97] *See* Bd. of Cnty. Comm'rs, Wabanusee Cnty., Kan. v. Umbehr, 518 U.S. 668, 679 (1996); *see* Manhattan Cmty. Access Corp. v. Halleck, 587 U.S. 802 (2019); *Cf.* Vania Blaiklock, *A License to Discriminate: The Risky Next Step of Religious Charter Schools*, 19 HARV. L. & POL'Y REV. 235 (2024) **(**"From the beginning, legislatures have understood charter schools as public schools with private management, meaning that charter schools are able to reshape the boundaries between public and private schooling. In this way, charter schools are unique because localities fund and support them like traditional public schools, but the schools are given more leeway in their management, employment, and curriculum.").

[98] *See* Lindke v. Freed, 601 U.S. 187, 197 (2024); *see* O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712, 721–22 (1996); *see* McElrath v. Georgia, 601 U.S. 87, 96 (2024); *see* United States v. Craft, 535 U.S. 274, 279 (2002); *see* Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 392–93 (1995); *see* NAACP v. Button, 371 U.S. 415, 429 (1963); *see* Carpenter v. Shaw, 280 U.S. 363, 367–68 (1930); *see* Chi., Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 235 (1897); *see also, e.g.*, Harris v. Quinn, 573 U.S. 616, 641 n.10 (2014).

[99] Rendell-Baker v. Kohn, 457 U.S. 830, 840–41 (1982).

Rather than focus on red herrings like these, the state-action question should be one of the government's actual involvement in the challenged actions of a charter school. State regulations of charter schools vary across a range of factors that might be relevant to the state-action question, including, importantly, the degree of government control over their operations. In most, if not all, states, however, we doubt that the level of control is sufficient to turn private action into state action. This is particularly true when courts are called to ask whether the particular *educational program* delivered by a charter schools is attributable to the State. Most states, like Oklahoma, grant charter schools broad autonomy to adopt unique educational programs, the contours of which are outlined in the charters approved by their authorizers.[100] Most important, these waivers usually exempt charter schools from complying with the same curricular mandates that govern public schools to foster a diversity of educational models (although all states must, under federal law, require charter schools to administer the same standardized tests as public schools).[101] Put differently, if it cannot be fairly said that the unique educational design of a Montessori charter school, a STEM charter school, or an arts charter school is fairly attributable to the state, it cannot be said that the educational design of a religious charter school is either. This was certainly true in the *Drummond* litigation.

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Eventually, these questions are likely to return to the Supreme Court. When they do, we predict that the Court will rule that charter schools are private actors, protected by the First

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[100] The Oklahoma program at issue in the *St. Isidore* case provide a representative example. Oklahoma law identifies educational freedom as the very purpose of the charter-school program, which aims to "[i]ncrease learning opportunities for students" by "[e]ncourag[ing] the use of different and innovative teaching methods," and "[p]rovid[ing] additional academic choices for parents and students" alike. Okla. Stat. § 3-131(A). Accordingly, each charter school has the latitude to "provide a comprehensive program of instruction" of its own, including by building "a curriculum which emphasizes a specific learning philosophy or style or certain subject areas." *Id.* § 3-136(A)(3). Each school's private board is "responsible for the policies and operational decisions" that govern its unique program of instruction. *Id.* 3-136(A)(8).

[101] *See, e.g.*, 70 Okla. Stat. § 3-136(A)(5) ("[A] charter school shall be exempt from all statutes and rules relating to schools, boards of education, and school districts.").

Amendment, and that laws prohibiting them from being religiously affiliated or requiring them to be "secular" or "nonsectarian" are unconstitutional. We acknowledge that it is possible, given variations in way they are created and regulated, that charter schools may be state or government actors in some states but not others. In most, however, charter schools are essentially programs of private-school choice, in which case *Carson* makes clear that a state with such a program not only may permit religious charter schools but must permit them. That does not mean that religious schools must, should, or will seek authorization to operate as charter schools. Nor does it mean that the Constitution *requires* states to choose to operate a charter-school system like this. States might choose to actually control the creation, design, and operations of charter schools to such an extent that they become governmental entities or state actors. But most have not—and likely for good reason. Indeed, the educational freedom afforded to charter schools across the country is, in fact, central to the decentralized design of charter-school systems in the first place. Thus, while a state might choose to impose far more exacting control over its charter schools, we believe that exerting such high levels of control would ultimately be a bad idea and threaten the educational pluralism that charter-school laws are designed to foster in the first place.

C. Applications Beyond Charter Schools

It is important to note that the implications for the question of "what is private" extend far beyond the charter-school context.[102] For example, in *Fulton v. City of Philadelphia*, which addressed Catholic Social Services' (CSS)—a private, religious foster care agency—free exercise challenge to regulations that required the placement of foster children in same-sex households, the City argued it was "simply asserting the right to control its own internal operations" and "analogize[d] CSS to either a City employee or a contractor hired to perform an exclusively governmental function."[103] While the majority did not directly address this argument, its holding that the regulations violated the Free Exercise rights of CSS implicitly rejected it. This is important because state, local, and federal governments fund and regulate an enormous amount of private

[102] *See* Elizabeth Sepper & James D. Nelson, *Government's Religious Hospitals*, 109 VA. L. REV. 61, 68–72 (2023) (arguing that some religious hospitals are government actors by virtue of their cooperation with the government).
[103] 593 U.S. 522, 616 (2021).

conduct. And many of the regulations imposed as a condition of receiving public funding in a wide variety of programs explicitly discriminate against religious organizations and religious conduct.[104] It is therefore critical that the Court draw sensible and appropriate lines protecting those programs against ambitious claims of what is "the government's" to control.

II. CAN RELIGIOUS SCHOOLS RECEIVE "DIRECT" STATE SUPPORT?

Even if charter schools like St. Isidore are private actors with full constitutional protections, a second possible distinction from the *Carson* line of cases exists: Because charter schools receive their funding directly *from the state*, they might raise Establishment Clause concerns not presented by the "indirect" schemes in *Carson* and *Espinoza*, where schools received state money as a result of families' private choices. Once again, this argument was raised by the respondents in the *St. Isidore* litigation. There, Drummond reiterated the observation in *Zelman* that the Supreme Court's cases have "drawn a consistent distinction between government programs that provide aid directly to religious schools, and programs of "true private choice," in which "government aid reaches religious schools only as a result of the genuine and independent choices of private individuals."[105] And, once again, it is a question that had been flagged by justices in both *Espinoza* and *Carson*[106]—but which is answered by neither case.

This argument, in our view, is a red herring. To be sure, the line between aid that flows "directly" to religious schools as a result of a governmental decision and aid that flows "indirectly" to them through intervening private choice is one that the Supreme Court has long marked.[107] But it is also a line that charter-school programs do not cross. Much like private-school vouchers or tuition reimbursements, charter schools in Oklahoma (and elsewhere) receive state money only based upon

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[104] *See Protecting Religious Organizations from Discrimination,* RELIGIOUS EQUAL., https://religiousequality.net (last visited Mar. 2, 2026).
[105] Zelman v. Simmons-Harris, 536 U.S. 639, 649 (2002); *see* Brief for Respondent, *supra* note 30, at 46.
[106] *See, e.g.*, Transcript of Oral Argument at 24–27, Espinoza v. Mont. Dep't of Rev., 591 U.S. 464 (2020) (No. 18-1195) (Breyer, J., questioning); *see* Transcript of Oral Argument at 31–32, Carson v. Makin, 596 U.S. 767 (2022) (No. 20-1088) (Breyer, J., questioning); *see* Brief for Respondent, *supra* note 30, at 45–48 (Barrett, J., questioning).
[107] *See, e.g.*, *Zelman*, 536 U.S. at 649.

the independent private decisions of parents to enroll their children in those schools.[108] More fundamentally, the line dividing direct and indirect aid programs is one that has shifted dramatically in recent decades, and whose constitutional salience seems to be diminishing. Following both *Carson* and the Supreme Court's recent decision in *Kennedy v. Bremerton School District*, we hold serious doubt about the vitality of the premise that the government must exclude religious organizations from receiving forms of "direct" public aid.

A. Prohibitions on "Direct" Advancement of Religion Under Lemon

The distinction between "direct" and "indirect" support for religious schools developed primarily in the 1970s, in a series of cases borne out of the much-derided—and since abrogated—Establishment Clause framework established in *Lemon v. Kurtzman*.[109] The early formulations of that line hold little weight today; indeed, the key premises that led to the distinction run headlong into both *Carson* and *Kennedy*.

The distinction has its roots in *Everson v. Board of Education*,[110] one of the earliest cases in this area. There, the Court upheld a New Jersey law that subsidized bus transportation for schoolchildren, including those attending religious schools. Perhaps surprisingly, the Court began by articulating a separationist premise that would seem to have undermined that law: The Establishment Clause "means at least" that the government may not "pass laws which aid one religion, aid all religions, or prefer one religion over another," and no tax "in any amount," may be "levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt."[111] But the Court then drew an important distinction to explain what it meant by "support" for religious institutions. Even though New Jersey's law benefitted religious schools by facilitating children's ability to attend them, the Court explained that it did not violate the Establishment Clause because the state "contribute[d] no money to the schools."[112] New Jersey could, the Court held, at least *incidentally* support such institutions through this "general program to help parents get their children, regardless of their

[108] *See infra* Part II.B.1.
[109] 403 U.S. 602 (1971).
[110] *See* 330 U.S. 1 (1947).
[111] *Id.* at 15–16.
[112] *Id.* at 18.

religion," to and from school.[113] The key was that New Jersey had chosen to offer "benefits to *all* its citizens without regard to their religious belief"—a constitutionally permissible choice because the Establishment Clause merely requires "the state to be a neutral in its relations with groups of religious believers and non-believers."[114]

Everson's focus on evenhanded support was ultimately overshadowed by the "indirect" nature of the New Jersey law it upheld. As the dissenters noted, there was tension between *Everson*'s resolute language *against* aid to religious schools and its result which allowed exactly that.[115] In an effort to resolve that tension, *Everson* was soon characterized as only upholding the constitutionality of funding programs that allowed public money to flow to religious schools indirectly[116] but not those that paid such money to the schools themselves.[117] The prevailing theory became that only programs which *incidentally* benefit religious institutions avoid the sort of "support for" religion that *Everson* suggested would be constitutionally barred.[118]

In a series of cases beginning in 1970, the Supreme Court ingrained this distinction explicitly. During this period, the "three main evils" that the Court understood the Establishment Clause to address were the "sponsorship, financial support, and active involvement of the sovereign in religious activity."[119] *Lemon* formalized these Establishment Clause "evils" into a

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[113] *Id.*

[114] *Id.* at 16, 18 (emphasis added).

[115] *See, e.g.*, *id.* at 19 (Jackson, J., dissenting) ("[T]he undertones of the opinion, advocating complete and uncompromising separation . . . seem utterly discordant with its conclusion."); *see also* Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 671 (1970) (noting the tension).

[116] Of course, *Everson* was not read to uphold *all* indirect support of religious schools. *See Everson*, 330 U.S. at 16–18.

[117] *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602, 621 (1971); McCollum v. Bd. of Educ. of Sch. Dist. No. 71, 333 U.S. 203, 248–49 (1948) (Reed, J., dissenting); *see* Protestants & Other Ams. United for Separation of Church & State v. United States, 435 F.2d 627, 629–30 (6th Cir. 1970).

[118] Indeed, that reading of *Everson* was championed by President John F. Kennedy himself, whom Justice Douglas later quoted as having argued that the "*Everson* case . . . [suggested] a very clear prohibition against aid to the school direct. . . . Aid to the school is—there isn't any room for debate on that subject. It is prohibited by the Constitution." Tilton v. Richardson, 403 U.S. 672, 690 (1971) (Douglas, J., dissenting in part) (quoting The President's News Conference of March 1, 1961, 1 PUB. PAPERS 142–43 (March 1, 1961)).

[119] *Walz*, 397 U.S. at 668; *accord Lemon*, 403 U.S. at 612; *see* Meek v. Pittenger, 421 U.S. 349, 359 (1975).

three-part doctrinal test. Under the *Lemon* test, a law would be invalid if it lacked a secular purpose, had the primary effect of advancing religion, or entangled government officials too greatly in religious affairs.[120] Under the most aggressive reading—one advanced by Justice Douglas in a concurring opinion in *Lemon*—this would mean that no public financial support could be given to religious schools for any purpose. Justice Douglas's theory was one of basic economics: every dollar given to a religious school would necessarily advance religion because it would free up another dollar of the school's own money to be spent toward religious ends.[121] And the Court had previously acknowledged that even in-kind services might in some way facilitate schools' religious missions in a similar way.[122] But a majority of the Court never adopted the view that all state support for religious schools was unconstitutional, a view which would defy *Everson* itself.[123] Instead, the Court read *Everson* to distinguish between funding programs that would directly aid the "religious mission" of the school and those which might only have the incidental effect of doing so.[124]

As Professor Carl Esbeck has identified, the Court's distinction controversially "assume[d] that a sacred/secular dichotomy accurately describes the world of religion and the work of faith-based" educators.[125] Under that framing, States could offer aid so long as it was limited to the *secular* functions of a school.[126] This, in turn, meant the Supreme Court drew

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[120] *See Lemon*, 403 U.S. at 612–13.

[121] *See id.* at 641 (Douglas, J., concurring).

[122] *See* Bd. of Educ. v. Allen, 392 U.S. 236, 243–44 (1968).

[123] *See* Hunt v. McNair, 413 U.S. 734, 743 (1973) ("[T]he Court has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends.").

[124] Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 779–80, 783 (1973); *see also, e.g.*, Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373, 393 (1985) (distinguishing "indirect" and "incidental" benefits to religious schools from "forms of aid that provide a 'direct and substantial advancement of the sectarian enterprise'" (quoting Wolman v. Walter, 433 U.S. 229, 250 (1977))); *Meek*, 421 U.S. at 366, 369 (asking whether funding program "results in the direct and substantial advancement of religious activity").

[125] Carl H. Esbeck, *A Constitutional Case for Governmental Cooperation with Faith-Based Social Service Providers*, 46 EMORY L.J. 1, 9 (1997).

[126] *See, e.g.*, *Nyquist*, 413 U.S. at 775 ("[S]ectarian schools perform secular, educational functions as well as religious functions, and . . . some forms of aid may be channeled to the secular without providing direct aid to the sectarian.").

questionable lines between schools based on its perception of how easily they might divide their religious and secular work. "Pervasively" religious schools—those which did not confine religious formation to "formal courses" or "a single subject area"[127]—presented the danger that support for *any* function would in some sense be "religious."[128] But, "if an organization's secular and religious functions [were] reliably separable, direct assistance [could] be provided for the secular functions alone."[129]

This all but doomed financial support to the "pervasively" religious schools. In *Lemon*, for example, the Court struck down two programs that helped offset "rapidly rising" teaching salaries by supplementing the salaries of teachers who taught "secular subjects" in private schools.[130] But, the Court worried, "a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral."[131] The Court cautioned that significant effort would be required to ensure that the money would be used to support only "secular, neutral, [and] nonideological" instruction in schools with a "substantial religious character."[132] And that "comprehensive, discriminating, and continuing state surveillance" meant that the programs ultimately demanded unconstitutionally "excessive and enduring entanglement

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[127] Lemon v. Kurtzman, 403 U.S. 602, 618–19 (1971).

[128] *See Hunt*, 413 U.S. at 743 ("Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting.").

[129] Esbeck, *supra* note 125, at 10; *see also Hunt*, 413 U.S. at 743 (upholding revenue-bond financing for a Baptist-affiliated college because the institution was not "pervasively sectarian" and its secular educational functions were distinguishable from any religious mission). *See generally* Roemer v. Bd. of Pub. Works of Md., 426 U.S. 736, 751–53 (1976) (discussing distinctions in funding pervasively vs. non-pervasively religious institutions). Although the Court itself never gave a clear definition of "pervasively" religious institutions, Esbeck highlights several features that can be distilled by comparing cases in which schools were found to be pervasive or not. He highlights, among other things, the salience of features such as religious restrictions on faculty appointments and student admissions, mandatory religious services, religiously informed codes of conduct, and integration of religion into the curriculum. *See* Esbeck, *supra* note 125, at 10 n.31.

[130] 403 U.S. at 607.

[131] *Id.* at 618.

[132] *Id.* at 616.

between state and church."[133] Professors Ira Lupu and Robert Tuttle recently described this as "the catch-22 of direct school aid programs" under *Lemon*: "[T]hey either unconstitutionally support religious experience, or they unconstitutionally intrude on teaching to ensure avoidance of that support."[134] The Court later held that the same was true even where public employees came to private schools to offer auxiliary services, lest they be influenced by the prevailing religious "atmosphere" of "religion-pervasive institutions" they were visiting.[135] Indeed, this line of reasoning even doomed programs that provided money to reimburse schools for purchases of certain secular *materials*.[136] The Court explained that any sort of "continuing cash subsid[ies]" to pervasively religious schools would require the same impermissibly entangling "control and surveillance" to monitor the nature of the purchases reimbursed.[137] Not even tuition reimbursements or tax credits given to parents who sent their children to pervasively religious institutions were safe.[138]

As a result, meaningfully religious schools could mostly receive limited in-kind benefits "unrelated to [their] primary, religion-oriented educational function"—things like bus transportation or school lunches.[139] Even there, the Court upheld the aid only if it would not be easily "diverted" to religious ends.[140] Strange lines emerged as the Court struggled to identify which aspects of religious schooling were, indeed, religious or which sorts of benefits might be employed to support them. For example, in *Meek v. Pittenger*, the Court upheld a Pennsylvania program that loaned secular textbooks to children who attended

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[133] *Id.* at 619.
[134] Ira C. Lupu & Robert W. Tuttle, *The Remains of the Establishment Clause*, 74 HASTINGS L.J. 1763, 1778 (2023).
[135] Meek v. Pittenger, 421 U.S. 349, 366, 371 (1975); *accord* Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373, 385–88 (1985).
[136] *Lemon*, 403 U.S. at 621.
[137] *Id.* at 621; *see also* Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 776–77 (1973) (striking down program providing "maintenance and repair" grants to religious schools because it failed to ensure that the money would not be used to maintain buildings "in which religious activities are to take place").
[138] *See Nyquist*, 413 U.S. at 783 ("By reimbursing parents for a portion of their tuition bill, the State seeks to relieve their financial burdens sufficiently to assure that they continue to have the option to send their children to religion-oriented schools. . . . [T]he effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions.").
[139] *Meek*, 421 U.S. at 364.
[140] *See id.* at 357.

religious schools but disallowed the provision of instructional materials and classroom equipment to the schools themselves.[141] The Court reasoned that the textbooks were useful for "purely secular purposes," whereas other items like maps, lab equipment, or film projectors could be used for religious instruction as well.[142] The fine line between books and maps left much to be desired and led New York Senator Daniel Patrick Moynihan to famously speculate about the constitutionality of donated atlases, since they are *books* filled *with maps*.[143]

Of course, the *Lemon* era has since ended[144]—and the strict rule against the "advancement" of religious instruction no longer stands today. After years of razor-thin distinctions that made a constitutional difference,[145] the façade crumbled. As Professor Doug Laycock has observed, beginning in the mid-1980s, the Court steadily "shift[ed] from a predominant commitment to the no-aid principle to a predominant commitment to [a] nondiscrimination principle" instead.[146] That shift was reflected in *Agostini v. Felton*, where the Court announced an end to the rule "that all government aid that directly assists the educational function of religious schools is invalid."[147] In *Agostini*, the Court upheld the use of a federal law to pay for remedial educational services for children attending religious schools, overruling a prior decision which held the opposite.[148] The Court acknowledged that such services would directly facilitate the delivery of a religious education—but

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[141] *See id.* at 373.
[142] *Id.* at 362, 365–66.
[143] *See* Ethan Bronner, *Church, State and School: Holes in the Wall of Separation*, N.Y. TIMES (June 28, 1998), https://archive.nytimes.com/www.nytimes.com/library/review/062898church-state-review.html.
[144] *See* Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 510 (2022) ("[T]his Court long ago abandoned *Lemon* . . . .").
[145] *Compare, e.g.*, Levitt v. Committee for Pub. Educ. & Religious Liberty, 413 U.S. 472, 482 (1973) (striking down law reimbursing schools for time spent on state-required but *teacher-prepared* tests), *with* Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 662 (1980) (upholding law reimbursing schools for time spent on *state-prepared* tests).
[146] Douglas Laycock, *Why the Supreme Court Changed Its Mind About Government Aid to Religious Institutions: It's a Lot More than Just Republican Appointments*, 2008 BYU L. REV. 275, 278–79 (2008). Laycock is far from the only scholar to track this shift. *See, e.g.*, JOHN WITTE ET AL., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 177-94 (5th ed. 2022).
[147] 521 U.S. 203, 225 (1997).
[148] *See id.* at 208–09 (overruling *Aguilar v. Felton*, 473 U.S. 402 (1985)).

rejected the notion that this made the *government* responsible for any religious "indoctrination" that took place.[149] Disavowing the idea that such public-private cooperation "constitutes a symbolic union between government and religion,"[150] the Court demanded a more searching test for whether "any use of [public] aid to indoctrinate religion could [actually] be attributed to the State."[151] And that inquiry, the Court held, is now to be guided by whether a funding program is *neutral* on the subject of religion, such that it allocates money "on the basis of criteria that neither favor nor disfavor religion," and therefore gives "recipients [no] incentive to modify their religious beliefs or practices."[152]

Nearly three decades later, the rule against direct support for religious education also runs headlong into *Carson*. *Carson*, of course, rejected the argument that the Establishment Clause prohibits public funding of schools' religious educational missions.[153] More deeply, the Court's decision in *Carson* dismantled the theoretical premises beneath the Court's past efforts to isolate a school's "religious" functions in the first place. *Carson* builds from the premise, earlier recognized by the Court in a pair of ministerial exception cases,[154] that "educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school."[155] Those religious commands, the Court held, cannot be meaningfully disentangled from the rest of the school's affairs.[156] Moreover, the Court cautioned against constitutional lines that would treat religious schools differently based on how they pursue their educational missions.[157] This directly echoes an earlier plurality opinion in which Justice Thomas harshly criticized the Court's previous cases restricting funding to "pervasively sectarian" schools, which "reserve[d] special hostility for those who take their

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[149] *See id.* at 230–31.
[150] *Id.* at 223.
[151] *Id.* at 230.
[152] *Id.* at 232; *see also* Mitchell v. Helms, 530 U.S. 793, 816 (2000) ("[P]rivate choice and neutrality . . . resolve the concerns formerly addressed by the rule [under *Lemon*].").
[153] Carson *ex rel* O.C. v. Makin, 596 U.S. 767, 787.
[154] Our Lady of Guadalupe Sch. v. Morrissey-Berru, 591 U.S. 732, 753–54 (2020); *see* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 192 (2012).
[155] *Carson*, 596 U.S. at 787 (alteration and quotation omitted).
[156] *See id.*
[157] *See id.*

religion seriously."[158] *Carson* ultimately answers Justice Thomas's call to "bury" the notion that the Establishment Clause requires the exclusion of such schools from otherwise permissible aid programs.[159]

B. Indirect Funding Through Programs of "True Private Choice"

Agostini signaled a fundamental shift in the way in which the Court distinguished "direct" and "indirect" aid. Those terms remained, but the Court replaced the concern over funding that would directly advance the *religious functions* of a school with a focus on whether money would flow to religious schools by *government direction* or, instead, indirectly through a mechanism of "true private choice."[160] It is on these grounds that Attorney General Drummond attacked the funding of the St. Isidore charter school in Oklahoma. Noting that charter-school funding "flow[s] directly to schools" without ever "pass[ing] through the hands of parents," Drummond argued that allowing such funds to be directed to a religious school would "revolutionize [the] Court's religious-funding jurisprudence" built upon the foundation of private choice.[161]

As we see it, Drummond's argument is wrong twice over. First, it misconceives of what is meant by a program of "true private choice"[162]—a feature that charter-school programs like Oklahoma's undoubtedly display. Second, and more fundamentally, although the Court has repeatedly referred to this distinction, its constitutional relevance seems to have significantly eroded. Today, it is hardly clear that a program which *lacks* "true private choice" is therefore unconstitutional. To the contrary, the best reading of *Carson*, *Espinoza*, and *Trinity Lutheran* suggests that the actual constitutional demand is

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[158] Mitchell v. Helms, 530 U.S. 793, 827 (2000) (plurality op.). Earlier this year, the Court reiterated Justice Thomas's underlying point, reiterating that doctrines which "establish a preference for certain religions based on the content of their religious doctrine [or] how they worship" are "fundamentally foreign to our constitutional order." *See* Cath. Charities Bureau, Inc. v. Wis. Lab. & Indus. Rev. Comm'n, 605 U.S. 238, 248–49 (2025).

[159] *Mitchell*, 530 U.S. at 829 (plurality op.).

[160] Zelman v. Simmons-Harris, 536 U.S. 639, 649 (2002); *see also* Agostini v. Felton, 521 U.S. 203, 226 (1997) (distinguishing programs that allocate public funding to religious institutions "'only as a result of the genuinely independent and private choices of' individuals" (quoting Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 487 (1986))).

[161] Brief for Respondent, *supra* note 30 at 46–47.

[162] *See Zelman*, 536 U.S. at 640.

simply one of neutrality toward religion in funding programs—whether or not the government or some intermediary ultimate "chooses" which institutions will receive benefits under them.

1. Charter Schools and Programs of "True Private Choice"

Shortly after *Agostini*, the Supreme Court detailed the distinction between "direct" funding programs and those of "true private choice" in *Zelman v. Simmons-Harris*.[163] *Zelman* considered an Establishment Clause challenge to a program that provided parents in Cleveland—home to some of the "worst performing public schools in the Nation"—vouchers of up to $2,250 a year that they could use to pay for tuition at private schools.[164] Still operating under the general Establishment Clause framework erected in *Lemon*, the Court considered whether that program "ha[d] the forbidden 'effect' of advancing or inhibiting religion" when voucher money would be spent on tuition at religious schools.[165] The Court rejected the challenge, noting a "consistent and unbroken" line of cases upholding the funding of religious schools through programs of private choice.[166] The Court explained that it had, on three separate occasions, upheld "neutral government programs that provide aid directly to broad class of individuals, who, in turn, direct the aid to religious schools or institutions of their own choosing."[167] In those situations, any "incidental advancement of a [school's] religious mission" or any "perceived endorsement of a religious message" is attributable to the individual funding recipient—not the government.[168] The Court thus upheld Ohio's program which gave no preference to religious schools and which enabled money to flow to such schools only if parents opted to send their children to them.[169]

With limited exceptions, charter-school funding tends to work in much the same way. First, it is important to clear away a superficial reading of "true private choice" that the

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[163] *Id.* at 649–50.
[164] *Id.* at 644–46.
[165] *Id.* at 649.
[166] *Id.*
[167] *Id.*; *see* Mueller v. Allen, 463 U.S. 388 (1983) (tax deductions for private school tuition costs); Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481 (1986) (vocational scholarship program); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993) (sign-language assistance to assist deaf children in religious schools).
[168] *Zelman*, 536 U.S. at 652.
[169] *Id.* at 653–56.

respondents' briefing in the St. Isidore case might suggest. At the most literal reading, sorting between "direct" and "indirect" funding might ask *to whom* the government has handed its money: the school itself or someone else (like a parent).[170] To be sure, many of the Supreme Court's older precedents seem to speak in those terms.[171] For more than 25 years, however, the Court has flagged the empty "formalism" of such a distinction.[172] As the four-justice plurality wrote in *Mitchell v. Helms*, there is no real difference between aid that has been "literally placed in the hands of school children rather than given directly to the school for teaching those same children."[173] Indeed, it is difficult to see why that distinction should matter under the logic of *Zelman*, which centers upon private *choice*, not private *delivery of aid*. The Court's concerns—neutrality, evenhandedness, independent choice—are unaffected by minutiae like whether the government hands parents a check to give to the school of their choice or instead enables them to specify a school that the government should mail the check to.[174] The irrelevance of such a distinction

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[170] *See* Brief for Respondent, *supra* note 30, at 47 (suggesting that state funds may not "pour into" religious charter schools without first "passing through the hands of parents"). Of course, Drummond is not the only one to suggest such a reading. *See, e.g.*, Derek W. Black, *Religion, Discrimination, and the Future of Public Education*, 13 U.C. IRVINE L. REV. 805, 849 (2023); Justin Driver, *Three Hail Marys:* Carson*,* Kennedy*, and the Fractured Détente over Religion and Education*, 136 HARV. L. REV. 208, 233 (2022).

[171] *See* Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 781 (1973) (distinguishing aid "disbursed to parents rather than to the schools"); *see also Mueller*, 463 U.S. at 399 (same); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 842 (1995) ("[W]e have recognized special Establishment Clause dangers where the government makes direct money payments to sectarian institutions."); *see also* Esbeck, *supra* note 125, at 9 (defining "direct assistance" as "a government's general program of assistance [that] flows directly to all organizations").

[172] *See* Mitchell v. Helms, 530 U.S. 793, 817 (2000) (plurality opinion).

[173] *Id.* Justice O'Connor concurred separately and sharply criticized the plurality's rejection of the "distinction between direct and indirect aid," and its move to give governmental neutrality "singular importance" in Establishment Clause analysis instead. *Id.* at 837 (O'Connor, J., concurring). As discussed in this section, however, the Court's decisions in *Trinity Lutheran*, *Espinoza*, *Carson*, and *Kennedy* solidified that move in the years since.

[174] For years, states designed their programs specifically to walk these fine lines. In *Zelman*, Ohio made checks payable to parents, who then could "endorse [them] over to the chosen school." 536 U.S. at 646. Thereafter, other states implemented programs where the government could send a scholarship payment "certificate" directly to the private school but required

is even more obvious today. Under *Lemon*, it was often argued that direct payments to religious schools increase the risk that the government would be seen as having impermissibly endorsed their teachings.[175] That concern is now constitutionally irrelevant following the Court's formal abandonment of *Lemon* and its "endorsement test offshoot" in *Kennedy*.[176] And the *Carson* line of cases entrenched *Zelman*'s focus on evenhandedness in public benefits programs, rather than the mechanism by which money arrives in a school's bank account.[177] Indeed, *Trinity Lutheran* itself upheld a direct grant program[178] over Justice Sotomayor's vigorous dissent on exactly that point.[179]

The better reading, therefore, asks whether the government or private actors determined which schools would actually receive public money.[180] On this score, the charter-

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a child's parents to come in to physically sign that certificate before the funding would actually be deposited in the school's account. *See* Kristopher L. Caudle, Note, *"True Private Choice" or a "Hobson's Choice?": Re-Thinking* Zelman v. Simmons-Harris *in North Carolina's Opportunity Scholarship Program*, 13 FIRST AMEND. L. REV. 377, 405 (2015). It is difficult to see why the Establishment Clause would require that additional step rather than allowing parents to simply select the school into which government funds could be deposited directly.

[175] This is a point that Justice O'Connor made frequently in defense of the direct/indirect funding distinction. *See Mitchell*, 530 U.S. at 842–43 (O'Connor, J., concurring); *Rosenberger*, 515 U.S. at 846–52 (O'Connor, J., concurring); *Witters*, 474 U.S. at 493 (O'Connor, J., concurring).

[176] *Kennedy*, 597 U.S. at 534.

[177] *See infra* Part II.B.2.

[178] *See Trinity Lutheran*, 582 U.S. at 454–56.

[179] *See id.* at 471–73 (Sotomayor, J., dissenting) ("The Court today profoundly changes [the relationship between church and state] by holding, for the first time, that the Constitution requires the government to provide public funds directly to a church. . . . [T]his is a case about whether Missouri can decline to fund improvements to the facilities the Church uses to practice and spread its religious views. This Court has repeatedly warned that funding of exactly this kind—payments from the government to a house of worship—would cross the line drawn by the Establishment Clause. . . . The Court's silence on this front signals either its profound misunderstanding of the facts of this case or a startling departure from our precedents.").

[180] This is a reading of the direct/indirect distinction that was detected by some scholars as early as the Court's 1983 decision, Mueller v. Allen, 463 U.S. 388 (1983), which upheld income tax deductions for tuition payments to religious schools. *See, e.g.*, Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230, 242 (1993) (distinguishing *Mueller* from programs that provide money to religious schools "as the result

school program challenged in *Drummond* is one of true private choice. As with the private schools in *Zelman*, students enroll in Oklahoma charter schools only upon the independent choice of their parents. And Oklahoma allocates public funding for each charter school based upon the number of students who exercise that choice to enroll there. Indeed, all of the parties in the *Drummond* litigation agreed: if no child were to choose to enroll in an Oklahoma charter school, that school would receive no state funding.[181] In other words, the amount of public aid given to any Oklahoma charter school derives directly from the independent private choices of parents. That is a common feature in charter-school programs, which, as the late Professor Stephen Sugarman described, "looks and feels much like the funding of voucher schools in the sense that in both instances the government is putting up money so as to facilitate [private] choice by families."[182] The suggestion that there is a constitutionally meaningful difference between such a scheme that distributes aid on a per-pupil basis on the back end and one, like school vouchers, that distributes the same aid individually on the front end echoes previously rejected theories of Justice O'Connor under the *Lemon* framework.[183] But it is not one that sits easily with the Court's actual decisions from *Agostini* onward.

2. Government-Directed Aid Programs After Carson

Putting aside the specifics of charter-school funding programs, the premise that such programs are permissible *only if*

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of explicit state direction"); Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 208 (1993) (describing *Mueller* as distinguishing between programs that allow "private individuals to choose how to use indirect tax benefits instead of centrally directing how cash grants will be used").

[181] *See* Brief for Petitioner at 53, *Okla. Statewide Charter Sch. Bd. v. Drummond*, No. 24-394 (U.S. Mar. 5, 2025); Brief for Petitioner at 26, *St. Isidore of Seville Catholic Virtual Sch. v. Drummond*, No. 24-396 (U.S. Mar. 5, 2025); Brief for Respondent, *supra* note 30, at 48.

[182] Stephen D. Sugarman, *Is It Unconstitutional to Prohibit Faith-Based Schools from Becoming Charter Schools?*, 32 J. L. & RELIG. 227, 250 (2017); *see also* Gillian Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1391–92 (2003) ("Enrollment in charter and voucher schools is voluntary, and students have the option of remaining in their regular neighborhood or district school or perhaps attending public school in another district.").

[183] *See Mitchell*, 530 U.S. at 842–43 (O'Connor, J., concurring); *supra* note 155; *see also* Philip Manns, *Charting the Spectrum of Prohibited and Permitted Aid to Religion*, 2001 UTAH L. REV. 319, 341–44 (2001) (discussing O'Connor's critique).

they turn on true private choice is dubious today. Indeed, the combined decisions in *Kennedy* and the *Carson* line of cases have substantially eroded the foundation upon which that distinction once stood.

To start, *Carson* and *Kennedy* eliminate the very reason that *Zelman* focused on programs of private choice in the first place. Recall that the distinction between direct and indirect funding programs largely rose out of two demands of the *Lemon* framework: that government programs not *impermissibly advance* religious purposes and that they not appear to *endorse* religious positions. *Agostini* largely put an end to the Court's inquiry into whether public aid might be used specifically to support a school's religious functions,[184] but the Supreme Court still assumed that government-directed funding programs might specially threaten to advance or endorse religion. Indeed, in both *Agostini* and *Zelman* the Court noted that programs of private choice were unproblematic specifically because any "incidental advancement" or "perceived endorsement" of religion would not be readily attributed to the government.[185] "It is precisely for these reasons," the Court wrote in *Zelman*, "that we have never found a program of true private choice to offend the Establishment Clause."[186]

Of course, the Court in *Zelman* never held that government-directed funding programs were unconstitutional.[187] But even if one were to assume that was implied by the Court's analysis in *Zelman*, these are Establishment Clause theories—"endorsement" or "advancement" of religion—that are no longer on the table today. Indeed, *Carson* emphatically rejected any concern over public funding being used to advance a private school's religious mission, and *Kennedy* explicitly jettisoned the *Lemon* framework and its focus on religious endorsement.

Trinity Lutheran, *Espinoza*, and *Carson* well illustrate the Court's turn away from questions of religious advancement or endorsement in this area. A central message of those cases is "the Establishment Clause is not offended when religious observers or organizations benefit from neutral government programs."[188]

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[184] Agostini v. Felton, 521 U.S. 203, 227 (1997); *see supra* Part II.B.1.
[185] *Zelman*, 536 U.S. at 652; *see Agostini*, 521 U.S. at 226, 235.
[186] 536 U.S. at 653.
[187] The Court left that question open, seeming to accept it for the sake of argument—and, perhaps, the sake of disturbing as little prior precedent as necessary to reach the decision. *See id.* at 649–50.
[188] *Espinoza*, 591 U.S. at 474.

As Justice Gorsuch has described it, the "thread running through" them is that "government control over religion offends the Constitution, but treating a church on par with secular entities and other churches does not."[189] These cases thus solidified the Court's shift to what Doug Laycock previously identified as a fundamentally different baseline for constitutional "neutrality" than that which gave rise to the direct/indirect distinction in the first place. The Court's cases under *Lemon* presumed a neutral baseline of "government *inactivity*"—no governmental aid—because "doing nothing neither helps nor hurts religion."[190] Because any support for religion was a constitutionally suspect departure from that baseline, the Court closely parsed which forms of aid were incidental enough to stand.[191] Writing shortly before *Agostini*, Laycock detected that the Court had begun to move increasingly toward a "nondiscrimination theory," which instead presumed a baseline of *analogous treatment* for religion.[192] Picking up the momentum of *Agostini* and *Zelman*, the *Carson* line of cases—particularly when coupled with *Kennedy*'s elimination of the last vestiges of *Lemon*—entrenched that move. Against the new baseline, funding itself is not constitutionally suspect; only departures from funding equality are.[193]

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[189] Shurtleff v. Boston, 596 U.S. 243, 287 (2022) (Gorsuch, J., concurring).

[190] Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 48 (1997). As Laycock identifies, others including Professors Ira Lupu, Carl Esbeck, and Stephen Monsma had previously articulated similar conceptions—and noted a similar shift—under different labels. *See id.*; Lupu, *supra* note 180, at 232 (describing the shift from "separationism" to "themes [of] neutrality and accommodation"); Esbeck, *supra* note 125 (similar); STEPHEN V. MONSMA, WHEN SACRED AND SECULAR MIX: RELIGIOUS NONPROFIT ORGANIZATIONS AND PUBLIC MONEY 30 (1996) (distinguishing "no-aid" theory from "equal access" or "equal treatment" theory).

[191] Laycock, *supra* note 190, at 48 ("The no-aid theory would forbid any government conduct that aids religion and it would most especially and most stringently forbid financial aid.").

[192] *Id.* at 65. At the time, Laycock identified this shift most explicitly in *Rosenberger*, where the Court's struggle to balance the no-aid and nondiscrimination theories came to a head and, "forced to choose, the Court applied the nondiscrimination theory to the funding of religious speech by a pervasively religious organization." *Id.* at 67.

[193] *Id.* at 48. This largely aligns with an argument for Establishment Clause neutrality famously urged by Philip Kurland well before the Supreme Court embarked on its meandering path through separationism during the *Lemon*-era. *See* Philip B. Kurland*, Of Church and State and the Supreme Court*, 29 U.

These fundamentally different premises help explain why considerations of "true private choice" feature so little in the *Carson* line of cases. To be sure, the Court pointed out that school-choice programs in *Espinoza* and *Carson* were ones driven by independent private choice.[194] But that feature, mentioned almost in passing, was hardly the crux of the Court's analysis. And *Trinity Lutheran*, of course, was undisputedly a direct-aid program.[195] Put simply, these cases did not turn on the funding mechanism but instead on the general rule that the Establishment Clause permits "nondiscriminatory public financial support for religious institutions alongside other entities."[196] At the same time, the Court has taken care in *Kennedy* and other recent cases to remark that the Establishment Clause should not be read to require governments to "preference secular activity" or "'be hostile to religion.'"[197] The argument that the First Amendment continues to *require* discrimination against religious conduct in government-aid programs is squarely contrary to that admonition.

Added up, these moves seem to at least signal—if not yet declare—the Court's abandonment of the distinction between government-directed funding programs from those driven by private choice. We are hardly the first to notice this.[198] In place

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CHI. L. REV. 1, 69–70 (1961). ("[A law] cannot classify in terms of religion. . . . [A] classification in terms of public and non-public schools would be valid. A classification in terms of religion would be invalid.").

[194] *Espinoza*, 591 U.S. at 474; Carson v. Makin, 596 U.S. 767, 781 (2022). Indeed, in *Espinoza*, the Court simply remarked that the choice-driven nature of the scholarship program made the Establishment Clause challenge "particularly unavailing." 591 U.S. at 474.

[195] Again, this fact featured centrally in Justice Sotomayor's dissent. *See Trinity Lutheran*, 582 U.S. at 474 n.2 (Sotomayor, J., dissenting).

[196] *Shurtleff*, 596 U.S. at 286 (Gorsuch, J., concurring).

[197] *Kennedy*, 597 U.S. at 540–41 (quoting Zorach v. Clauson, 343 U.S. 306, 314 (1952)); *see also, e.g.*, Am. Legion v. Am. Humanist Ass'n, 588 U.S. 29, 38 (2019) (plurality opinion) ("[H]ostility toward religion . . . has no place in our Establishment Clause traditions.").

[198] *See, e.g.*, Richard Schragger, et al., *Reestablishing Religion*, 92 U. CHI. L. REV. 199, 206 (2025) ("In the near term, we predict doctrinal consolidation, including the formal abandonment of barriers to direct funding of religion [and] the spread of public funding to religious charter schools . . . ."); Lupu & Tuttle, *supra* note 134, at 1788 ("[A]t least in theory, the constitutional prohibition on direct government financial support of religious uses remains in place. But there is not a syllable in the Trilogy that gives rise to any reasonable hope for survival of that prohibition."); Peter J. Smith & Robert W. Tuttle, *Gordon College and the Future of the Ministerial Exception*, 47 J.

of that distinction, the Court's recent cases suggest a simple rule: whatever educational funding a state chooses to provide must be offered to all schools, religious and secular alike. To be sure, government-directed aid programs, like grants or procurement contracts, may give rise to greater *risks* of impermissible governmental favoritism on the basis of religion or excessive entanglement with religious institutions. But, as in other areas, the Court's answer is not likely to be that such programs may therefore exclude religious believers at the outset. Rather, it simply means that government officials must make their funding or contracting decisions on religiously neutral criteria. They will not always succeed. But the fact that some public officials might fail to refrain from religious discrimination in how they dole out benefits is not, itself, a reason that would justify prohibiting all religious organizations from receiving those "direct" benefits in the first place. This, once again, is an issue that stands to affect significantly more than just school funding, as scores of federal and state funding programs presently exclude religious organizations from "direct" expenditures based on these same outdated theories of the Establishment Clause.[199]

CONCLUSION

We have sought to address two questions that were left unresolved in *Carson*, both of which were raised in the *St. Isidore* case. We close by flagging a third issue, which was not presented in that litigation. Even if, as we predict, the Supreme Court will eventually approve religious charter schools and clarify that the *Carson* principle applies with equal force to direct and indirect aid programs, the questions will remain about the regulations that can be imposed on religious organizations as a condition of participating in a charter-school—or other public benefit—program. St. Isidore's contract with Oklahoma's Charter School Board reserved the school's religious liberty rights to the extent protected by federal and state law, but that reservation did not articulate the scope of those rights. This "regulatory strings" question is not limited to the charter-school context but rather is present whenever the government extends benefits to private

COLL. & UNIV. L. 1, 38 (2022) ("The Supreme Court's decision in *Carson* . . . appears to make the distinction between direct and indirect funding essentially irrelevant.").

[199] *See generally Protecting Religious Organizations from Discrimination*, *supra* note 104 (mapping state statutes and regulations discriminating against religious institutions).

religious organizations but conditions their receipt on the regulations that impose particular burdens on some religious recipients.

These questions are the subject of ongoing litigation and significant scholarly debate. For example, the Tenth Circuit recently rejected a free exercise challenge to nondiscrimination requirements imposed on religious preschools participating in Colorado's universal pre-K program. The court found that the regulations were religion-neutral and generally applicable and rejected the argument that their differential burden on some religious providers had the effect of denominational discrimination.[200] A second case challenging similar regulations imposed on religious schools participating in the same program at issue in *Carson* is pending before the First Circuit. The district court upheld the regulations below.[201] These cases might be framed as posing questions about unconstitutional conditions, the church-autonomy doctrine, or even the definition of "religious discrimination."[202] Regardless of framing, however, the doctrine surrounding them—and how courts are to sort permissible from impermissible conditions—is far from clear. Clarifying that law will be a central task in courts for years to come.

[200] *See* St. Mary Cath. Par. v. Roy, 154 F.4th 752 (10th Cir. 2025).
[201] St. Dominic Acad. v. Makin, 744 F. Supp. 3d 43 (D. Me. 2024).
[202] In a recent decision, *Catholic Charities Bureau v. Wisconsin Labor and Industry Review Commission,* 605 U.S. 238 (2025), the Supreme Court unanimously held that Wisconsin violated the First Amendment's Religion Clause by adopting a policy that had the effect of extending a public benefit in a way that discriminates between religions on the basis of denominational theological differences.

FUN WITH DICK AND JANE: RELIGIOUS CONSERVATIVE PRIVILEGE IN *MAHMOUD V. TAYLOR*

Frederick Mark Gedicks*

INTRODUCTION: CONSERVATIVE RELIGION AND CONSTITUTIONAL PRIVILEGE

There's a lot going on in *Mahmoud v. Taylor*,[1] none of it good. *Mahmoud* recognized a new constitutional right of parents to selectively withdraw their children from any portion of a public school curriculum that conflicts with their religious beliefs.[2] In doing so, *Mahmoud* condemned, for their "normativity," public school curricula that do not reinforce traditional understandings of marriage and sexuality.[3] *Mahmoud* also implicitly justified hostility to LGBTQ people in public life, with a sympathy for conservative believers that it doesn't exhibit for believers burdened by racial anti-discrimination laws.[4] And, finally, *Mahmoud* fashioned doctrinal preferences for conservative believers in the form of imagined student coercion and special solicitude for parental rights when these serve culturally conservative ends.[5]

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Portions of this Essay draw on two amicus briefs to which I contributed. *See* Brief of Constitutional Scholars as *Amici Curiae* in Support of Respondents, Mahmoud v. Taylor, 606 U.S. 522 (2025) (No. 24-297); Brief for Family Law and Constitutional Law Scholars as *Amici Curiae* Supporting Petitioner and Respondents in Support of Petitioner, United States v. Skrmetti, 605 U.S. 495 (2025) (No. 23-477).

[1] Mahmoud v. Taylor, 606 U.S. 522 (2025).

[2] *Id.* at 530.

[3] *See infra* Part I.

[4] *See infra* Part II.

[5] *See infra* Part III.

I. HETERO-NORMATIVE PRIVILEGE

A. Transgressive Norms

A stark peculiarity of *Mahmoud* is the Court's accusation that the curriculum materials at issue—LGBTQ-friendly storybooks—are "unmistakably normative," that they endorse, rather than merely acknowledge or describe, same-sex relationships and gender transitioning.[6] In the words of Justice Alito, author of the majority opinion, the storybooks "are clearly designed to present certain values and beliefs as things to be celebrated and certain contrary values and beliefs as things to be rejected."[7] Alito then analyzes, if not over-analyzes, the plotlines to support this conclusion.

For example, in one story, a prototypical prince, after much angst at failing to find a woman to marry, encounters a dashing and courageous knight and decides to marry him instead, living happily ever after as the kingdom rejoices. Justice Alito observes that the celebrants "are not just family members and close friends, but the entire kingdom" which, in his view, leaves no moral space for those who believe same-sex marriage is not "in every respect a good thing."[8] He likewise condemns another story, which ends in a gay uncle's marriage to his male partner, for portraying the announcement of their engagement as cause for jubilation.[9] Alito seems particularly incensed by a mother's explanation of the marriage to her daughter: "Bobby and Jamie love each other . . . . When grown-up people love each other that much, sometimes they get married."[10] Referring to gay couples like this, Alito objects, "is directly contrary to the religious principles that the parents in this case wish to instill in their children."[11] Indeed, he continues, many "Americans wish to present a different moral message to their children. And their ability to present that message is undermined when the exact opposite message is positively reinforced in the public school classroom at a very young age."[12]

Justice Alito is equally critical of the trans-friendly storybooks. He criticizes one for depicting "a transgender child

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[6] *Mahmoud*, 606 U.S. at 589.
[7] *Id.* at 550.
[8] *Id.* at 551 (discussing DANIEL HAACK, PRINCE AND KNIGHT (2020)).
[9] *Id.* (discussing SARAH S. BRANNEN, UNCLE BOBBY'S WEDDING (2018)).
[10] *Id.* at 551-52.
[11] *Id.* at 552.
[12] *Id.*

in a sex-ambiguous bathroom" and then proclaiming that a "bathroom, like all rooms, should be a safe space."[13] Another book depicts the struggle of a biological girl suffering from gender dysphoria and the relief that followed when the family accepted that the child identifies as a boy. When a brother objected that one "can't *become* a boy. You have to be born one[,]" the mother responds that not everything in life needs to make sense for those who love each other.[14] These stories, Alito objects, present sex-transitioning as a positive experience while characterizing as "hurtful, and perhaps even hateful," the belief that gender is tied to biological sex.[15] To the contrary, he observes, "[m]any Americans, like the parents in this case, believe that biological sex reflects divine creation, that sex and gender are inseparable, and that children should be encouraged to accept their sex and to live accordingly."[16] Summing up, he concludes that these storybooks "impose upon children a set of values and beliefs that are 'hostile' to their parents' religious beliefs."[17]

B. White Dick and Jane

Justice Alito's criticism of normativity in elementary school education reminded me of the public school reading curriculum in my suburban New Jersey township in the late 1950s and early 1960s. I learned to read from the famous (or, perhaps, infamous) "Dick and Jane" books. The recurring characters are Dick and Jane and their toddler sister, Sally; Mom and Dad (or, actually, "Mother" and "Father") make periodic appearances, as do the family pets, a dog, "Spot," and a cat, "Puff."

The plots are skeletal and short, with frequent word repetitions, in keeping with educational reading theory of the time.[18] Two stories are typical. In the first, Dick and Jane are

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[13] *Id.* (discussing CHELSEA JOHNSON, ET AL., INTERSECTION ALLIES (2019)).
[14] *Id.* at 535 (discussing JODIE PATTERSON, BORN READY (2021)).
[15] *Id.* at 553.
[16] *Id.* at 552.
[17] *Id.* at 554 (quoting Wisconsin v. Yoder, 406 U.S. 205, 211 (1972)).
[18] *See* Exhibition Description, "*Reading with and without Dick and Jane: The Politics of Literacy in 20th-Century American*," RARE BOOK SCH. (University of Virginia, Elizabeth Tandy Shermer curator June 9 – Nov. 1, 2003), at 1-2 [hereinafter *Politics of Literacy*], rarebookschool.org/2005/exhibitions/dickandjane.shtml (last visited Jan. 7, 2026).

washing an uncooperative Spot.[19] In the second, Sally is playing in her backyard sandbox when, to her surprise and delight, Mother appears with a plate of cookies.[20]

Some observations. The Dick and Jane readers of the 1950s are uniformly White and unrelentingly sexist.[21] Various stories show White male Father coming home from work;[22] other occupations depicted in the stories, like the grocer, the dry-cleaning and milk delivery persons, and the shoe salesperson, are likewise held by White men.[23]

There's more. Mother and Father form a single-income household where Mother properly stays home to care for her children and tend to domestic chores. When Mother goes grocery shopping, she brings all the kids with her.[24] Likewise, when a story relates Jane's ability to work and help Mother, all the action is in the kitchen.[25] Mother always appears in a dress, even when doing major housecleaning; she never wears pants of

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[19] Appendix, *infra*, figs. 1-4.

[20] *Id.*, figs. 5-8.

[21] *E.g.*, DICK AND JANE: WE PLAY AND PRETEND (1962) (containing 29 stories over 143 pages in which all the characters are White and all the adult characters appear in stereotypical gender roles); Appendix, *infra*, figs. 2-16 (same); *see* Trip Gabriel, *'Oh, Jane, See How Popular We Are,'* N.Y. TIMES (Oct. 3, 1996), https://www.nytimes.com/1996/10/03/garden/oh-jane-see-how-popular-we-are.html; Wes Smith, *Dick and Jane*, CHI. TRIB., Mar. 10, 1994 (§ G), at 15, col.1 (reviewing Exhibit, "Dick and Jane: Illustrations of an American Education," Lakeview Museum, Peoria, Ill.); Dana Teach, *"Dick and Jane and Nothing in Between: Representation and the American Family,"* TONI MORRISON: A TEACHING AND LEARNING RESOURCE COLLECTION (May 29, 2021), https://scalar.lehigh.edu/toni-morrison/dick-and-jane-and-nothing-in-between-representation-and-the-american-family-dana-teach; Jervette, R. Ward, *In Search of Diversity: Dick and Jane and Their Black Playmates*, 13 MAKING CONNECTIONS: INTERDISC. APPROACHES TO CULTURAL DIVERSITY 17, 18 (2022); *Politics of Literacy*, *supra* note 18, at 3.

[22] Appendix, *supra*, fig. 9.

[23] *E.g*, Appendix figs. 10-12 & 22. For whatever it's worth, among my parents' circle of friends and families during my elementary school years, I don't recall even one mother who had a job other than teaching music lessons at home; all but one of my elementary school teachers, from kindergarten through the 5th grade, were single women; the single exception was an older woman past her child-bearing years. When my second-grade teacher got married at the end of the school year in 1961, she resigned. (She invited the entire class to the wedding, which gave me my first and only experience of the Latin mass.)

[24] *E.g.*, *id.*, fig. 10.

[25] *E.g.*, *id,* figs. 13-15.

any kind.[26] Father does all the work outside while Mother looks on (although Father does know how to wash windows).[27]

Finally, there are not-so-subtle class markers. Father's job apparently calls for a suit, tie, and hat, meaning he has some sort of white-collar job—my father dressed for his government contracts job at RCA exactly like this.[28] Mother can stay home because Father has a stable job with a salary sufficient for the whole family—unlike, say, the African American janitor at my elementary school. Mother doesn't have to work at all to make the family ends meet, let alone as a maid or "cleaning lady" or other low-paid, unskilled labor, as so many women of color did in the 1950s and 60s (and still do today). And, when Mother goes grocery shopping, she's better dressed than many of the women in my current Mormon congregation at Sunday worship—styled hair, a clasp purse, heels, and a dress and hat ensemble.[29]

The Dick and Jane reading books perfectly captured White middle-class aspirations in the aftermath of World War II:

> Dick and Jane live in a suburban house surrounded by a white picket fence. Mother cheerfully does the housework. Father wears a suit to work and on weekends mows the grass and washes the car. Dick . . . is well-behaved and always in motion: bicycle-riding, kite-flying or playing fetch with Spot. . . . Jane is pretty and lighthearted and helps care for their baby sister, Sally, while never upstaging her brother. Illustrators chose her stylish and frilly wardrobe . . . from the catalogues of Sears, Roebuck & Company and Montgomery Ward.[30]

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[26] *E.g.*, *id.*, fig. 16.

[27] *E.g.*, *id.*

[28] *Id.*, fig. 9. "RCA" was the common abbreviation of the "Radio Corporation of America," a once dominant U.S. electronics and telecommunications firm that founded the NBC television network, but whose primary business now consists of licensing its name to overseas manufacturers.

[29] *E.g.*, *id.*, fig. 10.

[30] Gabriel, *supra* note 21, at 3–4. *See also* Smith, *supra* note 21, at 15 (noting that the publisher was concerned with (White middle-class) authenticity, keeping careful track of the "clothes, toys, and furniture" appearing in the readers.) Sears and Montgomery Ward were middle-class style-setters into the 1970s.

The Dick and Jane books are as normative as the LGBTQ storybooks Justice Alito denounced for normativity in *Mahmoud*. Did they not communicate to school children particular views about race, gender, dress, and class? The readers depicted the White middle-class American norm of the 1950s—or, at least, what that class imagined the norm should be.[31]

If you have any doubts, try to imagine a 1950s in which Jane is a starter on an all-star travel soccer team, or Mother and Father socialize with an interracial couple, or Dick and Jane have African American playmates. Or Mother heading off to work as a lawyer or a doctor while Father drives to his job on the assembly line at the local manufacturing plant, dropping Sally at daycare on the way. Or Mother doing the grocery shopping in yoga pants and a baseball cap. Or Father buying the groceries. I can't either.

C. "Integrated" Dick and Jane

As it happens, we don't have to imagine *all* of this. In 1965, evidently prompted by the civil rights movement, the Dick and Jane publisher tried to pluralize the readers by introducing a Black family into Dick and Jane's White world. There's a Black Mother and Father; an African American boy, Mike, who is Dick's buddy; and Mike's little sisters, twins Pam and Penny, who hang out with Sally. We have stories of Sally, Pam, and Penny playing drums together, Mike playing with Dick, African American Father and Mike in the park and working around the house, African American Mother and Father and the family packing for a vacation.[32] With this edition, Dick and Jane become racially integrated.

But not quite or, more accurately, not really. Notice what you don't see. The parents don't socialize. There's a story set in a Dick and Jane family barbecue, where Mike, Penny, and Pam are present but their parents are nowhere to be seen.[33] Interracial neighborhood socials were probably a bridge too far in the mid-

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[31] *See* Gabriel, *supra* note 21, at 3 (The Dick and Jane readers described '"the way America wanted to see itself at the time."') (quoting journalist and editor Carole Kismaric); Teach, *supra* note 21, at 2,3 (The Dick and Jane readers illustrated the "symbolic standards of the parental composition of the American family" and influenced the "behavior and norms of America children.")

[32] *E.g.*, Appendix, *infra*, figs. 18-19; *see* Teach, *supra* note 21, at 2; *Politics of Literacy*, *supra* note 18, at 3. Later editions also portrayed a mother who worked outside the home. *See* Smith, *supra* note 21, at 15.

[33] *See* Appendix, *infra*, figs 19-21.

1960s, when segregated housing was the rule in North and South, and the Fair Housing Act existed only in Lyndon Johnson's imagination.

The Black kids play with the White kids—which was not unusual even in the Jim Crow South—but only in a gender-segregated and racially conscious way; Dick never plays with the twins or (heaven forbid!) Mike with Jane. It might have been an age thing, but Dick and Jane frequently play with each other and both of them play with Sally, who's only a toddler. Rather, one suspects another editorial decision to avoid provoking White paranoia about Black male sexuality and interracial marriage.[34] A striking ambiguity also appears in the portrayal of Mike, Pam, and Penny with their city-dwelling Grandfather, walking past an urban "Washington High School"—is it named after George or Booker T.?[35]

There is finally, at least one socio-economic dissonance to this integrated Dick and Jane world. African American Mike and the twins and their parents are simply dropped into Dick & Jane's suburban middle-class neighborhood as if they naturally belonged there,[36] despite the nearly complete absence of a Black middle class in the mid-1960s, extreme housing and education segregation, and widespread Negrophobia in both North and South.[37] Perhaps it was an aspirational message for Black children—though one they may not have understood.[38]

The "integrated" versions of the Dick and Jane stories depicted social impossibilities for the segregated southern and border states in 1965—and, frankly, for many northern states as well.[39] As one commentator acerbically noted, when Reverend King dreamt of a world where folks would be judged by the

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[34] *Cf.* Smith, *supra* note 21, at 15 ("Special editions were prepared for school districts that wanted cultural diversity in their reading texts even though [the publisher] feared a backlash . . . ."). *See also id.* at 15 (relating that the original author "wanted to call the oldest daughter 'Patty" but the editors thought it sounded too much like the Irish nickname 'Paddy,' so 'Jane' got the nod.").

[35] *See* Appendix, *infra*, fig. 23.

[36] *See* Teach, *supra* note 21, at 2–3; Ward, *supra* note 21, at 21. *See also Politics of Literacy*, *supra* note 18, at 3 (relating criticisms of Dick and Jane for not including "subject-matter appropriate for urban schoolchildren").

[37] Toni Morrison contrasted the Black experience in the 1960s with stereotypical White middle-class families by introducing her novel about a dysfunctional African American family with a progressively deconstructive riff on Dick and Jane. TONI MORRISON, THE BLUEST EYE 3-4 (1970).

[38] Ward, *supra* note 21, at 19, 23, 24.

[39] *See, e.g.*, Appendix, *infra*, fig. 22 (depicting White male salesman lowering himself before African American Mother to help her try on shoes).

content of their character and not the color of their skin, he would not have guessed that dream's fulfillment only two years later in the Dick and Jane readers.[40]

D. Anxiety about Pluralism

It's possible I'm overreading the normativity of Dick and Jane—always a danger in literary analysis, even of elementary school readers. But I'm no more overreading Dick and Jane than Justice Alito overread the storybooks in *Mahmoud*. One purpose of public education is, precisely, to instruct children in the "normal." The Dick and Jane readers taught the normal as the White, single-income, middle-class, working-dad, stay-at-home mom, white-collar household.[41] Racial minorities and working women didn't exist within their pages for 35 years; when they were finally permitted an entrance, they had to tailor their appearance and behavior to White and male sensibilities. These readers badly served the children who used them, like me, by leaving us unprepared to live in a real world that was far more diverse.[42] Meanwhile, the girls and racial minorities who used Dick and Jane learned lessons we should not want to have taught: that they and their families were *not* normal unless they corresponded to White middle-class values (including aversions to interracial marriage and working women), that there is no place for them in a standard representation of American life.

In *Mahmoud*, the district added the storybooks to the curriculum to reflect the diverse reality of its students and their families, which extends beyond traditional marriage and sexuality.[43] The storybooks teach heterosexual children that LGBTQ persons exist in the world and that encountering them is neither unusual nor cause for alarm. They also enable LGBTQ children to see themselves and their families as part of the social norm, affirming their existence.[44] Are these lessons descriptive or normative? Does it even matter? These are lessons that pluralist public schools ought to be able to teach and from which students need not—indeed, *should not*—be "protected."

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[40] *Id.* at 22-23.
[41] *See* Teach, *supra* note 217, at 2.
[42] *See*, *e.g.*, Pamela Starr Dewey, *Oh, Look. See.: The Books of Dick and Jane Unveiled at Last!* MEET MYTHAMERICA (Sep. 23, 2015), https://meetmythamerica.wordpress.com/2015/09/23/oh-look-see-the-books-of-dick-and-jane-unveiled-at-last/ (last visited Feb. 8, 2026).
[43] *See* Mahmoud v. Taylor, 606 U.S. 522, 531–32 (2025); Joint Appendix at 49–50, 53–54, *Mahmoud*, 606 U.S. 522 (2025).
[44] *See* Joint Appendix at 53–54, *Mahmoud*, 606 U.S. 522 (2025).

The problem, of course, is not that the storybooks are *normative*, as Justice Alito claims, it's that they're not *hetero*-normative.[45] It's doubtful that the parents or the Court would have objected to storybooks depicting traditional marriage and gender roles—*Snow White*, *Cinderella*, and countless other fairy tales with narratives similar to *Prince and Knight*, except the happily-ever-after ending is a traditional rather than a same-sex marriage.

Normative pluralism is a reality of American society. How to reflect it in public education is a complicated question but insulating students from this reality is not the answer. Though the *Mahmoud* parents vehemently denied that they objected to "mere exposure" of their children to alternative understandings of marriage and sexuality,[46] the Court makes clear that exposure alone may constitute an actionable burden on religious parents and their children.[47]

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[45] *See* Richard B. Katskee & Ira C. Lupu, Mahmoud v. Taylor*: Cause or Effect of Disruptions in the Public Schools?* 24 FIRST AMEND. L. REV. (forthcoming spring 2026), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5550278 (last revised Jan. 21, 2026), at 19 ("The preexisting curriculum promoted value judgments about sexual orientation and gender identity every bit as much as the newly introduced materials do, but those judgments are the ones that the plaintiffs and a majority of the Justices prefer.").

[46] Reply Brief for Petitioner at 1, 3, Mahmoud v. Taylor, 606 U.S. 522 (2025) (No. 24-297) (excoriating the district for characterizing their objections as aversion to "mere exposure" of their children to LGBTQ-positive themes), 2025 WL 1125680.

[47] *See Mahmoud*, 606 U.S. at 556–57 (quoting *Yoder*, 406 U.S. at 218):

> [T]he Board and the dissent are mistaken when they rely extensively on the concept of "exposure." The question in cases of this kind is whether the educational requirement or curriculum at issue would "substantially interfer[e] with the religious development" of the child or pose "a very real threat of undermining" the religious beliefs and practices the parent wishes to instill in the child. Whether or not a requirement or curriculum could be characterized as "exposure" is not the touchstone for determining whether that line is crossed.

The Court's jettison of normativity renders much of the majority opinion irrelevant, if not incoherent. *See* Zalman Rothschild, *Revisionist Religious Liberty*, MINN. L. REV. (forthcoming 2027) (unpub. ms. Mar. 2026), at 29-34 (cited with permission).

II. DISCRIMINATION PRIVILEGE

The Court's barely contained outrage at positive portrayals of LGBTQ children in public education betrays its own normative judgments about discrimination. *Mahmoud* is only the latest in a series of decisions in which the Court prioritized the religious sensibilities of conservative believers to the equal dignity of LGBTQ persons. The Court has excused conservative Christian bakers and website designers from providing their services to same-sex couples planning their weddings, despite a general state anti-discrimination law that protects LGBTQ persons.[48] It excused Catholic Social Services from certifying same-sex couples as foster parents, despite similar anti-discrimination conditions on the municipal funds it accepts.[49] Now, *Mahmoud* allows parents to shield their children from educational materials that portray LGBTQ persons as unexceptional participants in American life.

It's inconceivable that the Court would have exempted from anti-discrimination laws a baker or website designer or social service organization with beliefs against interracial marriage and racial integration; an effort by the *Mahmoud* parents to remove their children from exposure to racial equality themes would also have failed.[50] The Court has "rejected once and for all the idea that discrimination on the basis of race can be justified on the basis of religious belief or practice."[51] Social

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[48] 303 Creative LLC v. Colorado Civ. Rts. Comm'n, 600 U.S. 570 (2023); Masterpiece Cakeshop v. Colorado Civ. Rts. Comm'n, 584 U.S. 617 (2018).

[49] Fulton v. City of Philadelphia, 593 U.S. 522 (2021).

[50] This hypothetical came up repeatedly during the oral argument of *Fulton v. City of Philadelphia*; some of the Justices pressed petitioner's counsel to distinguish race from LGBTQ discrimination but no one entertained the plausibility of a religious exemption from racial anti-discrimination laws. *See* Tr. Oral Arg. 19-20, 31-32, 38-42, 45-48, 112-14 (Nov. 4, 2020), 593 U.S. 522 (2021) (No. 19-123). As Justice Barret summed up, "I think we would agree that there's really not any circumstance we can think of in which racial discrimination would be permitted as a religious exemption." *Id.* at 112. I am grateful to Professor Rothschild for suggesting this source.

[51] Laura S. Underkuffler, *Plessy Redux: Why the Human Rights of Gay, Lesbian, and Transgender Citizens Lost to Religious Claims*, 71 EMORY L.J. 1611, 1615 (2022) [hereinafter Underkuffler, *Plessy Redux*]; *e.g.*, Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (Government's compelling interest in eradicating race discrimination in education justified revocation of tax exemption from private university and private K-12 school with theological objections to inter-racial marriage and racial integration); Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 n.5 (1968) (characterizing as "patently frivolous" a restaurant owner's claim that the Civil Rights Act of 1964 "was invalid

norms likewise leave no room for race discrimination in public life.[52] There are no accommodations for believers who object to racial equality.

Given the uniform legal and social rejection of religious exemptions from racial anti-discrimination laws, distinguishing race discrimination from LGBTQ discrimination is crucial to the viability of religious exemptions from anti-discrimination laws that protect LGBTQ persons.[53] The Court, therefore, rejects the equation of race and LGBTQ discrimination, characterizing believers in traditional marriage and sexuality with a respect and sympathy it hasn't shown for believers in racial separation and

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because it contravenes the will of God" and interferes "with the free exercise of the [owner's] religion") (internal quotation marks omitted); Loving v. Virginia, 388 U.S. 1, 3 (1967) (quoting and then ignoring lower court's assertion that interracial marriage violates divine law). *See also* ANDREW KOPPELMAN, GAY RIGHTS V. RELIGIOUS LIBERTY: THE UNNECESSARY CONFLICT 109 (2020) (There is "zero tolerance for racism" in American law.).

[52] *E.g.*, Erica L. Green, *Trump Deletes Post with Racist Video of Obamas after Outcry*, N.Y. TIMES (Feb. 6. 2025), https://www.nytimes.com/2026/02/06/us/politics/trump-obamas-video-apes-truth-social.html; Carl Hulse, *Lott Fails to Quell Furor and Quits Top Senate Post*, N.Y. TIMES (Dec. 20, 2002), https://www.nytimes.2002/12/2002/politics/lott-fails-to-quell-furor-and-quits-top-senate-post.html (Public outcry over Sen. Trent Lott's (R-Miss.) praise of the arch-segregationist career of Sen. Strom Thurmond (R-S.C.) forced his resignation as Senate majority leader).

The habitual deployment of racist tropes by President Trump and his administration during both of his terms threatens to re-normalize unapologetic public racism. *See* Peter Baker, *A President Who Fans, Rather Than Douses, the Nation's Racial Fires*, N.Y. TIMES (Jan. 18, 2018) https://www.nytimes.com/2018/01/12/us/politics/trump-racism.html?searchResultPosition=4 (detailing the President's many racially charged statements during his first term, including his wish to replace immigrants from Haiti and African "shithole countries" with Norwegians); Anna Duben-ko, *Right and Left React to Trump's Latest Charlottesville Comments Blaming "Both Sides"*, N.Y. TIMES (Aug. 16, 2017), https://www.nytimes.com/search?dropmab=false&lang=en&query=Trump%20%20%20Charlottesville%20%20%20%22good%20people%20on%20both%20sides%22&sort=oldest; Evan Gorelick, *Administration Social Media Posts Echo White Supremacist Messaging*, N.Y. TIMES (Jan. 27, 2026), https://www.nytimes.com/2026/01/27/us/politics/white-supremacy-trump-administration-social-media.html).

[53] *See* Laura S. Underkuffler, *Religious Exceptionalism and Human Rights,* in RELIGION AND HUMAN RIGHTS DISCOURSE 439, 456 (Hanoch Dagan, Shahar Lifshitz *& Yedidia Z. Stern* eds. 2014) [hereinafter Underkuffler, *Religious Exceptionalism*].

inequality.[54] Many commentators also reject this "race analogy";[55] others endorse it.[56] Those who reject the analogy

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[54] *See, e.g.*, *Masterpiece Cakeshop*, 584 U.S. at 635-36 (Government official exhibited unjustified hostility to believers by comparing religious justifications for refusing to serve LGBTQ couple to religious justifications of slavery); Obergefell v. Hodges, 576 U.S. 644, 679-80 (2015): Believers and their religions

> may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.

See also Carlos A. Ball, *Supreme Court LGBTQ Orthodoxy*, 90 MO. L. REV. 751 (2025) (surveying Court opinions rejecting the race analogy).

[55] *See, e.g.*, THOMAS C. BERG, RELIGIOUS LIBERTY IN A POLARIZED AGE (2023); KOPPELMAN, *supra* note 51; Ryan Anderson, *Disagreement Is Not Always Discrimination: On* Masterpiece Cakeshop *and the Analogy to Interracial Marriage*, GEO. J.L. & PUB. POL'Y 123 (2018); Alan Brownstein, *Gays, Jews, and Other Strangers in a Strange Land: The Case for Reciprocal Accommodation of Religious Liberty and the Right of Same-Sex Couples to Marry*, 45 U.S.F. L. REV. 389 (2010); Kent Greenawalt, *Religious Toleration and Claims of Conscience*, 28 J.L. & POL. 91 (2013); Douglas Laycock, *The Campaign Against Religious Liberty* [hereinafter Laycock, *Religious Liberty*], *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 231 (Micah Schwartzman, Chad Flanders & Zoë Robinson eds., 2016) [hereinafter CORPORATE RELIGIOUS LIBERTY]; Douglas Laycock, *Afterword* [hereinafter Laycock, *Afterword*], *in* SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 189 (Douglas Laycock, Anthony R. Picarello, Jr. & Robin Fretwell Wilson eds., 2008) [hereinafter SAME-SEX MARRIAGE & RELIGIOUS LIBERTY]; Robin Fretwell Wilson, *Bargaining for Religious Accommodations: Same-Sex Marriage and LGBT Rights after* Hobby Lobby [hereinafter Wilson, *Religious Accommodations*], *in* CORPORATE RELIGIOUS LIBERTY, *supra*, at 257; Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context* [hereinafter Wilson, *Matters of Conscience*], *in* SAME-SEX MARRIAGE & RELIGIOUS LIBERTY. These scholars disagree with each other about justifications for rejection of the race analogy, as the notes that follow indicate.

[56] *E.g.*, Ball, *supra* note 54; Mary Anne Case, *Why "Live and Let Live" Is Not a Viable Solution to the Difficult Problems of Religious Accommodation in the Age of Sexual Civil* Rights, 88 S. CAL. L. REV. 463 (2015); Michael Kent Curtis, *A Unique Religious Exemption from Antidiscrimination Laws in the Case of Gays? Putting the Call for Exemptions for Those Who Discriminate Against Married or Marrying Gays in Context*, 47 WAKE FOREST L. REV. 173 (2012); James M. Oleske, Jr. *The Evolution of Accommodation: Comparing the Unequal Treatment of*

acknowledge the material costs that religious exemptions from anti-discrimination laws impose on LGBTQ persons,[57] but are not deterred from separating LGBTQ from race discrimination so as to allow exemptions in the one case but not the other. The reasons they offer consist of dubious assumptions and unsupported assertions that beg the question whether these two kinds of discrimination can, indeed, be meaningfully distinguished.

At bottom, rejections of the race analogy rest on a feeling, a bare intuition that religiously based LGBTQ discrimination is "just different," more benign than race discrimination and, therefore, understandable and defensible in terms other than naked prejudice. This feeling validates a "justified hostility" to LGBTQ persons that neither law nor society accepts when directed at racial and other minorities.[58]

Defenders of religious accommodations bristle at the accusations of discrimination and even bigotry drawn by their resistance to the race analogy, reacting to the label of moral failure that implicitly accompanies such accusations. My criticisms of their arguments are not criticisms of the people making them.[59] Legal academics are in the business of critically analyzing arguments; what follows is business, not personal.

A. "Race Is Unique."

The most common objection to the race analogy is the evident singularity of race discrimination in U.S. history. "Racial

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Religious Objections to Interracial and Same-Sex Marriages, 50 HARV. C.R.-C.L. L. REV. 99 (2015) [hereinafter Oleske, *Evolution of Accommodation*]; Underkuffler, *Plessy Redux, supra* note 51, at 1611; Underkuffler, *Religious Exceptionalism*, *supra* note 53, at 439; Laura S. Underkuffler, *Odious Discrimination and the Religious Exemption Question*, 32 CARDOZO L. REV. 2017 (2011) [hereinafter Underkuffler, *Odious Discrimination*]. *See also* Kyle C. Velte, *Recovering the Race Analogy in LGBTQ Religious Exemptions Cases*, 42 CARDOZO L. REV. 67 (2020) (endorsing the analogy in certain contexts).

[57] *See, e.g.*, Greenawalt, *supra* note 55, at 107-08; Laycock, *Afterword*, *supra* note 55, at 192, 198-99; Wilson, *Matters of Conscience*, *supra* note 55, at 99-101.

[58] The phrase, "justified hostility," is Professor Underkuffler's. Emails from Laura Underkuffler to Author (June 28, Aug. 2, 2025) (on file with author).

[59] I agree with Professor McLain that pejorative labels are beside the point of allowing or denying religious exemptions from anti-discrimination laws, because "it is not necessary to label a belief 'bigoted' to uphold an anti-discrimination law limiting people's ability to act on their sincere religious beliefs when dong so harms or interferes with the rights of others." *See* LINDA C. MCLAIN, WHO'S THE BIGOT?: LEARNING FROM CONFLICTS OVER MARRIAGE AND CIVIL RIGHTS LAW 5-6 (2020).

discrimination provides an inappropriate analogy" to LGBTQ discrimination, Professor Brownstein declares, "because racism plays such a uniquely invidious role in U.S. history. This is our country's original sin. The goal of purging racial discrimination from our polity and society has no equal and no counterpart."[60] On this view, doctrine governing race discrimination cannot inform questions about religious exemptions from LGBTQ anti-discrimination laws because race discrimination is in a constitutional class by itself. However serious the assaults on LGBTQ dignity, these simply measure less than racial oppression on the scale of social and personal destruction.[61]

Highlighting the uniquely destructive character of race discrimination to justify accommodation of LGBTQ discrimination doesn't do the analytic work its proponents imagine. Though Brownstein is correct—race discrimination in the United States has been exceptionally destructive of individuals and society—it doesn't logically follow that religious discrimination against LGBTQ persons merits constitutional exemption from anti-discrimination laws and immunity from social criticism.[62] One can condemn many kinds of discrimination while acknowledging that some are worse than

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[60] Brownstein, *supra* note 55, at 414–15; *accord* BERG, *supra* note 55, at 275–76 (In "American constitutional and social history . . . , racial discrimination is unique . . . . It is the wrong over which we fought a civil war . . . and the wrong whose correction transformed the Constitution . . . . Still today, nothing torments the nation as racial discrimination does."); Laycock, *Religious Liberty*, *supra* note 55, at 252–53 ("[G]ays and lesbians did not experience 250 years of slavery, and freeing them did not require a Civil War, 750,000 deaths, three constitutional amendments, and a century and a half and counting of further struggle. Race is constitutionally unique in our history . . . ."). *See also* Kent Greenawalt, *Religious Toleration and Claims of Conscience*, *in* CORPORATE RELIGIOUS LIBERTY, *supra* note 55, at 3, 17 ("I believe that, . . . because someone three-quarters white and one-quarter black counted as "negro" under southern statutes, those laws were designed to protect the purity of one race, the [race] analogy, though it carries some force, is not immune to differentiation."); Wilson, *Matters of Conscience*, *supra* note 55, at 101 ("While the parallels between racial discrimination and discrimination on the basis of sexual orientations should not be dismissed, it is not clear that the two are equivalent" in the context of religious accommodations from LGBTQ anti-discrimination laws.).

[61] Laycock, *Religious Liberty*, *supra* note 55, at 252.

[62] *Cf.* Oleske, *Evolution of Accommodation supra* note 56, at 121 (questioning why "the exceptional nature of the nation's struggle for racial equality should lead courts to treat race as occupying a *sui generis* constitutional category into which entry is barred for all other victims of discrimination").

others;[63] that the Jewish Holocaust was a singularly horrific event in European history hardly means that less violent pogroms deserve governmental and social solicitude.

The consistent confinement of this "racial exceptionalism" to the *African American* experience betrays its weakness. Its proponents rarely address whether Asian, Hispanic, or sex discrimination, or even anti-Semitism, is likewise "uniquely" destructive or otherwise different in kind from LGBTQ discrimination.[64] Ryan Anderson's attempt to theorize the racial exceptionalism objection is illustrative. Anderson emphasizes the crucial part that anti-miscegenation laws played in the systematic legal and social oppression of African Americans.[65] Since no comparable system has ever oppressed LGBTQ persons in the United States, he concludes, excusing conservative believers from providing goods and services to same-sex weddings can send no message of bigotry or inferiority.[66] The decisive evidence, Anderson believes, is that, unlike African Americans, LGBTQ persons in the U.S. are disproportionately represented in socio-economically advantaged classes.[67]

It would be much more difficult to distinguish the historical violence, insularity, and prejudice suffered by women and these other racial, ethnic, and religious groups from the comparable experiences of LGBTQ persons.[68] (Not that it should matter; a minority class should not have to win the "oppression Olympics" to prove worthy of constitutional protection.[69]) Indeed, the educational, economic, and political prominence of LGBTQ persons, on which Anderson relies to show that LGBTQ persons do not suffer from systematic discrimination,

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[63] *See* Ball, *supra* note 54, at 768.
[64] *But see* Brownstein, *supra* note 55, at 429 (comparing LGBTQ discrimination to anti-Semitism).
[65] Anderson, *supra* note 55, at 130-33, 135-37.
[66] *Id.* at 137, 138-39. This conclusion is obviously wrong with respect to exemption claims based the claimant's avoiding "complicity with evil." Such claims logically depend on a moral judgment that LGBTQ persons, or their behaviors, are sinful, immoral, evil, or some other pejorative. *See* Douglas Nejaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2575-78 (2015).
[67] Anderson, *supra* note 55, at 139-40.
[68] Underkuffler, *Odious Discrimination*, *supra* note 56, at 2087.
[69] Mark Satta, 303 Creative *for Everyone?*, 128 W. VA. L. REV. 1, 29 (2025).

could be used—and were used—to justify Christian discrimination against Jews.[70]

In short, the "uniqueness of race discrimination" is a *non sequitur* when deployed to justify religious exemptions from laws and norms that protect LGBTQ persons from discrimination. It simply does not follow from this uniqueness that religious exemptions from LGBTQ anti-discrimination laws are constitutionally justified.

B. "Our Faith Is Sincere."

Another common objection to the race analogy emphasizes the sincerity of believers in traditional marriage and sexuality. As Professor Wilson puts it, "The religious and moral convictions that motivate objectors to refuse to facilitate same-sex marriage simply cannot be marshaled to justify racial discrimination."[71] This objection often highlights the heterosexual understanding of marriage from time immemorial and the nearly-as-ancient theologies built upon it.[72] Another variation relies on centuries-old natural law arguments to insist that procreation has always been understood as the essence of marriage.[73] Still another points out the rapid change in American social mores and legal norms, from reflexive social and political opposition to same-sex marriage and LGBTQ anti-discrimination rights in the early 1990s to their embrace barely a generation later. Having been "caught by surprise," as it were,

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[70] *See, e.g.*, PAUL JOHNSON, A HISTORY OF THE JEWS 459-70 (1987) (recounting how the virulent American Christian anti-Semitism of the 1920s and 1930s coincided with American Jewish success in education, finance, industry, law, and politics).

[71] Wilson, *Matters of Conscience*, *supra* note 55, at 101.

[72] *E.g.*, KOPPELMAN, *supra* note 51, at 111 (Believers in traditional marriage and sexuality "are following a sexual ethic that, they believe, their religion has taught for centuries."); Greenawalt, *supra* note 55, at 113 ("Historically, virtually all cultures and religions have regarded marriage as between persons of different genders."); Laycock, *Religious Liberty*, *supra* note 55, at 253 ("[M]arriage and sexual morality have been central to religious teaching for millennia . . . .").

[73] *E.g.*, Anderson, *supra* note 55, at 133-34; Charles J. Reid, Jr., *Marriage: Its Relationship to Religion, Law, and the State*, *in* SAME-SEX MARRIAGE & RELIGIOUS LIBERTY, *supra* note 55, at 157. This natural law argument is rejected by many scholars otherwise unsympathetic to the race analogy. *See, e.g.*, Laycock, *Religious Liberty*, *supra* note 55, at 243–44; *cf.* Greenawalt, *supra* note 55, at 100 (suggesting that purportedly nonreligious natural law arguments against contraception are not "persuasive to more than a minute percentage of nonbelievers").

sincere believers in traditional marriage and sexuality are thought to deserve space in public life and even government offices to live out their traditional beliefs.[74]

This objection seeks to draw a hard line between the respective motives for racial and LGBTQ discrimination: unlike the unadorned bigotry and hate supposedly driving those who held to divinely inspired racial hierarchies, believers in traditional marriage and sexuality are motivated by genuine fidelity to God and his commandments.[75] Professor Velte describes the analytic and cultural work this distinction seeks to perform:

> [T]he vendors of the 1960s seeking to discriminate based on race under the guise of religious beliefs were actually racists, whereas today's exemption seekers are not actually homophobic but rather dedicated people of faith asserting honorable and sincere religious beliefs. . . . [T]oday's exemption seekers argue that because they are not like bigots and vendors of the 1960s were, the race analogy must fail. Otherwise, . . . today's exemption seekers will be improperly and inaccurately branded as bigots.[76]

The unspoken premise here is that no reasonable person could have held to racial hierarchies or White supremacy as a matter of faith.[77] Those who claimed theological justification for racial discrimination, therefore, must have been insincere, using religion as cover for indefensible prejudice.[78] The premise is clear in the rhetorical separation of race discrimination (driven by bad-faith bigotry) from religious LGBTQ discrimination (rooted in

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[74] *E.g.*, Greenawalt, *supra* note 55, at 113.

[75] *E.g.*, *Fulton* Tr. Oral Arg., *supra* note 50, at 57 (argument of co-counsel for petitioners) (Religious opposition to inter-racial marriage and racial integration is a "sort of odious anachronism," but religious opposition to same-sex marriage and LGBTQ anti-discrimination rights is a "decent and honorable view that people can recognize and accept in a country that's committed to religious tolerance.").

[76] Velte, *supra* note 56, at 74.

[77] *See* MCLAIN, *supra* note 59, at 8, 213. *See also id.* at 2 ("Defining a belief or practice as bigotry may be possible only after society has repudiated it as wrong and unjust. Once there is general agreement that such past beliefs and practices were bigoted, it becomes hard for people to understand that anyone every seriously defended them.").

[78] KOPPELMAN, *supra* note 51, at 108; MCLAIN, *supra* note 59, at 8, 212.

religious (good) faith).[79] The Court's decisions exempting believers from LGBTQ anti-discrimination laws are littered with this implication.[80]

This objection to the race analogy is blind to the history of slavery, racial subordination, and discrimination against African Americans. From the beginning, slaveholders and segregationists were as sincere in believing that their religion justified Black subordination as contemporary believers are today that their religion justifies LGBTQ discrimination.[81] One can draw a straight line from colonial and antebellum pro-slavery theologies,[82] through religious justifications of racial violence and segregation after the Civil War,[83] to sincere religious

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[79] *E.g.*, Laycock, *Afterword*, *supra* note 55, at 195 (Refusing service to LGBTQ persons "may be an act of bigotry or social protest, but very often, the claim to feel personal moral responsibility, or even fear of divine punishment, will be in complete good faith"). *But ee also* KOPPELMAN, *supra* note 51, at 116 (criticizing rejection of the race analogy on the ground of sincerity); Carlos A. Ball, *Against LGBTQ Exceptionalism in Religious Exemptions from Antidiscrimination Obligations*, 31 J. CIV. RTS. & ECON. DEV. 233, 239–40 (2018) (same).

[80] *See* Ball, *supra* note 54, at 788-96 (surveying opinions).

[81] *E.g.*, *id.* at 6; Curtis, *supra* note 56, at 187–88.

[82] *E.g.*, DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815-1848, at 475–80 (2009) (summarizing antebellum arguments that Black slavery is biblical and not intrinsically immoral); MARK A. NOLL, THE CIVIL WAR AS A THEOLOGICAL CRISIS 33-39 (2006) (same).

[83] *E.g.*, ERIC FONER, RECONSTRUCTION, AMERICA'S UNFINISHED REVOLUTION 1863-1877, at 89 (1988) (quoting General Assembly of the Southern Presbyterian Church):

> The end of slavery does not appear to have altered the views of many white clergymen as to the legitimacy of the peculiar institution or the desirability of preserving unaltered blacks' second-class status within biracial churches. The "whole doctrine" of the scriptural justification for slavery remained intact . . . . [A]s late as the 1890s, Southern ecclesiastics were still denouncing the idea of the inherent sinfulness of slaveholding.).

See also DAVID SEHAT, THIS EARTHLY FRAME: THE MAKING OF AMERICAN SECULARISM 47 (2022) ("The second Klan [of the early 20th century] was led by conservative Protestant ministers who were anti-immigrant, anti-Semitic, and anti-Catholic. It promoted a commitment to white supremacy, a persistent xenophobia, and a virulent form of Protestant moralism that it thought would protect white Christian America.").

opposition to interracial marriage and Black civil rights in the mid- and late 20th century.[84]

The abandonment of segregation also came suddenly. The triumvirate of foundational racial anti-discrimination statutes were all enacted less than 15 years after *Brown v. Board of Education* cracked open the door.[85] There were religious objectors to these laws, too, but neither the laws nor the Court recognized religious exemptions that would have allowed believers to ignore statutory anti-discrimination mandates.[86] We are little more than a generation distant from an American public discourse in which the pros and cons of racial separation were matters of reasonable

[84] *See, e.g.*, Bob Jones University v. United States, 461 U.S. 574, 595, 599, 602-03 (1983); KOPPELMAN, *supra* note 51, at 112–16; MCLAIN, *supra* note 59, at 6, 8; Curtis, *supra* note 56, at 188–91. Professor McLain discusses the voluminous evidence of sincere, theologically justified support for segregation and opposition to civil rights laws. MCLAIN, *supra* note 59, at 76-86, 97-99, 103-06, 115-22.

[85] *Compare* Fair Housing Act of 1968, Pub. L. 90-284, 82 Stat. 81 *and* Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437 *and* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 *with Brown*, 347 U.S. 483 (1954).

[86] *See* Oleske, *Evolution of Accommodation*, *supra* note 56, at 144.

intellectual and theological disagreement.[87] Only recently has public expression of racist beliefs become unacceptable.[88]

C. "Harms Are Symmetrical"

Still others who reject the race analogy posit a symmetry between the harms discrimination inflicts on LGBTQ persons and those suffered by conservative believers when denied exemptions from anti-discrimination laws—one that does not exist, apparently, when believers seek exemptions from racial anti-discrimination laws. Professor Laycock declares that "religious minorities and sexual minorities make essentially parallel demands on the larger society."[89] Others bolster this

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[87] *See* KOPPELMAN, *supra* note 51, at 119 (While racist speech is now "taboo," it "was not always the case that 'racist' was one of the worst things one could call a person."); Ball, *supra* note 54, at 794 ("As recently as the 1960s, many Americans did not believe that those who argued for the legal separation of the races were bigots.").

Bob Jones University was defended by mainstream religious organizations, including members of the Protestant main line. *See* Bob Jones Univ. v. United States, 461 U.S. 574, 576 (1983) (noting amicus briefs supporting Bob Jones filed in the Supreme Court by, *inter alia*, the American Baptist Churches (jointly with the United Presbyterian Church in the USA), the Christian Legal Society, and the National Association of Evangelicals). My own religion, The Church of Jesus Christ of Latter-day Saints, filed an amicus brief supporting Bob Jones in the Court of Appeals despite having just abandoned its longstanding exclusion of African Americans from priesthood ordination and temple worship. *See* Ronald S. Tewes, *Religion, Education, and Government Regulation: Implications of* Bob Jones University v. United States *for Congressional Decisionmaking*, 34 S.C. L. REV. 885, 886 n.2 (1983). It did not acknowledge the racist origins of this practice until 2013. *See generally Race and the Priesthood*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, https://www.churchofjesuschrist.org/study/manual/gospel-topics-essays/race-and-the-priesthood?lang=eng (last visited Feb. 21, 2026).

Senator Lott, booted from Senate leadership in 2002 for his endorsement of Strom Thurmond and segregation, *see supra* note 52, had attracted little attention when he made a virtually identical comment as a member of Congress in 1980 and filed an amicus brief supporting Bob Jones three years later. *See* 461 U.S. at 576; Carl Hulse, *Lott's Praise for Thurmond Echoed His Words of 1980*, N.Y. TIMES (Dec. 11, 2002), https://www.nytimes.com/2002/12/11/us/lott-s-praise-for-thurmond-echoed-his-words-of-1980.html#:~:text=Thurmond%2C%20then%20a%20top%20draw,said%20that%20he%20accepted%20Mr.

[88] *See supra* notes 51-52 and accompanying text.

[89] Laycock, *Religious Liberty, supra* note 55, at 242; *accord* BERG, *supra* note 55, at 277 ("Both religion and same-sex relationships involve a feature of identity that is deep-seated, changeable (if at all) only with significant pain and

claim with the Coase Theorem, which famously posited that negative externalities associated with economic production are reciprocal.[90] Applying Coase to religious exemption claims from LGBTQ anti-discrimination laws, they assert that refusing to accommodate conservative believers in public life harms those believers to the same extent that accommodations harm LGBTQ persons; if believers and LGBTQ persons impose equivalent harms on each other, there is no reason to protect one group over the other.[91] A premise of symmetrical harms also seems to lie beneath the suggestion that the proper analogy to religiously motivated LGBTQ discrimination is inter-faith discrimination: when the law permits religious objectors of one faith to refuse to serve, to acknowledge, or to facilitate believers of another faith or their practices, then religious objectors to LGBTQ rights should be permitted a similar exemption with respect to LGBTQ persons or conduct.[92]

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distress, and tied immediately to conduct (religious practices, same-sex partnerships, transgender expression.")); Wilson, *Religious Accommodations, supra* note 55, at 263 ("The same fundamental values of personal liberty that support an individual's right to follow and fulfill her sexual identity . . . also support an individual's right to live according to her religious convictions."). *See also* Mahmoud v. Taylor, 606 U.S. 522, 567-68 (2025) (rejecting contention that religious opt-outs from the LGBTQ-friendly storybooks stigmatize LGBTQ students, on ground that refusing opt-outs stigmatizes religiously conservative students).

[90] R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

[91] *E.g.*, Stephanie H. Barclay, *An Economic Approach to Religious Exemptions*, 72 FLA. L. REV. 1211, 1215–18, 1228 (2020) ("[T]he mere existence of a religiously caused externality would not, alone, provide a sufficient justification for government restriction of religious rights" because accommodated believers and third-party bystanders "are always inflicting externalities on each other."); *see* BERG, *supra* note 55, at 161-62 & nn.40–42, 208 & n.83 (endorsing Barclay's application of Coase to religious exemption disputes); Jason J. Meulhoff, Case Comment, *A Ministerial Exemption for All Seasons: Our Lady of Guadalupe School v. Morrissey-Berru,* 45 HARV. L.J. PUB. POL'Y 465, 475 n.59 (2022) (same).

[92] *E.g.*, BERG, *supra* note 55, at 277. Professor Brownstein uses the same rubric to create a presumption of religious accommodation that would be rebuttable in many circumstances. *See* Brownstein, *supra* note 55, at 422-23. Subsequent decisions, however, have skewed the evenhandedness of Brownstein's proposal towards accommodation. *Compare id.* at 428-29 (concluding that accommodations are not appropriate when believers or their organizations accept government funds or are engaged in commercial activity) *with* Tandon v. Newsom, 593 US 61 (2021) (holding government refusal to afford religious exemptions when it afforded secular exemptions constituted religious discrimination under Free Exercise Clause) *and* Fulton v. City of Phila., 593

The appeal to Coase fails on its own economic terms.[93] More generally, the plausibility of symmetry claims depends on systematically under-weighing and narrowing the costs of discrimination to LGBTQ persons in comparison to those of the believer who is denied an exemption from anti-discrimination laws. As Professor Brownstein has pointed out, believers seeking exemptions are rarely required to incur significant costs to avoid burdening others.[94] Denials of service to LGBTQ persons are described as causing them the "mere inconvenience" of obtaining goods and services from another willing vendor;[95] it would follow, apparently, that when willing vendors are present in the market, religious exemptions inflict no constitutional harm on LGBTQ persons. Indeed, proponents of this symmetry claim seem breezily unconcerned at the resemblance of their proposed

U.S. 522 (2021) (same regarding city's refusal to exempt religious nonprofit from anti-discrimination funding provision when provision permitted discretionary secular exemptions). *See also* Burwell v. Hobby Lobby, 573 U.S. 682 (2014) (holding Religious Freedom Restoration Act required accommodation of business corporation with religious objections to certain contraceptives from contraception mandate of Affordable Care Act).

[93] *See* Frederick Mark Gedicks, *Coase and Accommodation: A Reply*, 71 EMORY L.J. 1457, 1464–81 (2022) (showing that Barclay's application of Coase to religious exemptions ignores problems of incommensurability, idiosyncratic valuation, uncertainty about the elasticity of demand for religious accommodation, and Coase's own suggestion that government regulation is a plausible firm-like response to high transaction costs). *See also id.* at 1481–85 (summarizing ethical arguments against externalizing the costs of one's religious practices onto third-parties who believe differently).

[94] Brownstein, *supra* note 55, at 416; *accord* Underkuffler, *Odious Discrimination*, *supra* note 56, at 2091 ("[A] religious adherent who objects to rights for homosexual men and women would undoubtedly be incredulous if it were suggested that he could be subjected to discriminatory treatment, on the basis of the religious beliefs of others, in public and commercial life.").

[95] Laycock, *Religious Liberty, supra* note 55, at 198; *accord* BERG, *supra* note 55, at 294-95 (analyzing denials of service in terms of access and embarrassment).

Professor Wilson recognizes that more is at stake for LGBTQ couples than bare access, *see* Wilson, *Matters of Conscience, supra* note 55, at 99-01, but still comes down in the same place as Berg and Laycock, *see id.* at 98–99 (treating access to marriage by same-sex couples as a matter of avoiding embarrassment and inconvenience by informing them in advance which government officials will not, issue a license or solemnize a ceremony); *id.* at 102 (characterizing exemptions from LGBTQ anti-discrimination laws for religious adoption services as immaterial to LGBTQ persons).

religious accommodations to *Plessy*-like, separate-but-equal regimes.[96]

By comparison, violations of religious conscience are inflated to existential proportions. It is unjust that a believer be forced to risk the wrath of God and the burnings of hell when another baker is happy to bake a wedding cake or another clerk willing to issue the marriage license. This move belies the "symmetry" claim, implying that harms to religious conscience are not just *equal* to harms to LGBTQ persons from denials of service, but *outweigh* them.[97]

Proponents of religious anti-discrimination accommodations often describe them as "live-and-let-live" compromises, but the costs of compromise are borne almost entirely by LGBTQ persons.[98] The unequal burdens of compromise are all the more frustrating when they are not the pragmatic price to be paid for access to marriage and protection against discrimination in other situations; LGBTQ access to marriage is more than a decade old,[99] and in recent cases the Court has granted religious exemptions from existing anti-discrimination statutes and policies that LGBTQ persons already secured in the political arena.

Finally, the proposal that religiously motivated LGBTQ discrimination be analogized to interfaith discrimination verges on tautology. The proposal suggests that permissible religious

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[96] *E.g.*, Laycock, *Afterword*, *supra* note 55, at 200 ("[I]n the worst case, the stream of commerce might be sprinkled with public notices of discriminatory intent. In more traditional communities, same-sex couples planning a wedding might be forced to pick their merchants carefully, like black families driving across the South half a century ago."). *But see* Ira C. Lupu & Robert W. Tuttle, *Same-Sex Equality and Religious Freedom*, 5 NW. J. L. & SOC. POL'Y 274 (2010) (suggesting that public posting of discriminatory notices might multiply refusals of service).

[97] *Compare* Laycock, *Afterword*, *supra* note 55, at 198 ("Requiring a merchant to perform services that violate his deeply held moral commitments is far more serious, different in kind and not just degree, from mere inconvenience.") *with* Frederick Mark Gedicks, *Christian Dignity and the Overlapping Consensus*, 46 BYU LAW REV. 1245, 1265-66 (2021) ("In Western democracies, conservative Christians are often unwilling to accept the reciprocity of rights that equal dignity implies. Resistance to antidiscrimination laws is an obvious example."). *See also* Fulton v. City of Phila., 593 U.S. 522 (2021) (holding city's refusal to exempt Catholic Social Services from LGBTQ anti-discrimination policy constituted religious discrimination).

[98] *Cf.* Case, *supra* note 56, at 480 (suggesting "live and let live" is more like "live and let die").

[99] *See* Obergefell v. Hodges, 576 U.S. 644 (2015).

discrimination in one context (inter-faith marriage) is the measure of its permissibility in another context (same-sex marriage and LGBTQ rights); its validity depends on demonstrating that both contexts are essentially the same. Thus, Professor Berg asserts that religious affiliation, sexual orientation, and gender identity each "involve a feature of identity that is deep-seated, changeable (if at all) only with significant pain and distress, and tied immediately to conduct" like "religious practices, same-sex partnerships, [and] transgender expression."[100]

But this identification runs counter to the widespread consensus that sexual orientation and gender identity are not matters of choice;[101] many states—even red-state Utah[102]—have outlawed sexual orientation conversion therapy for minors because it is unavoidably abusive.[103] By contrast, religious affiliation *is* a matter of personal choice—a sometimes difficult choice, to be sure, but a choice nonetheless. Jehovah's Witnesses, Latter-day Saints, and Pentecostals, among other religions, are dependent on converts for growth. It is hardly unusual for people to leave even thick religious communities for other faiths or no faith at all. However difficult religious

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[100] BERG, *supra* note 55, at 277.

[101] *E.g.*, Talbott v. United States, 775 F.Supp.3d 283 (D.D.C. 2025) (analyzing research demonstrating that gender identity is not voluntarily chosen), *stayed pending appeal*, No. 25-5087 (D.C. Cir. Dec. 9, 2025), 2025 WL 3533344; Pedersen v. U.S. Off. Personnel Mgmt., 881 F.Sup.2d 968 (N.D. Cal. 2012) (same regarding sexual orientation), *appeal dismissed by stipulation*, 724 F.3d 1048 (9th Cir. 2013). *See also* Lisa M. Diamond & Clifford J. Rosky, *Scrutinizing Immutability: Research on Sexual Orientation and U.S. Legal Advocacy for Sexual Minorities*, 53 J. SEX RES. 363 (2016) (summarizing and synthesizing research demonstrating that, while sexual orientation is fluid and may change over a person's life, the role of personal choice is minimal).

There is also a strong popular consensus that neither sexual orientation nor gender identity is voluntarily chosen. *See* Underkuffler, *Odious Discrimination*, *supra* note 56, at 280-82 (summarizing survey data).

[102] *See* UTAH CODE ANN. § 58-1-511 (2023).

[103] *See* Diamond & Rosky, *supra* note 101, at 8-9. *See also* Esteban Hernandez & Avery Lotz, *Mapped: Conversion Therapy across the U.S.*, AXIOS (Mar. 10, 2025) (25 states and the District of Columbia have fully prohibited, and five states have partially prohibited, conversion therapy for minors, while four states have prohibited such bans), https://www.axios.com/local/denver/2025/03/11/mapped-conversion-therapy-across-the-u-s (last visited Mar. 12, 2026). The Supreme Court recently declared conversion therapy bans unconstitutional as applied to "talk therapy" that entails only pure speech. Chiles v. Salazar, 607 U.S. ---, 2026 WL 872307 (Mar. 31, 2026).

conversion may be, it remains voluntary in a way that sexual orientation and gender identity are not.

Dubious assertions of symmetrical harm miss the point of anti-discrimination laws, which extends far beyond bare access to goods and services. Anti-discrimination laws guarantee equality of citizenship, which includes the reasonable expectation that one can freely circulate in public markets and all of public life to satisfy one's wants and needs.[104] This includes protection for the subjective humiliation entailed by a particular denial of service because of one's sexual orientation or gender identity, but also the objective indignity inherent in those refusals—that LGBTQ people cannot participate in American economic and public life on the same terms as everyone else.[105]

Before the widespread adoption of racial anti-discrimination laws, a denial of service to an African American was not merely a transactional harm, forcing him to go elsewhere or without;[106] after all, a racially even-handed separate-but-equal regime would have guaranteed equal access to goods and services. African Americans rightfully claimed more—the right to access goods and services with the dignity to which their equal citizenship entitles them. It was the very norm of racial separation, justifying this denial, that constituted the evil at which racial anti-discrimination laws aimed, irrespective of adequate transactional alternatives.[107]

White segregationists had their own claims of dignity, the desire—often religiously grounded—to live authentically, in accordance with their deepest beliefs about racial separation. Their claims foundered on lack of attention to place—to the physical or conceptual site of discrimination. Segregationists were—and remain—constitutionally entitled to racially discriminate in their private lives; in public life, however, where we all must live together, they may not call on the state to protect their racist sensibilities.

So it is with religious LGBTQ discrimination. Claims of symmetrical harms cannot be weighed in the abstract; they depend, not just on accurately characterizing the comparative

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[104] Frederick Mark Gedicks, *Dignity and Discrimination*, 46 BYU L. REV. 961, 967–69 (2021).
[105] *Id.* at 969.
[106] Underkuffler, *Religious Exceptionalism*, *supra* note 53, at 459; *see* Greenawalt, *supra* note 55, at 108 (describing without endorsing this argument).
[107] Underkuffler, *Religious Exceptionalism*, *supra* note 53, at 459.

harms from discrimination and conscience violations, but also on attention to *where* discrimination and denial take place.[108] The symmetry argument depends on yet another unspoken premise—the privatization of quintessentially public spaces.[109] At bottom, conservative believers assert the right to project the consequences and costs of their religious beliefs onto others who do not share them, as if the believers were in their home or place of worship, rather than retail business establishments, public accommodations, government offices, and other quintessentially public places.[110]

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Neither the purported exceptionalism of race discrimination in U.S. history, nor religious sincerity, nor the phantom symmetry of respective harms demonstrates the invalidity or unsoundness of the analogy of race discrimination to LGBTQ discrimination. The Court did not credit any of these arguments when it applied heightened scrutiny to bases of discrimination other than race.[111] Central to those determinations, rather, is whether the basis of discrimination fairly measures one's individual worth and ability to contribute to society.[112]

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[108] Gedicks, *supra* note 104, at 971-72.

[109] Case, *supra* note 56, at 471, 474-77.

[110] *Id.* at 475; Gedicks, *supra* note 104, at 972-74.

Professor Laycock largely rejects religious accommodation of government officials who refuse to serve LGBTQ couples. *See* Laycock, *Afterword*, *supra* note 55, at 199 ("Government employees cannot have more than *de minimis* rights to refuse to perform their core job functions for all members of the public . . . .").

[111] *E.g.*, Mills v. Habluetzel, 456 U.S. 91 (1982) (applying intermediate scrutiny to dramatically different statutes of limitation for child support actions by marital and nonmarital children, without comparing discrimination suffered by nonmarital children to that by other protected classes); Craig v. Boren, 429 U.S. 190 (1976) (applying intermediate scrutiny to sex classification without comparing discrimination suffered by women to that by other protected classes); Graham v. Richardson, 403 U.S. 365 (1971) (holding alienage discrimination is subject to strict scrutiny, like race and national origin discrimination, without comparing discrimination suffered by aliens to that by other protected classes).

[112] James N. Oleske, Jr., Mahmoud*,* Skrmetti*, and* 303 Creative*: Ignoring Original Meaning, Rewriting Precedent, and Discounting Harm to LGBTQ People*, 26 HOUS. J. HEALTH L. & POL'Y (forthcoming 2026) [hereinafter Oleske, *Rewriting Precedent*], *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=6352418 (Mar. 6, 2026), at 16-17, 18; *e.g.*, Rice v. Cayetano, 528 U.S. 495, 517 (2000) ("One of the principal reasons race is treated as a forbidden classification is that it

This is the question accommodationists obscure with weak arguments against the race analogy: how is sexual orientation or gender identity, any more than race, national origin, parentage, or sex, relevant to one's social merit or public qualification—to marry, to work, to buy or rent a home, or to satisfy other legitimate wants and needs in retail businesses and public markets? That showing is always in short supply when believers seek a free exercise license to discriminate against LGBTQ persons.

III. DOCTRINAL PRIVILEGE

The last privilege the Court affords to conservative religion lies in unexplained inconsistencies in recognizing religious coercion and parental rights.

A. Student Coercion

Another peculiarity of *Mahmoud* is the Court's deep concern for the coercive pressures of public school instruction from authority figures like classroom teachers.[113] The record lacked

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demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities."); United States v. Virginia, 518 U.S. 515 (1996) ("[N]either federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women . . . equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities."); City of Cleburne v. Cleburn Living Ctr., 473 U.S., 440-41 (1985) ("[Sex] frequently bears no relation to ability to perform or contribute to society." (internal quotation marks deleted)); Matthews v. Lucas, 427 U.S. 495, 505 (1976) ("[T]he legal status of illegitimacy . . . like race or national origin . . . bears no relation to the individual's ability to participate in and contribute to society."). *See also Craig*, 429 U.S. at 198-99 ("[O]utdated misconceptions concerning the role of females in the home rather than in the marketplace and world of ideas" do not justify sex classifications.).

[113] *Mahmoud,* 606 U.S. at 554-55.

The Court cited *West Virginia Board of Education v. Barnette* and *Wisconsin v. Yoder* as supporting authorities for this conclusion. *See Mahmoud*, 606 U.S. at 548. *Barnette*, however, is inapposite, as the Court seemed to admit, because the law there compelled students affirmatively to speak and to act in support of a patriotic government message in violation of the Speech Clause. *See id*. No such compulsion is alleged to have occurred in *Mahmoud*. *See id.* at 604 (Sotomayor, J., dissenting).

As for *Yoder*, Professor Oleske persuasively demonstrates how the Court distorted *Yoder*'s holding in *Mahmoud*. *See* Oleske, *Rewriting Precedent*, *supra* note 112, at 11 ("[T]he Court's non-originalist opinion in *Mahmoud* rests on a mischaracterization of *Barnette*, a mischaracterization of *Smith*'s reading of Y*oder*, and a mischaracterization of *Yoder* itself."). *See also Rothschild,* supra

any evidence that any teacher had ever, even obliquely, pressured students to abandon religious precepts taught them by their parents; aside from parental assertions, the record contained only general directives from the district about how teachers might respond to student questions about the storybooks; some suggestions, highlighted by the Court,[114] included answers that challenge hetero-normative thinking.[115] The Court ultimately found this lack of evidence immaterial, essentially holding that classroom teaching is *inherently* coercive: "[W]e have recognized the potentially coercive nature of classroom instruction . . . because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure."[116]

In *Kennedy v. Bremerton School District*, handed down by the identical majority only three years earlier, the Court upheld ostentatious football-field prayers by a coach who invited others to pray along with him, including his own players.[117] There, the Court summarily dismissed parental concerns about religious coercion as "hearsay," precisely because the record lacked evidence that the coach had directly pressured his players to pray

note 47, at 16 (*Mahmoud* "borrows the moral authority" of *Barnette* and *Yoder* "while discarding the limits that made them intelligible within the Court's broader Frist Amendment architecture.").

[114] Mahmoud v. Taylor, 606, U.S. 522, 560 (2025).

[115] Mahmoud v. McKnight, 102 4th 191, 198–99 (4th Cir. 2024) (summarizing the record), *rev'd*, 606 U.S. 522 (2025).

These directives might have been written with more sensitivity to concerns of religiously conservative children and parents. *But see* Katskee & Lupu, *supra* note 45, at [23] (Education "inevitably either reinforce[s] or disrupt[s] traditional norms of all sorts"). Nevertheless, they were not material to the outcome; the Court's obvious sympathy for the parents, its harsh objections to normalizing LGBTQ people, and its determination that mere exposure to difference constitutes a free exercise burden, show that it would have decided the case in the same way even in the absence of these (or any) directives.

[116] *Mahmoud*, 606 U.S. at 554–55 (internal quotation marks omitted).

[117] 597 U.S. 507 (2022). The majorities in both *Mahmoud* and *Kennedy* consisted of Chief Justice Roberts and Justices Alito, Barrett, Gorsuch, Kavanaugh, and Thomas; Kavanaugh did not join the *Kennedy* majority's analysis of whether the coach's prayers implicated government employee speech rights under Pickering v. Board of Education, 391 U.S. 563 (1969) and Garcetti v. Ceballos, 547 U.S. 410 (2006). *See Kennedy*, 597 U.S at 511.

with him or that the players felt any such pressure from the coach or their peers.[118]

One might maintain that the elementary age children in *Mahmoud* were more easily swayed by authority figures like classroom teachers than the high school students in *Kennedy*. But the cases the Court cited in *Mahmoud* for the inherently coercive atmosphere of public school classrooms dealt with pressure on middle and high-school students.[119] More to the point, as the *Kennedy* dissenters recognized, one can hardly imagine a situation more freighted with coercive potential than one in which a high school athlete's playing time, starting possibilities, NIL payments, and college career depend on the subjective evaluations of a coach who has invited that athlete to worship with him.[120]

In short, there was no evidence of teacher coercion in either *Mahmoud* or *Kennedy* but this seemed to matter only in *Kennedy*. It is hard to avoid the conclusion that the majority in *Mahmoud* and *Kennedy* allowed their personal views about religious accommodation and LGBTQ discrimination to affect their determination that an inherently coercive situation existed in *Mahmoud* (*despite* no evidence) but not in the equally coercive situation in *Kennedy* (*because of* no evidence).

B. Parental Rights

Finally, there is the Court's concern with the fundamental right of parents to transmit to their children traditional religious

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[118] *Id.* at 538–39. *Compare id.* at 518–19 (noting coach's contention that district policy prohibited him from discouraging students from praying with him), *and id.* at 551–52 (Sotomayor, J., dissenting) (observing that coach evidently desired willing students to pray with him) *with* Andrew Koppelman, *The Emerging First Amendment Right to Mistreat Students*, 73 CASE WES. RES. L. REV. 1209, 1227 (2023) (arguing that school administrators should have been permitted to recognize the coercive potential of the prayers on students "rather than first allowing the harm to happen and then collecting sworn proof of it").

[119] *Mahmoud*, 607 U.S. at 554–55 (quoting and citing Lee v. Weisman, 505 U.S. 577 (1992) (middle school students); Edwards v. Aguillard, 482 U.S. 578 (1987) (high school students)).

[120] *See Kennedy*, 597 U.S. at 562 (Sotomayor, J., dissenting) ("Players recognize that gaining the coach's approval may pay dividends small and large, from extra playing time to a stronger letter of recommendation to additional support in college athletic recruiting.").

beliefs about marriage and sexuality.[121] The Court concluded that classroom use of LGBTQ-friendly storybooks undermines the ability of parents to teach their children traditional religious values about marriage and sexuality.[122] Under the Court's expansive reading of *Wisconsin v. Yoder*,[123] the school district's refusal to allow parents to selectively remove their children from this curricular unit was subject to strict scrutiny. Unsurprisingly, the Court rejected the district's justifications as neither compelling nor narrowly tailored.[124] It ordered the district to notify parents "in advance whenever one of the books in question or any other similar book is to be used in any way and to allow them to have their children excused from that instruction."[125]

This deep concern for parental rights was entirely absent from the Court's opinion in *United States v. Skrmetti*, issued only nine days earlier.[126] There, the Court upheld Tennessee's statutory denial of transgender care to children without a word about the burden this imposes on the fundamental right of parents to raise their children without state interference.[127] The Court and lower federal and state courts have consistently held that "fit" or suitable parents have a presumptive right to choose professionally approved medical treatments for their children, on the unremarkable ground that they are better situated than the government to know what is best for their children.[128] One might

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[121] For a detailed and insightful examination of the origin and development of the constitutional rights of parents with respect to their children, *see* Ira C. Lupu, *The Centennial of* Meyer *and* Pierce*: Parents' Rights, Gender-Affirming Care, and Issues in Education*, 26 J. CONTEMP. LEGAL ISSUES 147 (2025).

[122] *Mahmoud*, 606 U.S. at 522.

[123] 406 U.S. 205 (1972) (Free Exercise Clause requires exemption of Amish parents from legal mandate to enroll their children in two years of high school, based on existential threat of public education to Amish community and parents' provision of informal vocational education at home).

[124] *Mahmoud*, 606 U.S. at 565–66.

[125] *Id.* at 527. The Court dismissed the administrative complexities of this opt-out regime but they are substantial. *See* Katskee & Lupu, *supra* note 45, at 30-41 (detailing the efforts of the school district to comply with the Court's mandate on remand).

[126] United States v. Skrmetti, 605 U.S. 495 (2025). *Skrmetti* was handed down on June 18, *Mahmoud* on June 27.

[127] *Id.* at 524-25.

[128] *E.g.*, Parham v. J. R., 442 U.S. 584, 602 (1979) (*Meyer*, *Pierce*, *Prince*, and *Yoder* constitutionally protect the parental right "to recognize symptoms of [mental] illness and to seek and follow medical advice."); Kanuszewski v. Mich. Dep't Health & Hum. Servs., 927 F.3d 396, 418 (6th Cir. 2019) ("[C]hildren cannot control their own medical care and must instead rely on

have expected this Court, hyper-sensitive to government influence on children in *Mahmoud*, to have likewise concluded in *Skrmetti* that parents know better than any state legislature whether their children would benefit from medically indicated treatments for gender dysphoria—just as past Courts concluded that parents knew better than state legislatures whether their children would benefit from learning a foreign language,[129] or enrolling in a private school,[130] or visiting with grandparents.[131] As Professor Lupu concluded, "Once medical care is included in the general concept of parental control over development and upbringing of children, the state should have to justify under strict standards any interference with choices of treatments [that

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parents or legal guardians to do so until they reach the age of competency. Therefore, any substantive due process rights related to their care devolve upon the parents or legal guardians . . . ."); *cf.* Jensen v. Cunningham, 250 P.3d 465 (Utah 2011) (In protracted dispute with parents over proper medical treatment of their child, state "conceded that [parents] would not submit to chemotherapy and that it was unreasonable to force an unwilling 13–year–old boy to undergo chemotherapy."). *See also* Mirabelli v. Bonta, 607 U.S. ___,146 S.Ct. 797, 803 (2026) (*Meyer* and *Pierce* constitutionally protect parents' "right not to be shut out of participation in decisions regarding their children's mental health."); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents . . . ."). The medical professional support for treatments of gender dysphoria in minor children is summarized in Lupu, *supra* note 121, at 181–83. Both sides in the medical and political debate have lately contended that pro- and anti-transgender ideology on the other side have influenced the standard and legality of transgender care for minors. *See*, *e.g.*, Nicholas Confessore, *The Road to United States v. Skmetti*, NY TIMES MAG. (June 24, 2025), at 30. The result has been medical and political polarization. The issue has been further complicated by the Court's recent decision that state prohibition of therapies aimed at changing a patient's sexual orientation or gender identification, but not therapies aimed at affirming the patient's existing orientation or identification, constituted viewpoint discrimination in violation of the Speech Clause as applied to providers offering "talk therapy" entailing only pure speech. Chiles v. Salazar, 607 U.S. ---, 2026 WL 872307 (Mar. 31, 2026).

Nevertheless, it remains unclear how and why the judgment of the Tennessee legislature should preempt that of parents, whose decisions about appropriate medical care for their children are constitutionally protected. Unlike debates over the presence of transgender persons in private female spaces or their participation in girls' and women's sports, there are no negative externalities imposed on unconsenting third parties when parents and their child decide with health care providers that gender-affirming treatment is the best course for the child. *See* Lupu, *supra* note 121, at 190.

[129] *See* Meyer v. Nebraska, 262 U.S. 390 (1923).

[130] *See* Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).

[131] *See* Troxel v. Granville, 530 U.S. 57 (2000).

are] medically approved in other contexts for children."[132] Yet, nowhere in *Skrmetti* does the Court even allude to the parental rights obviously violated by the state's anti-treatment law. Only when faced with a later case, in which parental rights seemed to lean in a culturally conservative, anti-transgender direction, did the Court belatedly deem them worthy of mention.[133]

Of course, the Court granted certiorari in *Skrmetti* only on an equal protection question, which would seem to exclude consideration of parental and other substantive due process rights.[134] Tennessee's law criminalizes medical treatments and drugs when used to treat gender dysphoria, while allowing their use to enhance biological sex characteristics; it denies drugs and treatments to *transition away* from a child's biological sex but permits the identical drugs and treatments *to affirm* a child's biological sex. On that basis, the Court held that the law classifies on the basis of patient age and medical treatment goals, neither of which is suspect,[135] thereby avoiding the question whether discrimination on the basis of transgender status is subject to heightened scrutiny.

Still, the nonsuspect age and treatment-goal classifications operated to deprive some parents but not others of their fundamental right to choose medically accepted treatments for their children.[136] *Skrmetti*, therefore, fell squarely within the Court's line of fundamental rights/equal protection decisions, which provide that nonsuspect classifications—normally subject

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[132] Lupu, *supra* note 121, at 187. *See also id.* 238 ("Parents seeking treatments, otherwise available for both cisgender minors and adults, for their children suffering gender dysphoria have due process claims as strong as any the law has seen since *Meyer, Pierce*, and *Farrington*.").

[133] *See Mirabelli*, 146 S.Ct. at 802-03 (enjoining, as a violation of parental rights, enforcement of state law prohibiting public school authorities from informing parents of their child's gender transitioning).

The possibility that *Skrmetti* foreshadowed a narrowing or elimination of substantive due process parental rights, *see* Lupu, *supra* note 121, at 168, 174–75, seems to have been foreclosed by *Mirabelli*'s recognition and application of such rights, *see* 146 S.Ct. at 803. *See also id.* at 803-05 (Barrett, J., joined by Roberts, C.J. & Kavanaugh, J., endorsing parental rights despite their substantive due process roots).

[134] *See* United States v. Skrmetti, 144 S. Ct. 2679 (2024) (granting certiorari). The petition asked for review only of the equal protection question.

[135] United States v. Skrmetti, 605 U.S. 495, 517–18 (2025).

[136] *See* Lupu, *supra* note 121, at 192 ("[P]arents who (with medical approval) want their minor children to have the freedom to use certain pharmaceutical substances to treat gender dysphoria are being treated worse than parents who want their children to have the option to use the identical substances . . . to treat other conditions.").

to minimal rational basis scrutiny—trigger strict scrutiny when they operate to selectively deny the exercise of unenumerated fundamental rights.[137] Indeed, the Court expressly recognized this doctrine in *Skrmetti* when it summarized the equal protection principle at the outset of its analysis: "We have reconciled the principle of equal protection with the reality of legislative classification by holding that, if a law *neither burdens a fundamental right* nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end."[138]

Although classifications based on patient age and treatment goals would normally draw only minimal rational basis scrutiny, in *Skrmetti* they burden the fundamental right of parents to choose medically approved treatments for their transgender children. Under its own equal protection doctrine, therefore, the Court was obligated to explain how and why Tennessee's discriminatory distribution of fundamental parental rights satisfied strict scrutiny.

Once again, it's difficult to avoid the conclusion that prior personal commitments of the *Mahmoud* majority on religious accommodation and gender transitioning affected their decision to ignore a well-established doctrine that was squarely on point.

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[137] *E.g.*, Skinner v. Oklahoma, 316 U.S. 535 (1942) (law prescribing sterilization of serial offenders based on the violent or nonviolent character of the crime violated the Equal Protection Clause by depriving violent (but not nonviolent) offenders of their fundamental right to procreate); Reynolds v. Sims, 377 U.S. 533 (1964) (malapportionment of state legislative districts violated the Equal Protection Clause by diluting the right of some to vote in state elections and concentrating that right in others); Williams v. Rhodes, 393 U.S. 23 (1968) (law applying different ballot-qualification requirements based on a party's share of the presidential vote violated the Equal Protection Clause by differentially burdening the right of members of small parties to vote in state elections); Shapiro v. Thompson, 394 U.S. 618 (1969) (durational residency prerequisite to receipt of state welfare benefits violated the Equal Protection Clause by differentially burdening the fundamental right to travel of newly arrived state residents); Stanley v. Illinois, 405 U.S. 645 (1972) (law permitting deprivation of unwed fathers of child custody without a finding of unfitness—while not imposing the same rule on married fathers or unmarried mothers—violated the Equal Protection Clause by differentially burdening the fundamental right to raise one's children).

[138] *Skrmetti*, 605 U.S. at 509–10 (emphasis added) (internal quotation marks omitted).

CONCLUSION: THE NEW ESTABLISHMENT?

At every juncture, the Court in *Mahmoud* takes the side of religiously conservative parents to the exclusion of everyone else. It expresses outrage at the normalization of LGBTQ persons while ignoring the heterosexual normativity that has dominated public education since its beginnings.[139] It excuses religious discrimination against LGBTQ persons that it did not permit—and would not now permit—against racial and ethnic minorities.[140] And it displays a special sensitivity to religiously conservative students and their parents that it withholds from others in the Culture Wars.[141]

Mahmoud provides an unvarnished look into the Court's distorted understanding of American pluralism: schools may teach traditional marriage and heterosexual norms (but not the existence of others), religious discrimination against racial minorities is invidious and unacceptable (but not religious discrimination against LGBTQ persons), and constitutional doctrine may be selectively applied and facts selectively recognized to protect conservative believers (but not others). Only the Court's imperative of protecting conservative religion can explain this multitude of sins.

[139] *See supra* Part I.
[140] *See supra* Part II.
[141] *See supra* Part III.

APPENDIX: EXCERPTS FROM DICK AND JANE STORIES

Contents

Figure 1

Figure 2

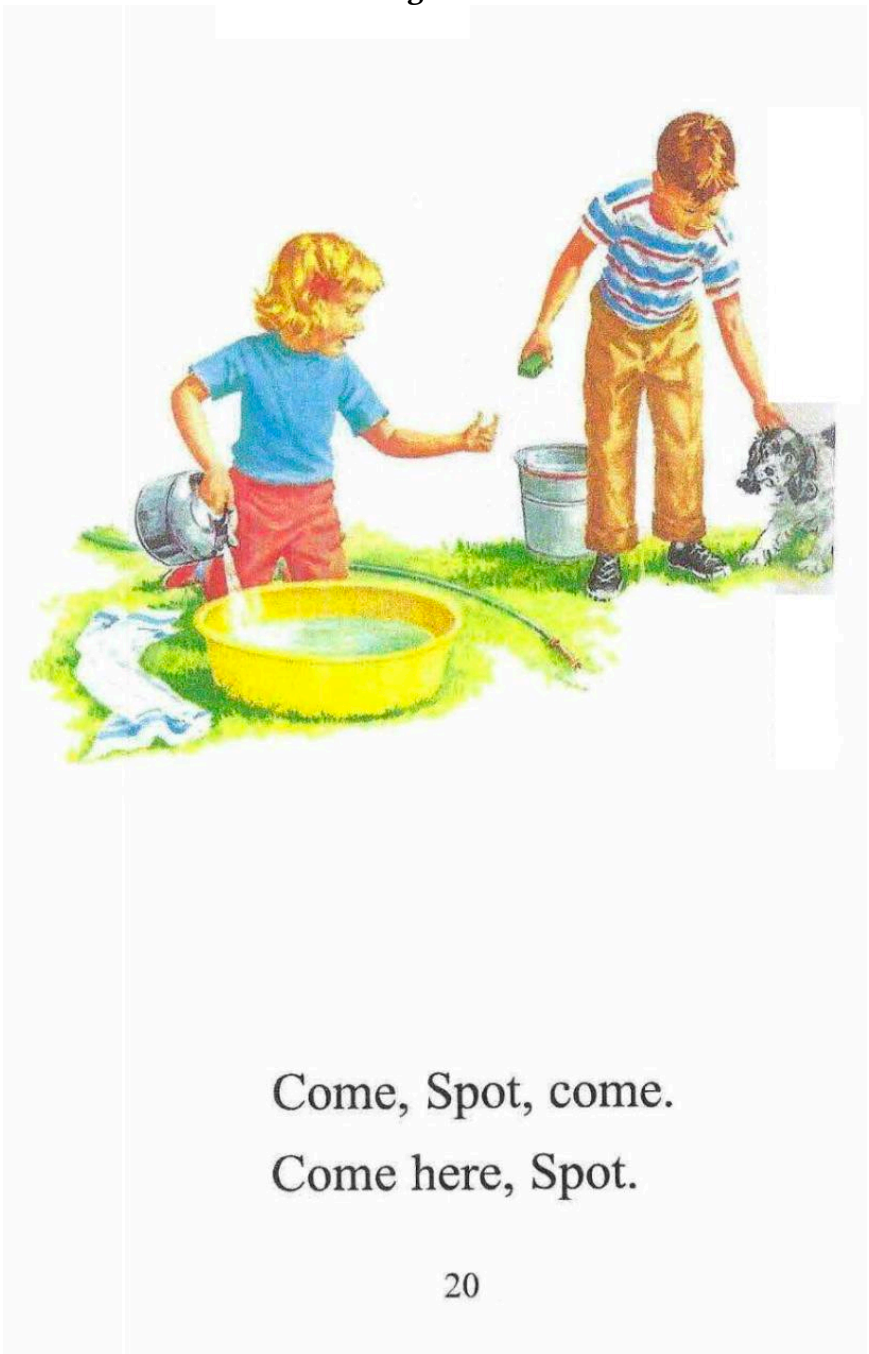

Figure 3

Silly, silly Spot!

Figure 4

Stay, Spot, stay.

21

Figure 5

Sally Plays

23

Figure 6

Sally plays.

Sally plays in the sand.

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Figure 7

Here comes Mother.

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Figure 8

Look! Look!

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Figure 9

Oh, oh, oh.

See my red car.

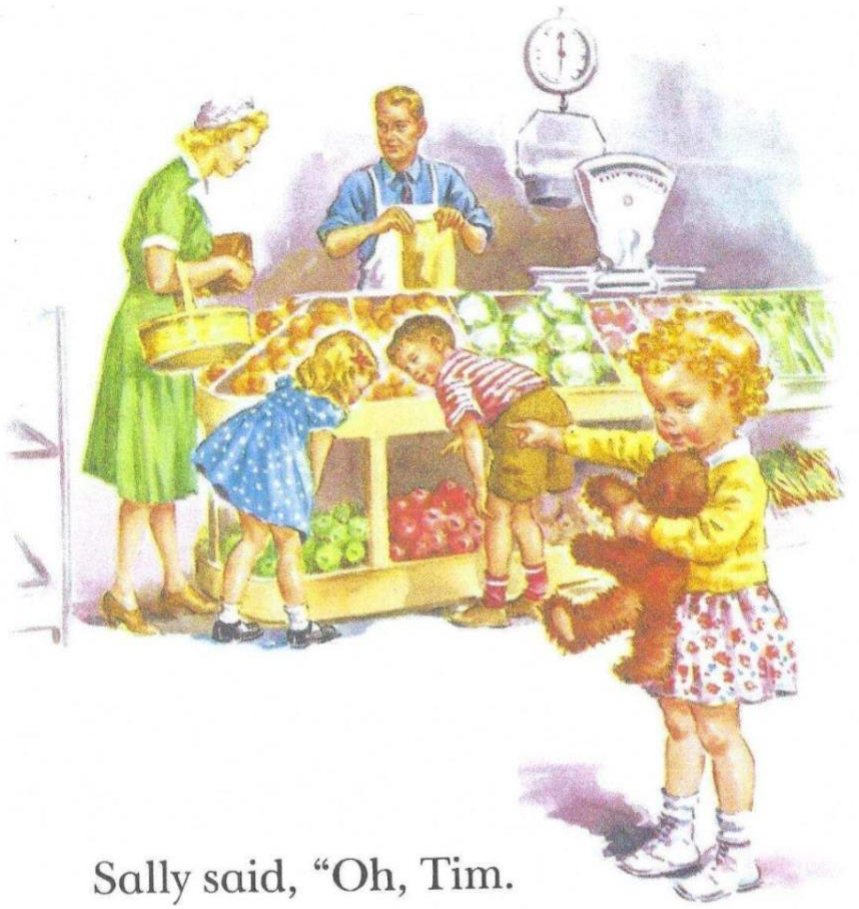
See my yellow car.

Come, Father, come.

Help Baby Sally.

10

Figure 10



Sally said, "Oh, Tim.

I see something.

Mother sees something.

Dick and Jane see something."

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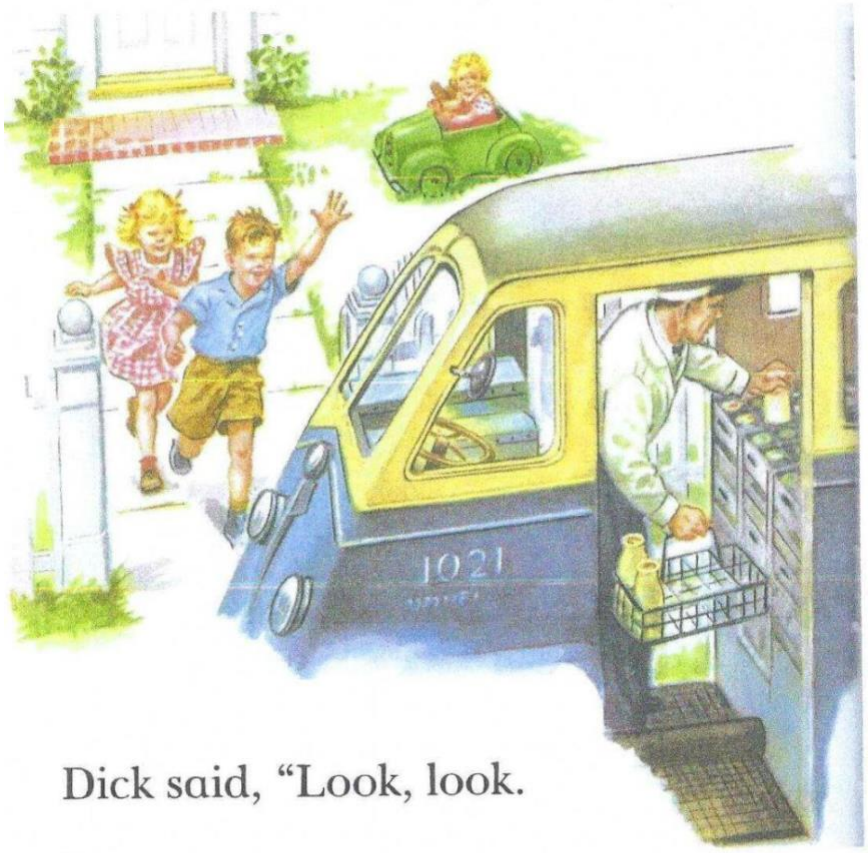
Figure 11

Figure 12



Dick said, "Look, look.

Here we come.

We can help."

Jane said, "Run, Dick.

Run, run.

We can help."

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Figure 13

Chapter 4
Who Can Help?

See Jane.

Jane can work.

17

Figure 14

Jane can help.

Jane can help Mother.

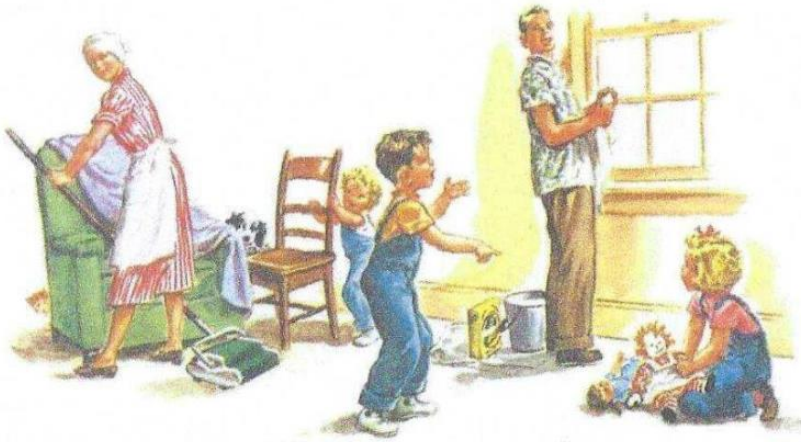
18

Figure 15

Jane can help Mother work.

19

Figure 16



Dick said, "See me work.

I can help Father.

I can get something.

Something for Father."

Dick said, "Look, Father.

Jane plays and plays.

You and Mother work.

And I work.

Jane cannot work.

Jane is a little baby."

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Figure 17

Spot wants to play, too.
Sing, Spot, sing.

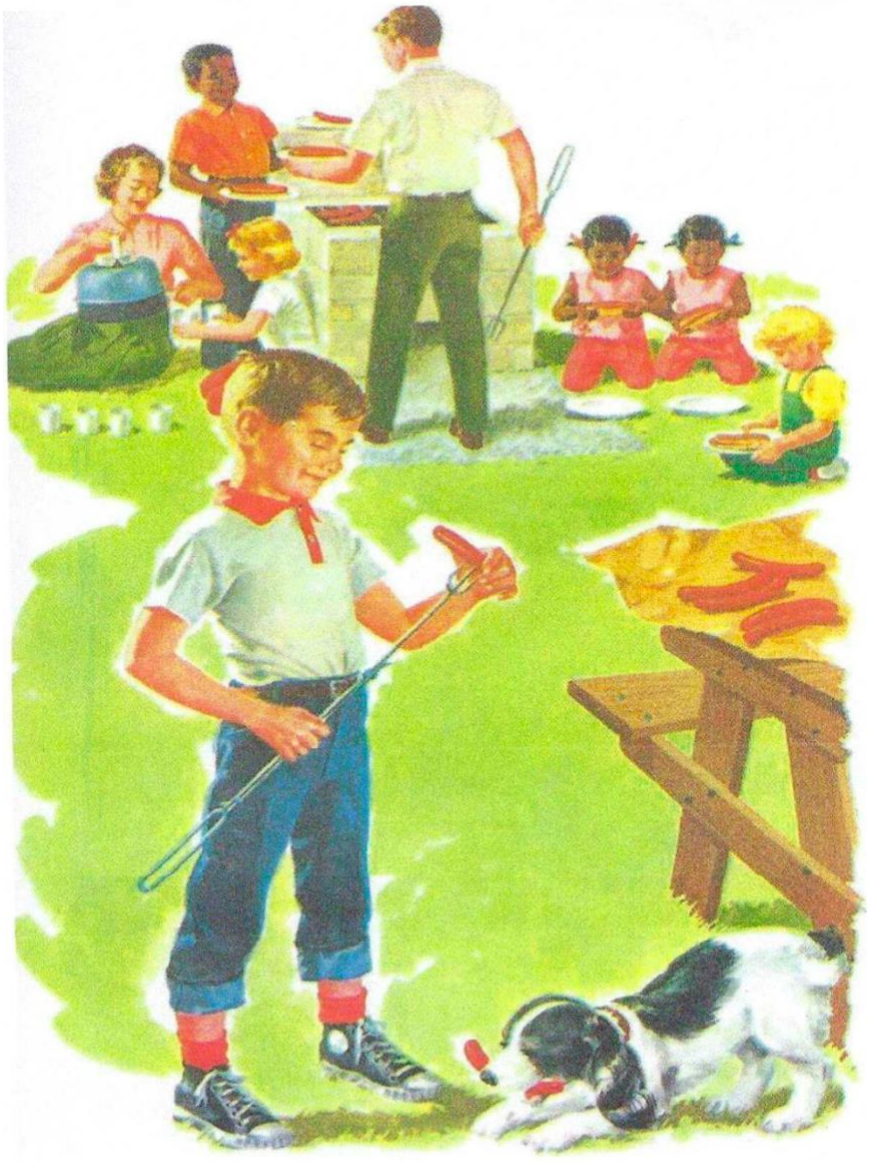
52

Figure 18

Up, Spot, up.

10

Figure 19



Dick wants to eat.

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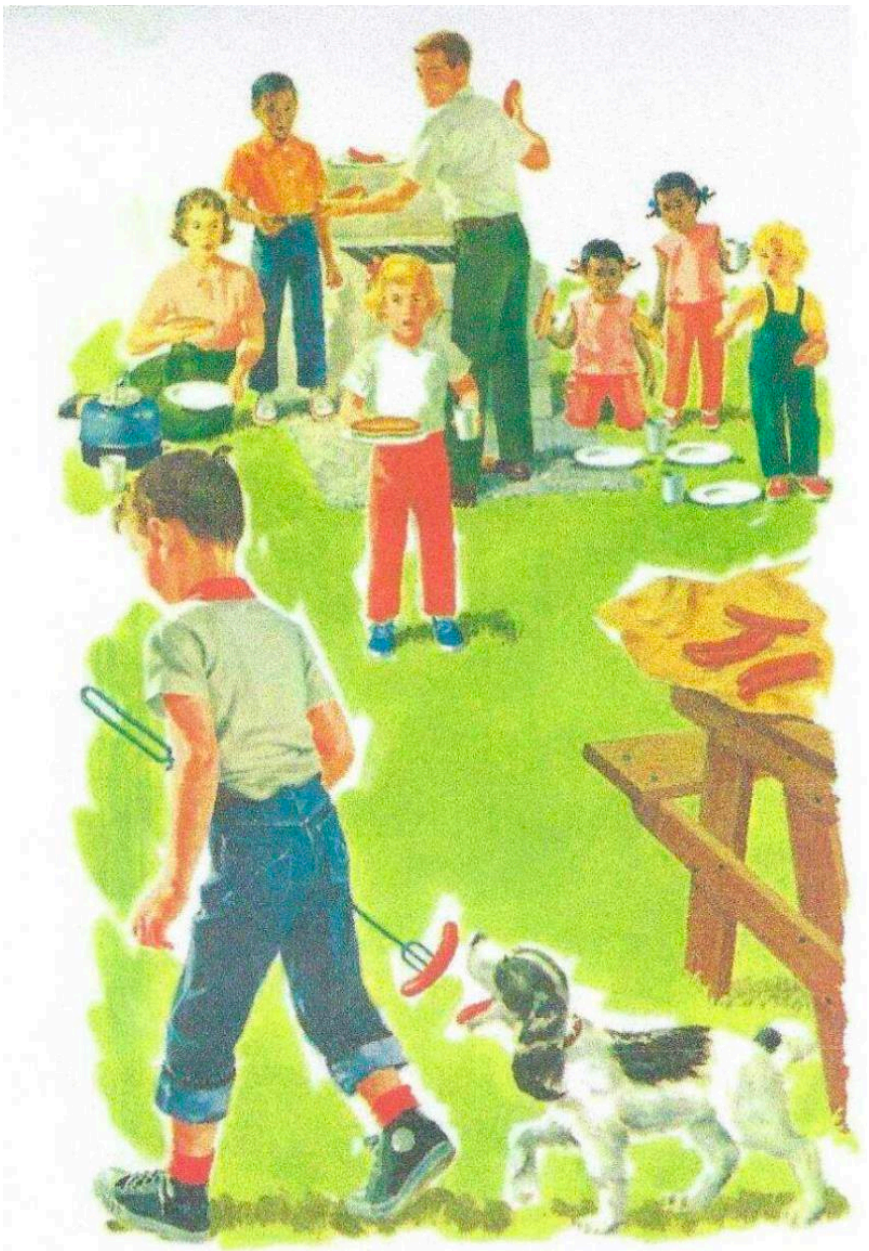
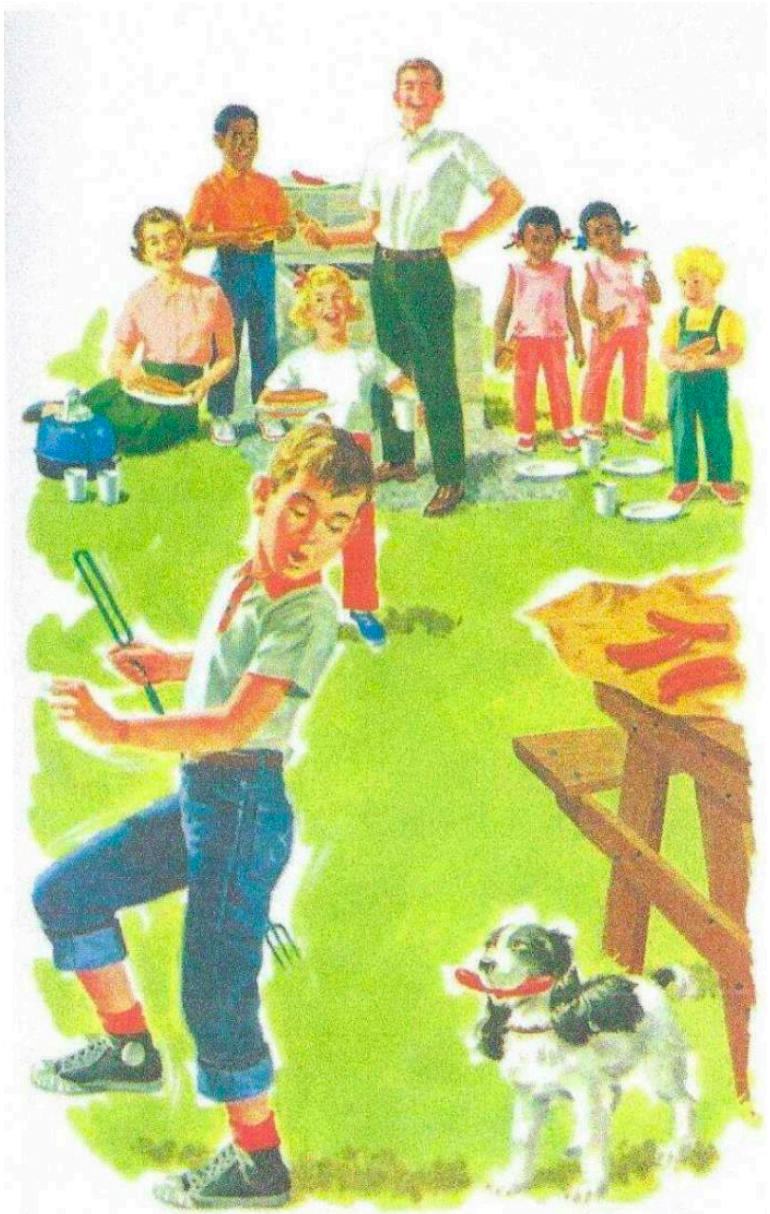
Figure 20



Spot wants to eat more.

40

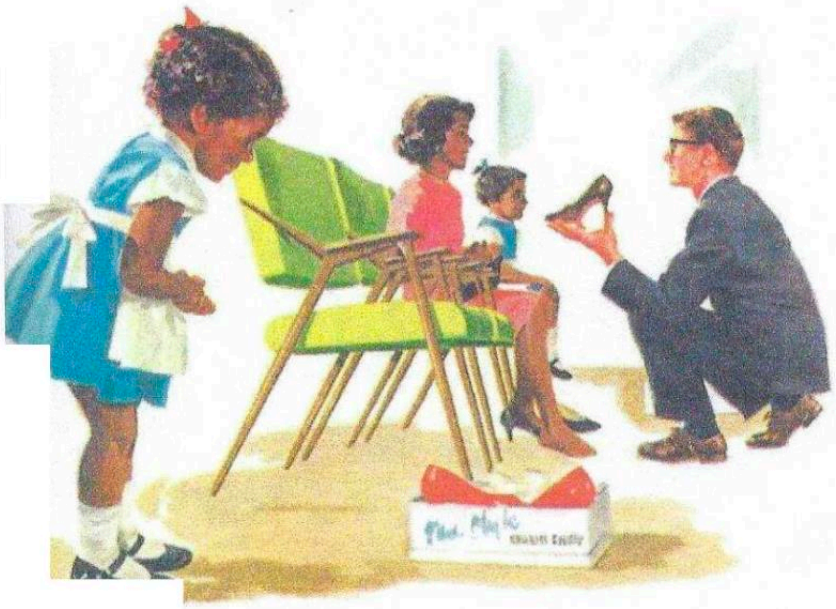
Figure 21



Funny, funny Spot.

41

Figure 22



Funny Pam

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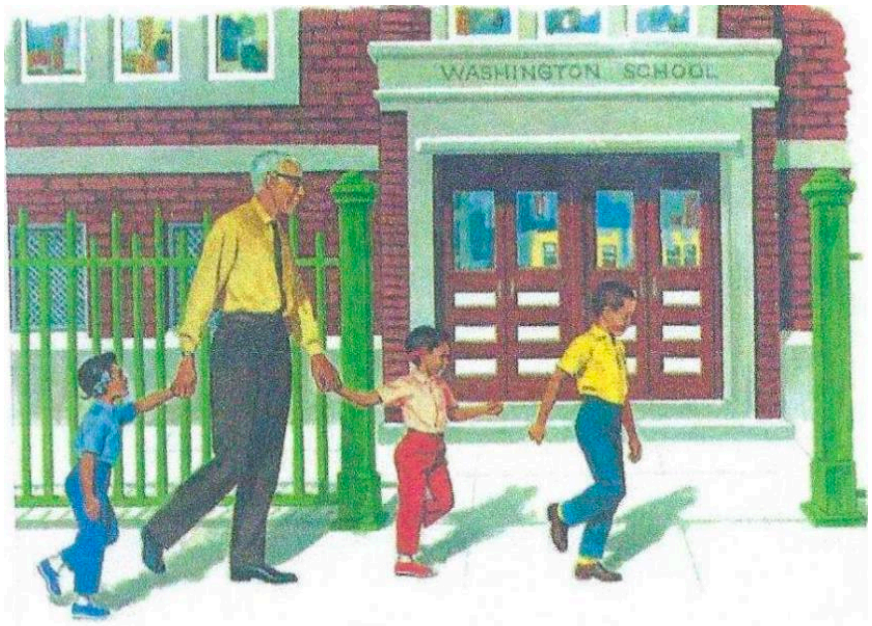
Figure 23



"Look," said Grandfather.
"There is a school.
We will walk past the school."

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MAHMOUD V. TAYLOR: CAUSE OR EFFECT OF DISRUPTIONS IN PUBLIC SCHOOLS?

Richard B. Katskee & Ira C. Lupu*

INTRODUCTION

Mahmoud v. Taylor[1] represents a startling departure from the Supreme Court's historic pattern of recognizing rights within public schools while maintaining respect for the schools' mission and authority. Beginning with *West Virginia Board of Education v. Barnette*,[2] and continuing through and beyond the School Prayer Cases of the early 1960s,[3] the Supreme Court has treated public schools as a significant locus of constitutional rights.[4] The Court has done so, however, with a sharp eye toward necessary limitations, lest concerns for the rights overwhelm the administration of our nation's system of public education. In *Barnette*, the Court recognized that the public schools could teach the value of patriotism, even if they could not demand recitation of the Pledge of Allegiance.[5] In *School District of Abington Township v. Schempp*,[6] the Court took pains to emphasize that the schools could teach about religion, including the study of the

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[1] 606 U.S. 522 (2025).

[2] 319 U.S. 624 (1943) (holding that freedom of speech under the First Amendment protects students against being compelled to salute the American flag).

[3] Engel v. Vitale, 370 U.S. 421 (1962); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963).

[4] For later decisions addressing freedom of speech by students in public schools, *see* Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503 (1969) (freedom of speech of students in public school), Goss v. Lopez, 419 U.S. 565 (1975) (procedural safeguards in cases of suspensions from school), and New Jersey v. T.L.O., 469 U.S. 325 (1985) (searches and seizures of student property at school).

[5] *Barnette*, 319 U.S. at 631.

[6] 374 U.S. 203 (1963).

Bible as literature, even though they were prohibited from sponsoring worship or devotional readings.[7]

Mahmoud ignores this practice of principled reconciliation of the interests at play. The case involved a challenge by a group of parents to the inclusion of books that include LGBTQ+ characters in the English Language Arts curriculum for grades K–5 in the public schools of Montgomery County, Maryland. In holding that the Free Exercise Clause requires the Montgomery County Public Schools to give parents notice and the opportunity to opt their children out of readings to which the parents object on religious grounds, the Supreme Court has for the first time recognized a right that will significantly disrupt the schools' educational programs.

Mahmoud stretches, to a remarkable extent, the Court's 1972 decision in *Wisconsin v. Yoder*,[8] which held that the Free Exercise Clause requires a state to exempt members of the Amish community from compulsory-education laws once their children reach the age of 14. The analytical focus in *Yoder* was not the stand-alone rights of each of the parents. Instead, the Court's opinion carefully emphasized the character and lengthy history of the Amish community. In the decades since then, American courts have seen *Yoder* in that light and applied it narrowly.[9] *Mahmoud* suddenly revolutionized its significance. The case is thus the latest in an explosive series of free-exercise decisions that have altered the constitutional landscape in ways that ten years ago would have been unthinkable.[10]

In what follows, we explain the constitutional dynamics that produced *Mahmoud*, the case's substantive dimensions, and the ways that the Court's decision is likely to demand radical

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[7] *Id.* at 225 ("[T]he Bible is worthy of study [in public schools] for its literary and historic qualities.").

[8] 406 U.S. 205 (1972).

[9] For an analysis of *Yoder* as a decision about communal or associational rights, *see* B. Jessie Hill, *Discrimination,* Wisconsin v. Yoder*, and the Freedom of Association*, 60 ST. LOUIS U. L.J. 695, 701–02 (2016).

[10] These decisions include *Carson v. Makin*, 596 U.S. 767 (2022), *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021), *Tandon v. Newsom*, 593 U.S. 61 (2021), *Espinoza v. Montana Department of Revenue*, 591 U.S. 464 (2020), *Kennedy v. Bremerton School District*, 586 U.S. 1130 (2019), *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449 (2017), and *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 584 U.S. 617 (2018). *See generally* Richard Schragger, Micah Schwartzman & Nelson Tebbe, *Reestablishing Religion*, 92 U. CHI. L. REV. 199 (2025); Ira C. Lupu & Robert W. Tuttle, *The Remains of the Establishment Clause*, 74 HASTINGS L.J. 1763 (2023).

changes in both planning and administration of curricula for the nation's public schools.

Part I provides the doctrinal and historical backdrops to *Mahmoud*, which reflect the acute tension between a once-narrow understanding of *Wisconsin v. Yoder* and the post-*Obergefell* constitutional backlash against equality for LGBTQ+ people.

Part II addresses the substance of the *Mahmoud* opinion. In proclaiming a right of parents to insulate their children from teaching that "substantially interfere[s] with the[ir] religious development" or "threat[ens]" their "religious upbringing"[11] or the "religious beliefs and practices that the parents wish to instill,"[12] the Court invites curricular challenges and opt-out demands across a broad range of subjects, not just sex and gender. Most but not all the challenges will come from the right and be aimed at progressive developments in public education. Moreover, despite the relative youth of the children in *Mahmoud* itself, the decision's principles of parental authority cannot be confined by the age of the students. *Mahmoud* will instead affect school operations from kindergarten through high-school graduation. It may also, perhaps counterintuitively, buttress some claims that once were considered the province of the Establishment Clause, though any effects on that score are uncertain.

Part III builds on these substantive insights to explore various ways that *Mahmoud* may affect the content of public schools' curricula. The principle vehicle for analysis is a new Regulation that the Montgomery County Public Schools ("MCPS") have adopted post-*Mahmoud* on "Curriculum Transparency and Requests to be Excused from Instruction."[13] As the MCPS Regulation reveals, school districts are now under immense pressure to design and implement protocols for parents to receive notice and opt their children out of readings to which the parents object on religious grounds. These policies will disrupt the process of public education,[14] and will in some cases

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[11] Mahmoud v. Taylor, 606 U.S. 522, 556, 568 (2025).
[12] *Id.* at 565.
[13] Montgomery Cnty. Pub. Sch., *Curriculum Transparency and Requests to Be Excused from Instruction* (Aug. 21, 2025), https://ww2.montgomeryschools md.org/departments/policy/pdf/ifd-ra.pdf.
[14] Writing immediately after the decision in *Mahmoud*, Professor Michael Dorf of the Cornell Law School warned that "the opt out that the decision gives to parents [will be] a practical nightmare for school districts." Michael Dorf, *Justice Alito's Opinion in* Mahmoud v. Taylor *is Dangerous and*

alter its content considerably. In the wake of *Mahmoud*, education for life in a pluralistic democracy will suffer.

I. THE CONSTITUTIONAL BACKDROP OF *MAHMOUD V. TAYLOR*

A. The Rhetorical Strength and Tiny Ambit of Yoder

The status of *Yoder* in the law of religious freedom has long been a conundrum. In the decision's immediate wake, *Yoder* was the standout citation for the proposition that religious adherents are entitled to a constitutional exemption from general laws unless the state can show that denial of the exemption is necessary to accomplish "interests of the highest order."[15] That standard was so tilted against government, however, that courts endlessly worked around it.[16] In contexts other than the public schools, the Supreme Court itself refused time and again to apply the *Yoder* standard.[17] And in cases involving claims of right to educate children at home, lower courts typically distinguished *Yoder* by emphasizing its communitarian character, the age of the children, or both.[18] In early commentary on *Mahmoud*, therefore, several approving voices mentioned that the decision had rescued *Yoder* from the doctrinal dustbin.[19]

Gratuitously Dishonest, https://www.dorfonlaw.org/2025/06/justice-alitos-opinion-in-mahmoud-v.html.

[15] Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

[16] A highly respected account of this phenomenon appears in James E. Ryan, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1413–17 (1992); *see also* EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 622–25 (9th Cir. 1988) (Noonan, J., dissenting).

[17] For a succinct account of these developments, *see* Ira C. Lupu, Hobby Lobby *and The Dubious Enterprise of Religious Exemptions*, 38 HARV. J. L. & GENDER 35, 48–53 (2015).

[18] *See, e.g.*, Johnson v. Charles City Sch. Cmty. Bd. of Educ., 368 N.W.2d 74, 83–84 (Iowa 1985) (ruling that students may be released from public school to attend religious instruction off-campus); *see generally* Ira C. Lupu, *Home Education, Religious Liberty, and the Separation of Powers*, 67 B.U. L. REV. 971 (1987). For examination of a context in which *Yoder's* communitarian concerns apply, *see* Zalman Rothschild, *Free Exercise's Outer Boundary: The Case of Hasidic Education*, 119 COLUM. L. REV. F. 200 (2019).

[19] *See, e.g.*, Asma Uddin, *When Inclusion Becomes Compulsion:* Mahmoud v. Taylor*, Pluralism, and Public Education*, https://www.scotusblog.com/2025/07/when-inclusion-becomes-compulsion-mahmoud-v-taylor-pluralism-and-public-education/ ("In *Mahmoud*, the Court used *Yoder* not as a relic but as a living precedent."); Mark Movsesian & John McGinnis, *Legal Spirits 068: Religion at the Court: October Term Recap*, LAW AND RELIGION FORUM, at

In pre-*Mahmoud* cases in which parents sought opt-outs from particular assignments, lower courts repeatedly held that exposure alone to ideas that compete with parents' religious convictions did not burden the parents' or students' exercise of religion. Accordingly, this kind of exposure did not trigger the *Yoder* standard. The germinal decision was *Mozert v. Hawkins County Board of Education*,[20] which involved an effort by fundamentalist Christian parents to have the public schools excuse their children from readings that touched on "seventeen categories" of instruction to which the parents objected, including evolution, secular humanism, "'futuristic supernaturalism,' pacifism, magic[,] and false views of death."[21]

Then, in 1990, the Supreme Court's controversial decision in *Employment Division v. Smith*[22] explicitly placed *Yoder* in a discrete category of cases in which the Free Exercise Clause operated in conjunction with other constitutional protections. For cases involving the Free Exercise Clause alone, *Smith* repudiated the religion-protective standard for which advocates had cited *Yoder* over the previous 18 years. After *Smith*, the Supreme Court and lower courts no longer had to write around *Yoder*. Instead, Justice Scalia's opinion for the Court in *Smith* bracketed and preserved *Yoder* as a decision involving "hybrid rights"—a combination of a right of parental control over a child's upbringing and a right of religious freedom.[23] Unsurprisingly, hybrid rights turned out to be a jurisprudential dead end.[24]

14:24-14:34 (July 8, 2025) https://lawandreligionforum.org/2025/07/08/legal-spirits-068-religion-at-the-court-october-term-2024-recap (Before *Mahmoud*, "*Yoder* had been a kind of doctrinal outlier.").

[20] 827 F.2d 1058 (6th Cir. 1987).

[21] *Id.* at 1062. For a significant commentary on the *Mozert* litigation, *see* Nomi Stolzenberg, *"He Drew a Circle That Shut Me Out": Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106 HARV. L. REV. 581 (1993).

[22] 494 U.S. 872 (1990).

[23] *Id.* at 881–82 (analyzing *Yoder* as a case about free exercise coupled with parents' rights to control the education of their children).

[24] *See, e.g.*, Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 567 (1993) (Souter, J., concurring in part and concurring in the judgment) ("If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule . . . . But if a hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would

Smith thus left *Yoder* stranded on its own, rather tiny free-exercise island. Before *Mahmoud*, the category of cases presenting a cognizable burden on religious liberty in public schools was hardly bigger than *Yoder* itself. As an engine of adjudication, *Yoder* remained stalled for half a century.[25]

Despite *Yoder*'s failure to produce a meaningful body of law at any level of the judicial system, its invocation of a strict standard for religious freedom remained an icon for supporters of broad free-exercise rights. When the drafters of the Religious Freedom Restoration Act[26] sought to respond to *Smith* with a statutory override, *Yoder* represented a convenient symbol of free-exercise vigor. The first declared purpose of RFRA is to "restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder* and to guarantee its application in all cases where free exercise of religion is substantially burdened."[27]

Ultimately, however, the Supreme Court limited RFRA to applications of federal law.[28] Thus, even after RFRA reached full flower in *Burwell v. Hobby Lobby Stores*,[29] the public schools and their curricula, policies, and administration remained outside its ambit. As a symbol, *Yoder* stood astride RFRA. As an operative element in the law, it never advanced beyond protecting the Amish community.

More recently, in cases involving state and local law, the Justices have been engaged in an ongoing fight over the boundaries of the *Smith* standard. *Smith* applies only when laws are "generally applicable," and departures from general applicability, however trivial or illusory, have lately been viewed

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have been no reason for the Court in what *Smith* calls the hybrid cases to have mentioned the Free Exercise Clause at all."); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1121 (1990) ("How can claimants be entitled to greater relief under a 'hybrid' claim than they could attain under either of the components of the hybrid? One suspects that the notion of 'hybrid' claims was created for the sole purpose of distinguishing *Yoder* in [*Smith*].").

[25] For a comparable analysis, *see* Micah Schwartzman, Richard Schragger, & Nelson Tebbe, *The Structure of Religious Preference*, 139 HARV. L. REV. 211, 231–32 (2025).

[26] 42 U.S.C. § 2000bb.

[27] *Id.* § 2000bb(b)(1). *Sherbert v. Verner* involved a constitutionally mandated extension of what counted in an unemployment-compensation scheme as "good cause" to refuse "available suitable work." 374 U.S. 398, 400–01 (1963). It is thus conceptually distinct from the exemption in *Yoder*.

[28] City of Boerne v. Flores, 521 U.S. 507 (1997).

[29] 573 U.S. 682 (2014).

as discrimination against religion that triggers a virulent form of strict review.[30] In *Mahmoud*, however, this move played no role. Instead, *Yoder* provided all the legal grounding that the plaintiffs needed to argue in favor of notice and opt-out rights for religiously objectionable materials or instruction.[31]

As the district court carefully delineated in *Mahmoud*,[32] *Mozert*[33] had for thirty-five years been the template for a whole host of decisions on similar sorts of claims.[34] *Yoder* simply did not extend to these kinds of parental demands. Allowing removal of Amish fourteen-, fifteen-, and sixteen-year-olds from school to protect the character of an old (and to the Justices, quaint) religious community was not analogous to exercising cafeteria-style choices of reading assignments in elementary school.

Thus, on the eve of the oral argument in the Supreme Court in *Mahmoud*, *Yoder* had long been a relic, an outlier, an object in the road to steer around rather than a signpost to follow. There was no circuit split on the role of *Yoder* in free-exercise challenges to curricula, which uniformly failed. With the law that well settled, it would require something massive to get the Supreme Court to pay attention and transform *Yoder* into a broad constitutional shield from assignments that parents deem a threat to their religious beliefs.

B. The Ongoing Backlash Against Obergefell

The forces that supercharged *Yoder* are not hard to locate. *Obergefell v. Hodges*,[35] in which the Supreme Court held that the Equal Protection and Due Process Clauses protect same-sex couples' right to marry, has become a lightning rod for

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[30] *See, e.g.*, Tandon v. Newsom, 593 U.S. 61 (2021); Fulton v. City of Phila., 593 U.S. 522 (2021).

[31] The Court in *Mahmoud* thus brushed aside the hybrid-rights theory. *See supra* note 23. Justice Alito wrote for the majority: "We need not consider whether the case before us qualifies as such a 'hybrid rights' case. . . . Rather, it is sufficient to note that the burden imposed here is of the exact same character as that in *Yoder*." Mahmoud v. Taylor, 606 U.S. 522, 565 n.14 (2025).

[32] Mahmoud v. McKnight, 688 F. Supp. 3d 265 (D. Md. 2023).

[33] 827 F.2d 1058 (6th Cir. 1987).

[34] For the district court's careful unpacking of the controlling effect of *Mozert* and its progeny, *see Mahmoud*, 688 F. Supp. 3d at 290–95.

[35] 576 U.S. 644 (2015).

constitutional change driven by opposition to the rights and interests of LGBTQ+ people.[36]

The *Obergefell* opinion acknowledged that some religious communities preach that same-sex intimacy, including marriage, should not be condoned, and that these groups are free to teach those principles.[37] The promise of respect for dissenters has, however, gone far beyond governmental acknowledgment of religious norms that depart from the law's recognition of same-sex unions. After *Obergefell*, the Supreme Court quickly began to validate religiously motivated noncompliance with laws demanding equal treatment for same-sex couples. This trend began in 2018 with *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,[38] in which the Court held that a state administrative board had not acted with the requisite neutrality toward a bakery that refused to prepare a customized wedding cake for a same-sex couple. Although the Court stopped short of declaring a constitutional right to religious exemptions from nondiscrimination laws, the decision revealed a highly unusual sensitivity toward opponents of same-sex unions.[39] Never before had civil-rights violators been accorded this kind of constitutional solicitude.[40]

The Court's receptiveness to religious objections in *Masterpiece Cakeshop* set the stage for a more robust recognition

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[36] Writing on the eve of *Obergefell*, Douglas Laycock (Professor of Law, University of Texas School of law at time of writing) analyzed effects of the culture wars over matters of sexuality and reproduction on the law of religious liberty. Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839 (2014).

[37] *Obergefell*, 576 U.S. at 679–80. The *Obergefell* opinion acknowledges, however, that while some people's objections have religious roots, that provenance does not and cannot justify laws or public policies that deny equal protection to same-sex couples. *Id.* at 672.

[38] 584 U.S. 617 (2018).

[39] For astute criticism of the *Masterpiece Cakeshop* opinion, *see* Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L. REV. 133 (2018). The LGBTQ+-friendly decision in *Bostock v. Clayton County*, 590 U.S. 644 (2020), holding that the prohibition against sex discrimination in Title VII of the Civil Rights Act of 1964 encompasses discrimination based on sexual orientation and gender identity, was rooted in statutory textualism, not constitutional values. Even then, Justice Gorsuch's opinion for the Court nodded affirmatively toward the possibility of religious exemptions. *Id.* at 681–82.

[40] Earlier treatment of those sorts of arguments had been dismissive. *See, e.g.*, Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 n.5 (1968) (describing free-exercise defense to claim of racial discrimination in public accommodations as "patently frivolous").

of religious exemptions in later cases concerning antidiscrimination law.

In the Spring of 2021, the Court held in *Fulton v. City of Philadelphia*[41] that Catholic Social Services was exempt from state and local laws forbidding discrimination against same-sex couples in the administration of Philadelphia's foster-care system. As in *Masterpiece Cakeshop*, the Court employed unprecedented tactics in free-exercise adjudication, this time triggering strict scrutiny based on only the potential for discrimination against religion, which the Court located in the existence of official discretion that had never been exercised.[42]

The new majority's overwhelming sympathy for religious opposition to same-sex marriage then led to yet another victory for those social forces. In 2023, the Court held in *303 Creative LLC v. Elenis*[43] that the compelled-speech doctrine protected a designer of customized wedding websites from liability under civil-rights laws for refusing to work with same-sex couples planning their weddings. As Justice Sotomayor's dissent cogently argued, the majority's concern for those who oppose marriage of same-sex couples on religious grounds yet again swamped the state interest in nondiscriminatory treatment of LGBTQ+ people.[44]

The trend is unmistakable. *Masterpiece Cakeshop*, *Fulton*, and *303 Creative* involved no divisions among the lower courts and likely would have received no notice from the Supreme Court without their common element—religious opposition to same-sex intimacy.[45]

II. THE *MAHMOUD* DECISION AND ITS DOCTRINAL IMPLICATIONS

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[41] 593 U.S. 522 (2021).

[42] *Id.* at 534–38. The result in *Fulton* can be partially explained as an effort to block Justice Alito's attempt to have the Court overrule *Employment Division v. Smith*. For a thorough account of how six Justices combined to thwart Justice Alito's misguided efforts, *see* Ira C. Lupu & Robert W. Tuttle, *The Radical Uncertainty of Free Exercise Principles: A Comment on* Fulton v. City of Philadelphia, 5 AM. CONST. SOC'Y SUP. CT. REV. 221, 221–56 (2021).

[43] 600 U.S. 570 (2023).

[44] *Id.* at 636–39 (Sotomayor, J., joined by Kagan and Jackson, JJ., dissenting).

[45] For a stark example of this dynamic at work in the lower courts, *see Bates v. Pakseresht*, 146 F.4th 772 (9th Cir. 2025) (holding that Oregon violated the Free Speech and Free Exercise Clauses by requiring that applicants to adopt foster children respect the children's sexual orientation and gender identity). The decisions in *Masterpiece Cakeshop* and *Fulton* played a significant role in the panel's free-exercise analysis. *Bates*, 146 F.4th at 791–98.

The grant of certiorari in *Mahmoud* fit the pattern perfectly. The circuit courts had been in complete agreement that *Yoder* did not protect parents against reading assignments that conflicted with their religious beliefs. The decisions of the district court and court of appeals in *Mahmoud*, though thorough and detailed, were mundane applications of the consistent free-exercise jurisprudence of the half-century since *Yoder*. What attracted the Supreme Court's intervention was the Montgomery County School Board's decision to include LGBTQ+ characters in the district's curriculum. Had the dispute been provoked by books about magic, as in *Mozert*, it likely would have been just another in the previously unbroken line of decisions that treat *Yoder* as *sui generis*.

Yet the language of the Supreme Court's pronouncement in *Mahmoud* is expansive. On its face, the decision applies to anything in a public school's program of instruction to which a parent objects on religious grounds.

A. The Controversy in Montgomery County and the Lower Courts

The Montgomery County School Board serves a large school district in a diverse community in the Maryland suburbs of the District of Columbia. The board believed that the district's students should therefore learn about the experiences and perspectives of others in their community. And the board determined that the school district's language-arts curriculum did not sufficiently serve that end because, among other gaps, it lacked books with LGBTQ+ characters.

The school district therefore undertook an elaborate, years-long process to identify and add new curricular materials. It appointed reading specialists and other experts, who recommended that the district adopt several storybooks with LGBTQ+ characters into the elementary-school curriculum. (The district had previously diagnosed the same problems and adopted similar solutions for materials with African-American and Asian-American characters.) The district did not specify how teachers should use the new storybooks. It did provide optional guidance to teachers, with suggested responses to questions that students might ask about the books or their themes.

The school district also initially allowed parents to exclude their children from the use of the new storybooks. A number of parents invoked that opt-out opportunity. Some parents offered religious objections, while others advanced the

*non*religious objection that the storybooks were not age-appropriate for their children.[46]

The number of opt-outs quickly increased to an unmanageable number. The school district concluded, therefore, that managing the opt-outs and educating the excused students would require either altering the educational program substantially or implementing individually tailored educational programs for each opted-out student. Hence, the district announced that previously granted excusals would be honored for the rest of the school year, but no new ones would be allowed for that year, and none would be offered when the students returned to school the following fall.

The plaintiffs in *Mahmoud* were parents who objected on religious grounds to use of the storybooks in their elementary schoolers' classes. They filed suit, demanding notice and an opportunity to opt out whenever their children might be exposed to what the plaintiffs termed issues of "family life and human sexuality."[47] Beyond that, they asserted broad constitutional rights to receive notice and exclude their children from any exposure to "sensitive religious and ideological issues."[48]

The district court denied the parents' request for a preliminary injunction. Citing ten decisions in earlier cases addressing free-exercise objections to particular lessons or topics of instruction, Judge Deborah Boardman wrote that "[e]very court that has addressed the question has concluded that the mere exposure in public school to ideas that contradict religious beliefs does not burden the religious exercise of students or parents."[49] The court determined that the plaintiffs' claims amounted to nothing more than exposure. Accordingly, the parents had not shown a legally cognizable burden on their religious exercise.

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[46] *Mahmoud*, 688 F. Supp. 3d at 280.

[47] *Id.* at 273. They might instead have challenged the books through the school district's ordinary administrative processes but chose not to do so. Meanwhile, the school district did allow, and continues to allow, parents to exclude their students from the "Family Life and Human Sexuality Unit" in health class, which is the distinct part of the curriculum that provides sex education. *Id.* at 281. Though the *Mahmoud* parents employed that same label, the school district does not offer sex education in Grades K–5.

[48] *See* Mahmoud v. McKnight, 102 F.4th 191, 201 (4th Cir. 2024).

[49] *Mahmoud*, 688 F. Supp. 3d at 290. In the Supreme Court, Justice Alito mentioned none of those decisions. Justice Sotomayor identified several in dissent. *See Mahmoud*, 606 U.S. at 614 (Sotomayor, J., joined by Kagan and Jackson, JJ., dissenting).

In reaching that conclusion, the district court rejected the plaintiffs' invocation of *Yoder*, based in large part on the Supreme Court's own explanation that its holding in *Yoder* "was inexorably linked to the Amish community's religious beliefs and practices."[50] The district court recognized that the Free Exercise Clause protects against "certain forms of governmental compulsion" but does not confer a right to make the public schools conform what they teach to parents' preferred religious beliefs or practices.[51]

The Fourth Circuit affirmed. In an opinion by Judge Agee, the panel majority agreed that the plaintiffs needed to show that "the absence of an opt-out opportunity coerces them or their children to *believe* or *act* contrary to their religious views."[52] The *Mahmoud* parents had offered no evidence "about how any teacher or school employee has actually used any of the Storybooks in the Parents' children's classrooms, how often the Storybooks are actually being used, what any child has been taught in conjunction with their use, or what conversations have ensued about their themes."[53] On this "threadbare" record, the Fourth Circuit concluded that the plaintiffs' complaint that the school district "expose[d] their children to views that are at odds with their religious faith" did not establish the requisite religious coercion.[54]

Yoder thus did not apply. Exposure alone to ideas that parents find religiously objectionable did not constitute a free-exercise violation.[55]

B. Mahmoud *in the Supreme Court*

The rulings by the district court and the Fourth Circuit in *Mahmoud* were entirely in line with decades of squarely-on-point free-exercise precedent. Yet in the Supreme Court, none of that mattered in the slightest.

Justice Alito's opinion for the majority adopted an expansive new substantive standard for a vague, undefined class of free-exercise claims. Recharacterizing *Yoder* as a grand doctrinal pronouncement untethered to the special

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[50] *Mahmoud*, 688 F. Supp. 3d at 294 (citing *Yoder*, 406 U.S. at 235–36).
[51] *Id.* (quoting Bowen v. Roy, 476 U.S. 693, 700 (1986)).
[52] *Mahmoud*, 102 F.4th at 208 (emphasis in original).
[53] *Id*.
[54] *Id.* at 209–10. *But see id.* at 217–28 (Quattlebaum, J., dissenting).
[55] *Id.* at 211–12.

circumstances of the Amish,[56] the Court declared broadly that "government burdens the religious exercise of parents when it requires them to submit their children to instruction that poses 'a very real threat of undermining' the religious beliefs and practices that the parents wish to instill."[57]

The opinion thus squarely rejected the distinction between religious coercion and exposure to ideas that parents find religiously objectionable. Indeed, the Court straightforwardly declared that "[w]hether or not a requirement or curriculum could be characterized as 'exposure' is not the touchstone for determining whether [the constitutional] line is crossed."[58] In so holding, the Court said not one word about how, for decades, exposure had in fact been the consistent touchstone throughout the federal courts.

The majority also conducted its own analysis of the storybooks and the school district's optional guidance to teachers. It criticized the books for being "designed to present certain values and beliefs as things to be celebrated and certain contrary values and beliefs as things to be rejected."[59]

Justice Alito's opinion for the Court excoriated one book (and the school district for selecting it), for example, for depicting the wedding of a same-sex couple as a happy occasion, when the plaintiffs wished "to present a different moral message."[60] In the majority's view, that presentation made the books "potentially coercive,"[61] and therefore an "objective danger to the [parents'] free exercise of religion."[62] The majority also decried the guidance to teachers for "present[ing] as a settled matter a hotly contested view of sex and gender that sharply conflicts with the religious beliefs that the parents wish to instill in their children."[63] In reaching those conclusions, the majority entirely ignored the lower courts' determinations that the plaintiffs had offered no evidence about the use or effect of either the books or the documents containing the school district's guidance to teachers.

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[56] *Mahmoud*, 606 U.S. at 558.
[57] *Id.* at 530 (quoting *Yoder*, 406 U.S. at 218).
[58] *Id.* at 556.
[59] *Id.* at 550.
[60] *Id.* at 552.
[61] *Id.* at 554.
[62] *Id.* at 555.
[63] *Id.* at 553. Justice Sotomayor's dissent goes into detail about the majority's misdescriptions of the storybooks and guidance to teachers. *See id.* at 594–98, 610–15 (Sotomayor, J., dissenting).

At the most basic level, the majority's strong, insistent criticism that the books teach "values and beliefs" is just a recognition that the books teach *something*. Every curricular decision reflects educators' determinations about what matters and is worthwhile for children to learn. Those sorts of choices always and inevitably inform curricular design.

In setting a curriculum, as in all other things, government must not target religion for disfavor, disparagement, or maltreatment. But in the public schools, ensuring that students are never exposed, even incidentally, to anything that their parents regard as a threat to their religious beliefs is unrealistic to the point of incoherence.

Storybooks, other instructional materials, and classroom discussions inevitably introduce implicit and often explicit views on sexual orientation and gender identity. That is what led the Montgomery County Public Schools to expand the language-arts curriculum in the first place. The *Mahmoud* plaintiffs objected, for example, to a book about a prince who falls in love with and marries a knight. But countless storybooks involve princes who fall in love with and marry princesses. The vast majority of storybooks that portray families include cisgender couples. In addition, when students refer to their own families in class discussions, art projects, or other assignments, many will inevitably talk about or show a mother and father. All of that reinforces the idea that heterosexual relationships and cisgender couples are normal—so normal that these arrangements do not invite comment and become reinforced by repetition.

Adding a same-sex couple in any of those contexts might, in the Court's words, disrupt a belief that cisgender relationships are the only acceptable ones.[64] The preexisting curriculum promoted value judgments about sexual orientation and gender identity every bit as much as the newly introduced materials do, but those judgments are the ones that the plaintiffs and a majority of the Justices prefer. Maintaining the exclusivity of those views was the plaintiffs' aim.

The constitutional question should have been whether the plaintiffs have the right to insulate their children completely from a decision by the public schools about what social arrangements might qualify as ordinary or acceptable. Before *Mahmoud*, the Religion Clauses gave a straightforward answer to that question. The public schools were forbidden to compel religious

[64] *Id.* at 529–30 (majority opinion).

conformity or disparage anyone's faith. But they remained appropriately free to decide on nonreligious grounds, as matters of educational policy, what their teachers communicate, and what students learn.[65] Parents who disliked those choices could counter the lessons at home and in their religious communities. Moreover, they could exercise their constitutional right to send their children to private school.[66] They could not, however, invoke the power of the courts to supplant educators' professional curricular judgments made on nonreligious grounds.[67] After *Mahmoud*, the tables have turned.

C. The Force and Reach of Mahmoud

The demand that schoolchildren be protected from exposure to anything that their parents deem a threat to the parents' religious views about sexual orientation or gender identity did not start with *Mahmoud*. The aim to limit what students see and experience animates more sweeping measures that affect all students, such as Florida's Don't Say Gay law.[68] Supporters of those policies are not, as they pretend, anti-indoctrination. Rather, they desire to indoctrinate all children, their own and everyone else's, into a view that the world is populated exclusively with cisgender people and opposite-sex couples. If one genuinely wanted to avoid indoctrinating students into a view about sexual orientation or gender identity, one would provide them with more perspectives, not fewer.

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[65] *See generally, e.g.*, Epperson v. Arkansas, 393 U.S. 97, 106 (1968) ("There is and can be no doubt that the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma.").

[66] *See* Pierce v. Soc'y of Sisters, 268 U.S. 510, 534 (1925) (recognizing substantive-due-process right of parents to send their children to private, religious schools, while not doubting governmental authority to regulate schools and specify subjects and lessons "essential to good citizenship" that must be taught).

[67] *See, e.g.*, *Mozert,* 827 F.2d at 1067 ("The plaintiff parents can either send their children to church schools or private schools . . . or teach them at home. . . . Tennessee's school attendance laws offer several options to those parents who want their children to have the benefit of an education which prepares for life in the modern world without being exposed to ideas which offend their religious beliefs.").

[68] FLA. STAT. § 1001.42 (2025). For an analysis of the litigation and settlement arising from the Florida law, *see* Ira C. Lupu, *The Centennial of* Meyer *and* Pierce*: Parents' Rights, Gender-Affirming Care, and Issues in Education*, 26 J. CONTEMP. LEGAL ISSUES 147, 198–209 (2025).

Neither do the plaintiffs' repeated invocations of the relative youth of their children meaningfully limit the scope of the Court's decision. The plaintiffs maintained that young children are impressionable and may regard teachers as authority figures to whom the children should listen.[69] Hence, the plaintiffs argued, there was overwhelming danger that the students might be corrupted by classroom exposure to ideas about sexual orientation and gender identity that the plaintiffs disfavor.[70] But nothing about their notice and opt-out demands, and nothing about the Court's holding, points to an age-specific standard that affords greater rights to parents of elementary-school students than to parents of middle- or high-schoolers. Rather, the focus of the new free-exercise right on threats to parents' ability to instill their religious beliefs in their children may well function in precisely the opposite way.

The threat of drawing older students away from their parents' religious beliefs and practices is more real, substantial, and persistent.[71] Older students reflect and rely on their own experiences, particularly with peers, to come to their own conclusions.[72] Moreover, the influences on them are more worldly and come from many directions and sources, inside and outside of school.[73] Older students are thus more likely than younger children to experience enduring changes in their moral

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[69] *E.g.*, Br. for Pet'rs at 21, 32, *Mahmoud*, 606 U.S. 522 (2025) (No. 24-297).
[70] *Id.* at 2, 16–18, 21.
[71] Research on child development confirms this intuition. *See* Elizabeth Weiss Ozorak*, Social and Cognitive Influences on the Development of Religious Beliefs and Commitment in Adolescence*, 28 J. SCI. STUDY RELIGION, No. 4. 448, 455, 460 (1989) (finding that effect of parents' religious affiliation and commitment, though always significant, is weaker on older children, and that "middle adolescence," i.e., 9th to 11th grades, "is a period of readjustment," with rates of departures from parents' beliefs and practices peaking at age 14½).
[72] *See id.* at 458 (finding that "connectedness to peers emerged as a unique and fairly effective predictor of changed faith," with effects increasing in later adolescence).
[73] *See* Jennifer B. Barrett et al., *Adolescent Religiosity and School Contexts*, 88 SOC. SCI. Q., 1024, 1025 (2007) (summarizing research showing that "[i]ndividual preferences for religion are developed socially through interaction with friends, family, and larger society, and [that] adolescents may be particularly likely to experience changes in their religious beliefs and practices as parental restrictions decline and adolescents gain more control over their own behavior" (citations omitted)); *id.* at 1026, 1034–35 (finding that adolescents pursue social status by conforming to religious practices to those of popular students at school).

and religious beliefs if they are exposed to new ideas, new perspectives, and different ways of living.

Indeed, that was the logic of the complaint and the Supreme Court's holding in *Yoder* itself. Whatever formal instruction and socialization the Amish children received in elementary school did not trouble their parents overmuch.[74] While the Court noted that the Amish often "established their own elementary schools" to resemble "small local schools of the past,"[75] the danger that the Court treated as of constitutional dimension was allowing the students to experience "higher learning [that] tends to develop values [that the parents] reject as influences that alienate man from God."[76] The parents objected to public schooling only after the eighth grade, for it was their view, and the view of their expert witnesses, that teenagers were most susceptible to influences at school that might draw them away from the Amish faith and culture. The parents thus saw those older students' attendance at school as the real threat to the intergenerational survival of the parents' religious way of life.

If, as the Court in *Mahmoud* declared, *Yoder* recognized a constitutional right to avoid anything that threatens parents' transmission of their faith to their children, that right surely attaches to the parents of older children, like the successful *Yoder* plaintiffs themselves. Hence, there would appear to be no age line, short of the age of legal majority and emancipation, beyond which the new parental right gives way to the children's rights or the educational interests and administrative needs of the state embodied in the public schools.

In an effort to downplay the sea change that would result from adopting their position, the plaintiffs also insisted that their requests were limited to the "narrow[]" issue of instruction on "gender and sexuality," emphasizing that this issue necessarily implicates religious doctrine.[77] But the plaintiffs' contention that a ruling in their favor could be limited to this subject matter cannot withstand close analysis. The *Mahmoud* plaintiffs' demand and the logic of the Court's ruling surely cover a wide array of topics routinely covered in school. Nothing in the structure of their legal claims or in the logic or language of the Court's holding recognizes a subject-matter limitation. Rather, if

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[74] Wisconsin v. Yoder, 406 U.S. 205, 212 (1972).
[75] *Id.*
[76] *Id.*
[77] Br. for Pet'rs at 22, 29, 31–32, *Mahmoud*, 606 U.S. 522 (2025) (No. 24-297).

the rule is that parents are entitled to opt out of whatever they believe threatens their ability to instill their religious beliefs in their children, then everything in the curriculum is up for grabs. No instruction in history, literature, art, or any scientific discipline is safe.[78]

In their most candid moments, the plaintiffs and their counsel effectively acknowledged as much. The reason why the particular topics of sexual orientation and gender identity should trigger heightened scrutiny, they argued, is that the plaintiffs "sincerely believe that subjecting their children to instruction contrary to their religious beliefs" threatens their religious standing.[79] Classic works and central concepts in any literature, social-studies, art, science, or even physical-education curriculum inevitably either reinforce or disrupt traditional norms of all sorts. So does any study of current events or social change.

History lessons, for example, necessarily speak to issues of civics, patriotism, economic priorities, immigration, the role of women, the politics and practical consequences of race, and the place of religion (or religions) in society. That is so whether the lessons introduce those topics explicitly or implicitly, and whether they make value judgments intentionally, unintentionally, or merely incidentally. The lessons, therefore, necessarily reinforce or disrupt what the Supreme Court might term traditional views on America's place in the world, national security, economic and social policy, patriarchy, white supremacy, and other deep questions of values. They also make and expose schoolchildren to judgments about more modern understandings of these topics, whether the judgments being offered are positive or negative.

Substantial religious perspectives exist on every side of all these issues. If the possibility of parents' religious disagreement gives rise to constitutional notice and opt-out rights, that will be so for virtually everything in the curriculum. No matter what curricular choices a school district makes, there will likely be

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[78] *See* Schwartzman et al., *supra* note 25, at 238 ("the Court has basically invited aggrieved parents to scrutinize every aspect of instruction in public schools"). As we explain further in Part III, *infra*, Montgomery County is, in light of *Mahmoud*, now extending rights of notice and excusal to all subjects in the core curriculum, and parents are exercising opt-outs from a variety of instructional materials.

[79] Br. for Pet'rs at 28, *Mahmoud*, 606 U.S. 522 (2025) (No. 24-297).

some parents in a religiously pluralistic community who disagree.

Moreover, the prevailing norms of free-exercise substance, pleading, and proof will make it all too easy to establish a *prima facie* case of a violation of parents' rights. Under decisions like *Thomas v. Review Board*[80] and *Burwell v. Hobby Lobby Stores, Inc.*,[81] government cannot readily dispute the content of claims that its actions have burdened religious liberty.

For reading assignments, the potential claims are legion. If, for example, a parent asserts that she believes in patriarchy and that an assignment normatively subverts her child's belief in that mode of social ordering, the school district will have great difficulty defending a denial of notice and opt-out rights. Successfully challenging parental sincerity will be nearly impossible. For parents' objections to readings that in any way show women challenging the authority of men, asserting authority over men, or even just having a valid place in the political or working world outside the home, the claim of subversion could not be defeated. These concerns are far from hypothetical. The plaintiff-parents in *Mozert*, for example, raised precisely these objections to standard elementary-school readers.[82]

This approach to burdens on religious freedom is thus far looser and more plaintiff-friendly than in conventional cases about religious coercion. Ordinarily, free-exercise claimants must show that government has imposed some objective detriment to their exercise of religion, by either punishing them or depriving them of a governmental benefit.[83] The *Mahmoud* principle demands neither. The so-called burden is atmospheric, residing in the environment of learning. When *Mahmoud* repudiated the long-standing idea that exposure alone is not a burden on parents' religious freedom, it opened the door to a remarkably broad set of claims.

Moreover, there are novel and crucial questions about the scope of *Mahmoud* in controversies over noncurricular aspects of schooling and school administration. In *Mirabelli* v. *Bonta*,[84] the

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[80] Thomas v. Review Bd. of Ind. Emp. Sec. Div., 450 U.S. 707 (1981).
[81] 573 U.S. 682 (2014).
[82] *See Mozert,* 827 F.2d at 1062 (parent objected to passages that recognized women for "achievements outside their homes" as religiously objectionable "role reversal or role elimination").
[83] *See, e.g.*, *Hobby Lobby*, 573 U.S. at 710, 719–26.
[84] 607 U.S. __, 2026 WL 575049 (Mar. 2, 2026).

Supreme Court intervened on behalf of parents seeking injunctive relief against California policies concerning social gender transition at public school. In recognition of minors' safety and privacy, the policies prohibited disclosure to parents of social transitions without the child's consent. In a *per curiam* opinion from the shadow docket, six Justices ruled that the parents were likely to succeed on their free-exercise and substantive-due-process claims. Remarkably, the analysis of the free-exercise merits consisted entirely of this:

> The parents who assert a free exercise claim have sincere religious beliefs about sex and gender, and they feel a religious obligation to raise their children in accordance with those beliefs. California's policies violate those beliefs and "impos[e] the kind of burden on religious exercise that *Yoder* found unacceptable." Indeed, the intrusion on parents' free exercise rights here—unconsented facilitation of a child's gender transition—is greater than the introduction of LGBTQ storybooks we considered sufficient to trigger strict scrutiny in *Mahmoud*.[85]

One would expect, before the Court weighed in so heavily on the parents' side, a more thorough analysis of the competing interests in the case and the diversity of policies around the United States.[86] That the challenged policy affected minors who had initiated the transition process as a way to ease their own suffering made the case quite different from *Mahmoud* and deserved focused attention. Yet none of the Justices who joined the disposition in *Mirabelli* mentioned any of that.

The hazards of expansion of *Mahmoud* are obvious. If the decision is pushed to cover school-management policies generally, it might authorize opt-outs from, among other things,

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[85] *Id.* at *2. The per curiam decision also held that the parents were highly likely to succeed on their claim of a substantive-due-process right to control their children's upbringing. *Id.* at *3. Justice Barrett's separate concurring opinion highlighted and reinforced this aspect of the decision. *Id.* at *3–*5 (Barrett, J., joined by Roberts, C.J., and Kavanaugh, J., concurring). It remains to be seen whether this move will support curricular opt-out rights for all parents, religious or not, who object to the content of instruction.

[86] For constitutional analysis of the range of public-school policies about disclosure to parents of gender dysphoria and other sensitive matters, *see* Lupu, *The Centennial* of Meyer *and* Pierce, *supra* note 68, at 216-224.

any interactions with teachers, school staff, or other students based on their race, sex, religion, gender identity, or sexual orientation.[87] The *Mahmoud* opinion, focused entirely on religious indoctrination, does not support this broad application to all instances of school interaction with students. Perhaps the brief *per curiam* opinion in *Mirabelli*, like *Mahmoud* itself, is driven by extra-constitutional concern with transgender identity and sexual orientation.[88]

D. Will Mahmoud *Rescue Establishment Clause Values?*

Ironically, *Mahmoud* may turn out to be a check on the current rush to reintroduce school-sponsored prayer and reverential messages in public schools. Since the middle of the twentieth century, the Supreme Court has treated the Establishment Clause as the primary locus of the rights of public-school students to be free from religious indoctrination and compulsory religious exercises.[89] That clause has thus protected

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[87] Before *Mirabelli*, the focus on indoctrination in *Mahmoud* strongly suggested that the decision was limited to curricular matters. *See, e.g., Doe No. 1 v. Bethel Local School District Board of Education*, No. 23–3740, 2025 WL 2453836 (6th Cir. Aug. 26, 2025), in which parents objected on free-exercise grounds to transgender girls' being permitted to use a communal girls' bathroom that the Does' daughter used. By a 2–1 vote, the panel held that *Mahmoud* does not apply to schools' noncurricular decisions or actions. *Id.* at *6–*7. Neither the per curiam opinion nor Justice Barrett's concurrence in *Mirabelli* paused to consider whether expansion of *Mahmoud* is warranted or what the implications might be if it is. Those questions surely would have been extensively briefed by the parties and *amici curiae*, and presumably would have been addressed by the Court, if *Mirabelli* or a case like it had been heard on the Court's regular merits docket.

[88] *See also* Miller v. McDonald, 130 F.4th 258 (2d Cir. 2025), in which the Second Circuit rejected a free-exercise challenge, brought by several private schools run by the Old Order Amish, to New York State's repeal of a statutory religious exemption from the requirement that children receive specified vaccinations before starting school. The Supreme Court recently granted certiorari in *Miller*, vacated, and remanded for reconsideration in light of *Mahmoud*. *Miller v. McDonald*, __ S. Ct. __, 2025 WL 3506969 (Dec. 8, 2025). On remand, the Second Circuit should not treat the decision in *Mirabelli* as a mandate to expand *Mahmoud* to cover matters of public health.

[89] *See, e.g.*, Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203 (1948) (doctrinal religious instruction); *Engel*, 370 U.S. 421 (classroom prayer); Schempp, 374 U.S. 203 (classroom prayer and Bible reading); *Epperson*, 393 U.S. 97 (ban on teaching evolution as contrary to Biblical account of creation); Stone v. Graham, 449 U.S. 39 (1980) (mandatory posting of Ten Commandments in classrooms); Edwards v. Aguillard, 482 U.S. 578 (1987) (requirement that creation science be taught alongside scientific theory of

all students and their families, whether of the majority faith, minority faiths, or nonbelievers, from religious coercion. In the public schools, Establishment Clause rulings have reinforced free-exercise values.

Recently, however, the Roberts Court—within public schools and otherwise—has elevated a vigorous, ahistorical conception of free exercise as the preeminent Religion Clause value, while undercutting Establishment Clause concerns.[90] Moreover, the Court has done so even at the expense of religious dissenters.[91] As a result, Establishment Clause principles that have protected religious freedom in the public schools are now in jeopardy.

With this constitutional blood in the water, some legislatures, state and local educational officials, and advocates are pushing to reintroduce religious observance in schools.[92] Legal challenges to their actions that would traditionally have been straightforward victories under the Establishment Clause are now hotly disputed.

The leading example of this unsettling trend involves state laws requiring posting of the Ten Commandments in public-school classrooms. In 1980, the Supreme Court held in *Stone v. Graham*[93] that a statute requiring posting of the Ten Commandments in every public-school classroom in Kentucky

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evolution); Lee v. Weisman, 505 U.S. 577 (1992) (graduation prayer); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (prayer over public-address system at high-school football games).

[90] *See, e.g.*, *Kennedy*, 586 U.S. 1130. *See* also the additional decisions and secondary literature cited *supra* note 10. These moves have eroded norms of equal protection as well as nonestablishment. *See* Richard B. Katskee, *Taking Liberties: The Supreme Court's New Hierarchy of Rights and Its Victims*, 127 W. VA. L. REV. 173, 195 (2024).

[91] *See Kennedy*, 586 U.S. 1130; Am. Legion v. Am. Humanist Ass'n, 588 U.S. 29 (2019); Town of Greece v. Galloway, 572 U.S. 565 (2014). Professor Katskee was counsel for the respondents in both *Town of Greece* and *Kennedy*.

[92] Several states have passed legislation, described below, requiring public schools to display the Ten Commandments permanently in all classrooms. In addition, the Texas legislature recently passed several bills designed to support religious exercise for public-school students and employees. These bills are summarized in Howard Friedman, *Texas Passes 3 Bills Promoting Religion in Public Schools*, BLOG SPOT: RELIGION CLAUSE (May 30, 2025), https://religionclause.blogspot.com/2025/05/texas-passes-3-bills-promoting-religion.html [https://perma.cc/83A3-HYGW].

[93] 449 U.S. 39.

violated the Establishment Clause.[94] Any requirement to post the Ten Commandments in public-school classrooms has for so long been a flagrant Establishment Clause violation that, until recently, only the most constitutionally reckless public officials would have tried such a thing.

The Supreme Court's systematic efforts to dismantle the Establishment Clause, however, have now encouraged Arkansas, Louisiana, and Texas to enact laws requiring that posters with a Protestant version of the Ten Commandments "materially identical to the displays challenged in *Stone*" be placed on the walls of all classrooms in those states.[95] The courts that have thus far addressed the continued validity of *Stone* and related Establishment Clause jurisprudence on the merits have held the statutes unconstitutional.[96] Tellingly, however, the Fifth Circuit panel in the Louisiana case felt the need to engage in extensive analysis to explain why the Supreme Court's free-exercise decision in *Kennedy v. Bremerton School District* did not

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[94] *Id.* at 40 (illustrating that, at that time, the Court saw no need even to describe, much less to analyze, the plaintiffs' attendant free-exercise claim, but instead merely noted it in passing).

[95] *See Roake*, 141 F.4th at 643; Nathan v. Alamo Heights Indep. Sch. Dist., No. SA–25–cv–00756–FB, 2025 WL 2417589 (W.D. Tex. Aug. 20, 2025) ("The Texas and Louisiana statutes require the display of the same specific version of the Ten Commandments in public school classrooms."). As explained in the following footnote, the Fifth Circuit has vacated the decisions in *Roake* and *Nathan* and reheard both cases *en banc*, but has not undone the conclusion that *Stone* remains good law. *See also* Ringer v. Comal Indep. Sch. Dist., No. CV SA-25-CV-1181-OLG, 2025 WL 3227708 (W.D. Tex., Nov. 18, 2025) ("The state statutes are remarkably similar. If anything, [Texas] mandates more intrusive displays of the Ten Commandments than those at issue in *Stone*."); Stinson v. Fayetteville Sch. Dist. No. 1, 798 F. Supp. 3d 931, 937 (W.D. Ark. 2025) (Arkansas law "closely resembl[es] the one enjoined in Louisiana").

[96] *See, e.g.*, Roake v. Brumley, 141 F.4th 614, 647 (5th Cir. 2025); *id.* at 652–53 (Dennis, J., concurring). On October 6, 2025, the Fifth Circuit vacated the panel's judgment in *Roake* and in the parallel case from Texas, *Nathan*, 2025 WL 2417589, and ordered that the cases be reheard together en banc. *See* Roake v. Brumley, 154 F.4th 329 (5th Cir. 2025). In early 2026, the *en banc* court held that *Roake* was not ripe for decision because of factual uncertainties about how the Commandments might be displayed in different classrooms. Roake v. Brumley, No. 24-30706, 2026 WL 482555 (5th Cir. Feb. 20, 2026) (en banc). Five of the seven judges who believed that the court should reach the merits continued to maintain that *Stone* is controlling. *Id.* at *9 (Dennis, J., concurring, joined by Graves, J., Higginson, J., Douglas J., and Ramirez J.). Only Judge Ho argued that Stone was no longer good law. *Id.* at *4–*6 (Ho, J., dissenting). The *en banc* court has not yet announced a decision in *Nathan*.

overrule *Stone*.[97] The district court in the Arkansas case followed suit.[98]

In lawsuits challenging these new measures, the plaintiff-parents in all three states quite understandably included free-exercise claims that would previously have been unnecessary distractions.[99] After the decision in *Mahmoud*, the district courts in the Texas and Arkansas cases took up and ruled in favor of the plaintiffs on their free-exercise claims.[100] The preliminary injunctions against enforcement of the display requirements in those states thus rest on both Religion Clauses.

Will *Mahmoud* now come to the rescue of imperiled Establishment Clause norms? The decision recognizes free-exercise rights for parents whose religious views are threatened by readings in school. School-sponsored religious messages would obviously present that hazard to some parents. In the ongoing Ten Commandments cases, for example, the postings compete with the parent-plaintiffs' views of the Decalogue.[101] The states will argue that the displays are passive, involving no recitation by students or instruction from teachers, and therefore do not burden free-exercise rights. This argument seems remarkably weak when the posters are on the wall of every classroom in every public school, all day long, in every grade from kindergarten through senior year of high school. The pervasiveness of the displays elevates them from occasional exposure to heavy-handed religious indoctrination that the

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[97] *See Roake,* 141 F.4th at 637, n.14 (holding, that as a free-exercise case, *Kennedy* does not change the law on standing in Establishment Clause cases); *id.* at 642 (same for the merits); *see* also Ringer, 2025 WL 3227708, at *5–*6. For detailed analysis of why Establishment Clause norms remain substantially intact after *Kennedy v. Bremerton School District, see* Ira C. Lupu & Robert W. Tuttle, *The Ten Commandments in Louisiana Public Schools: A Study in the Survival of Establishment Clause Norms*, 100 CHI. KENT L. REV. 602, 621-630 (2025). For an encouraging sign in that direction, *see* Arroyo-Castro v. Gasper, 2025 U.S. Dist. LEXIS 215843, at *59–*70 (D. Conn. Nov. 3, 2025) (to avoid possible Establishment Clause liability, public school district may prohibit teacher from displaying one-foot-high crucifix on classroom wall during instructional time).

[98] *Stinson*, 798 F. Supp. 3d at 948–51.

[99] *Roake,* 141 F.4th at 628; *Stinson*, 798 F. Supp. 3d at 939–40; *Nathan*, 795 F. Supp. 3d at 928.

[100] *Stinson*, 798 F. Supp. 3d at 953; *Nathan*, 795 F. Supp. 3d at 948–49.

[101] *See* Compl. at ¶¶ 82–155, *Roake*, 141 F.4th 614 (No. 3:24-cv-00517), *available at* https://www.aclu.org/cases/rev-roake-v-brumley?document=Complaint; *see* Compl. at ¶¶ 84–226, *Nathan*, 2025 WL 2417589 (No. 5:25-cv-00756).

plaintiffs, and many parents, experience as perpetual subversion of their contrary religious perspectives.[102]

In *Mahmoud*, the Court limited the remedy for free-exercise violations to an opt-out, not the interdiction of the exercise required by Establishment Clause decisions like *Engel*, *Schempp*, and *Lee v. Weisman*.[103] When a display is on the wall (or *every* wall) for all to see, however, opt-outs for objecting students are impossible. The only effective remedy for this violation of the dissenters' religious freedom is removal of the display.[104]

If the Religion Clauses do not forbid schools to mount permanent displays of overtly religious sentiments, consistency requires the same treatment for secular displays alleged to subvert religious beliefs. For example, the Montgomery County Public Schools (and other districts) might consider permanently putting Pride Flags or other LGBTQ+-friendly messages on classroom walls. How teachers might constitutionally answer questions from students about Pride Flags or Ten Commandments posters is a puzzle that we leave to others.

III. SCHOOL ADMINISTRATION IN THE SHADOW OF *MAHMOUD*

[102] *See Mahmoud,* 606 U.S. at 556 ("the question in cases of this kind is whether the educational requirement . . . pose[s] a 'very real threat of undermining' the religious beliefs . . . the parent wishes to instill in the child." (citing *Yoder*, 406 U.S. at 218). For free-exercise purposes, the pervasive presence of posters on the wall renders them readily distinguishable from books on a classroom shelf. As Justice Sotomayor's dissent explains, the mere presence of the books in a classroom would not be vulnerable to the ruling in *Mahmoud*. *Id.* at 620–21 n.11 (Sotomayor, J., dissenting).

[103] The *Mahmoud* Court insists that its ruling does not require the complete removal of objectionable material. *Id.* at 568 ("Providing . . . an opportunity [to opt out] would give the parents no substantive control over the curriculum itself.").

[104] In appropriate cases, courts have ordered complete invalidation of policies that violate the free exercise clause. *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993) (invalidating local ordinances that suppressed Santerian religious practices); McDaniel v. Paty, 435 U.S. 618 (1978) (invalidating state statutory provision that effectively disqualified clergy from holding state legislative office); Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449 (2017) (holding that disqualification of religious entities from playground-improvement grants violated Free Exercise Clause). In a judicial climate in which once-settled Establishment Clause norms are vanishing, however, we can hardly be confident that this ironic twist on *Mahmoud* will prevail. *See* Schwartzman et al., *The Structure of Religious Preference*, *supra* note 25, at 236 ("It is possible the Court will treat the government's religious speech more deferentially than it treats the government's secular speech.").

As Part II demonstrates, lower courts are highly unlikely to confine *Mahmoud* to cases with similar fact patterns. That method limited *Yoder* for a half-century, but the *Mahmoud* opinion declares that a broader *Yoder* principle has now been unleashed. The Court's explicit concern in *Mahmoud* is the protection of religious beliefs of parents with minor children in public schools. As explained in Part II, that concern cannot be bound by the age of the minors or the academic subject in which instruction occurs.

New parental claims will no doubt appear as schools distribute each semester's reading lists. Moreover, the religious-liberty field is now crowded with groups like the Becket Fund, Alliance Defending Freedom, First Liberty Institute, and a rash of newly formed law-school clinics devoted primarily to free-exercise concerns.[105] There will be no shortage of parents inclined to object to assignments on many subjects, aimed at all ages, and no shortage of legal representation for them.[106] Any resulting lawsuits would be expensive for school districts, especially if facts are in dispute. Moreover, if school districts are unsuccessful in litigation, they are likely to face attorney-fee awards to the plaintiffs, as well as the costs of their own defense. Hence, it will frequently be far cheaper and less risky to capitulate than to fight *Mahmoud* claims.

With these concerns in mind, what should school districts do in response to the decision in *Mahmoud*? To what extent should they anticipate parental claims and try to channel them into procedures for fair and efficient administrative treatment?

School districts nationwide are undoubtedly scrambling to make sense of the new parental rights that the Supreme Court recognized in *Mahmoud*. With few data points currently available, we have investigated the immediate response from the defendant, Montgomery County Public Schools. The Court's opinion included this direction to the district court on remand:

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[105] The law schools at Stanford, Harvard, Yale, Notre Dame, the University of Texas, Pepperdine, and the University of St. Thomas all now operate religious-liberty clinics.

[106] The Supreme Court's recent per curiam disposition in *Mirabelli v. Bonta*, 607 U.S. __, 2026 WL 575049 (Mar. 2, 2026), extends due-process rights to all parents to interfere with the application of school policies to their children. Accordingly, these demands and legal claims will be more frequent.

> [U]ntil all appellate review in this case is completed, the [MCPS] Board should be ordered to notify [the plaintiff-parents] . . . in advance whenever one of the books in question or any other similar book is to be used in any way and to allow them to have their children excused from that instruction.[107]

Classes at MCPS opened for the Fall semester on August 26, 2025. As of that date, the remand in *Mahmoud* had not yet produced a responsive order from the federal district court in Maryland. Even when that order appears, the Supreme Court's mandate does not extend beyond the rights of the three couples who actually sued to receive notice and opt-out opportunities with respect to books with LGBTQ+ characters in their children's elementary-school classes.[108]

Yet as the school year commenced, MCPS announced a new set of policies to govern religion-based opt-out claims by parents and guardians. The three-page MCPS Regulation, issued August 21, 2025, is entitled "Curriculum Transparency and Requests to Be Excused from Instruction."[109]

What is immediately striking about the MCPS Regulation is its breadth. It includes all curricular matters and subjects, including Language Arts, Social Studies, Mathematics, and Science, in grades K–12.[110] In other words, its coverage

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[107] *Mahmoud*, 606 U.S. at 570.

[108] The *Mahmoud* precedent applies nationwide, but the Supreme Court's decision last Term barring universal injunctions reinforces that the district court's order must be limited to the plaintiffs. *See* Trump v. CASA, Inc., 606 U.S. 831, 841–47 (2025). *Mahmoud* was not a class action, so the injunction will run in favor of the named plaintiffs only.

[109] Montgomery Cnty. Pub. Sch. Regul. IFD-RA § I (2024). *See generally* Request to Be Excused from Instructional Material, Montgomery Cnty. Pub. Sch. (Aug. 2025), https://ww2.montgomeryschoolsmd.org/departments/forms/pdf/281-26.pdf (providing a form to accompany the MCPS Regulation, designated as "Request to be Excused form Instructional Material," for parents to fill out and submit to the school district's Division of Student Conduct and Appeals). The 2025–2026 MCPS Guidelines for Respecting Religious Diversity echo this new regulation with respect to core curricular materials, but the reference awkwardly remains under a heading that references excusal from noncurricular activities. *See Religious Diversity Guidelines,* Montgomery Cnty. Pub. Schs. 4 (2025–2026), https://www.montgomeryschoolsmd.org/siteassets/district/students/rights/religiousdiversity/religious-diversity-guidelines-2025-2026-secured.pdf.

[110] *See* Montgomery Cnty. Pub. Sch. Regul. IFD-RA § III (A) (2024).

extends far beyond the factual context of *Mahmoud*, the parents' demands in the litigation, or the Supreme Court's directive for a preliminary injunction. The Regulation requires timely notice to parents and guardians of all reading assignments, the opportunity to review the instructional materials, and the possibility of having their children excused and provided with alternative instruction.[111]

The Regulation opens with a declaration of the purposes to permit parents to (1) review curricular materials, (2) identify "specific core instructional materials that substantially interfere with a sincerely held religious belief," (3) "request that their child be excused from any portion of instruction involving that material," and (4) ensure the provision of alternative materials "in a non-punitive manner" for any student whose parents' request has been approved.[112]

Section II of the MCPS Regulation offers a guiding philosophy. The school district reaffirms its commitments to respect all students and to ensure that the "lives, experiences, and cultures" of students be reflected in classroom materials.[113] The MCPS Regulation also reaffirms the rights of students to "express their religious or nonreligious beliefs and practices free from discrimination."[114] For the first time, however, the school district acknowledges "that students and families may seek to refrain from participation in specific portions of instruction that substantially interfere with their sincerely held religious beliefs."[115]

What follows the Regulation's introductory sections are specifications for notice and review with respect to curricular materials,[116] and the substantive standards by which the school district will evaluate requests to be excused from instruction.[117] The notice requirements begin with a commitment that the district will provide to parents electronically, before each

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[111] *Id.* §§ IV-V.
[112] *Id.* § I.
[113] *Id.* § II. To the best of our knowledge, MCPS has not eliminated from the Language Arts curriculum for grades K–5 any of the books that were on the approved list as of the date of the Supreme Court's decision in *Mahmoud*.
[114] *Id.*
[115] *Id.*
[116] The regulation applies to "core instructional materials," defined as "text(s) or textbook(s) that are directly aligned with MCPS curriculum that have been designated by the [school district] for use as a primary and supplemental source of instruction in core curriculum areas." *Id.* § III.D.
[117] *See id.* § VI (G).

marking period, a comprehensive list of core instructional materials to be used.[118] Parents will have the opportunity to review those materials on request to a "school-based administrator."[119] These administrators are then required to make the materials available for inspection within seven school days after receiving the request.[120]

The burden to review materials for objectionable content rests with the parents. The school district is not going to do the work of searching out, for example, all references to certain themes or subjects. It is reasonable to expect, therefore, that political groups will help with this kind of screening, which may in turn lead to a strikingly broad set of objections.

The operative section on "Requests to be Excused from Specific Core Instructional Materials" authorizes parents to "submit requests to have their child excused from instruction involving core instructional materials that substantially interfere with a sincerely held religious belief."[121] These requests must be

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[118] *Id.* § IV. The Regulation uses the term "marking periods" to refer to quarters of the academic year. Each of the four marking periods is approximately ten weeks long. *See Calendar*, Montgomery Cnty. Schs., https://www.montgomery.k12.nc.us/calendar.

[119] Montgomery Cnty. Pub. Sch. Regul. IFD-RA § V.

[120] *Id.*

[121] *Id.* § VI.A. The reference to "specific materials" seems designed to exclude blanket requests for exclusion from all instruction on particular subjects—*e.g.*, all instruction pertaining to sexual orientation or gender identity, or all instruction relating to the scientific theory of evolution. For analysis of that sort of request, *see* Thomas Peele, *California Schools Brace for Fallout from U.S. Supreme Court Decision on Religious Rights*, EDSOURCE (Aug. 25, 2025), https://edsource.org/2025/alternatives-public-school-education/739199?amp=1. The concern for specificity is highlighted in *Alan L. v. Lexington Public Schools*, 2025 U.S. Dist. LEXIS 267350 (D. Mass., Dec. 30, 2025), in which the court entered a preliminary injunction requiring notice and opt-out rights for books that include LGBTQ+ themes for a parent of a child in kindergarten. The complaint more broadly referenced "content that focuses on diversity, equity, and inclusion including issues of race, gender, and sexuality, taught from a secular world view," *id.* at *5 & n.3, but the opinion and preliminary injunction address only content involving LGBTQ+ characters or themes. The order requires notice and opt-out rights with respect to ten identified books used in the curriculum, *id.* at *35–*38. The order also requires notice and the opportunity to opt out of "Other LGBTQ+ Educational Materials," defined as materials that might be used in the kindergarten curriculum that "depict or describe LGBTQ+ characters, relationships, or activities, or LGBTQ+ political or social advocacy." *Id.* In a more recent order, the court refused to allow opt-outs from *Pink is for Boys* and *Except When They Don't* because they critique gender

made within the first ten days of the marking period.[122] The form on which the requests are to be made will go to a centralized authority, the school district's Division of Student Conduct and Appeals, rather than to personnel at the school that the student attends.[123]

The excusal form asks parents "to determine whether the use of specific core instructional materials substantially interferes with their sincerely held religious beliefs."[124] It requires the parents to list books or chapters from which they want their children excused.[125] In a striking omission, the form does not ask for any specification of religious belief or recital of the quality or quantity of the interference with that belief. Thus, the school district will not review the religious content or sincerity of claims. The only grounds for denial of requests are, as explained below, extrinsic to the religious claims being made.

Requests are then to be reviewed by the school district's Division of Student Conduct and Appeals, which, as the name suggests, normally handles appeals from school-level decisions on student discipline.[126] Parents are promised a decision within ten school days after submission.[127] The MCPS Regulation thus contemplates the possibility of a decision coming more than three weeks into a ten-week marking period—ten calendar days from the beginning of the marking period to submit the request, plus ten school days for the response.

The precision and mechanical qualities of the submission process contrast sharply with the discretion that appears in some of the MCPS Regulation's listed grounds for denial, and even more in the description of what approval entails beyond the excusal itself. The MCPS Regulation specifies but does not explain four categories of permissible denials: (1) excusals from

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stereotypes but do not constitute "LGBTQ+ Educational Materials." 2026 U.S. Dist. LEXIS 27128 (D. Mass. Feb. 10, 2026).

[122] Montgomery Cnty. Pub. Sch. Regul. IFD-RA § VI.C. Families that are new to Montgomery County are given 30 days to make opt-out requests. *Id.*

[123] *See id.* § VI.D.

[124] *See Form 281-26 Request to be Excused from Instructional Material*, Montgomery Cnty. Pub. Schs. (Aug. 2025), https://ww2.montgomeryschoolsmd.org/departments/forms/pdf/281-26.pdf.

[125] *See id.*

[126] *See Appeals*, MONTGOMERY CNTY. PUB. SCH., https://www.montgomeryschoolsmd.org/departments/appeals/ (last visted Feb. 26, 2026).

[127] Montgomery Cnty. Pub. Sch. Regul. IFD-RA § VI.D. The MCPS Regulation does not specify what happens if the district fails to meet this deadline.

the entirety of a course required for graduation; (2) excusals from "instructional standards, objectives, and content required by law"; (3) excusals that would fundamentally alter the required curriculum; and (4) incomplete requests.[128]

Categories one and four—complete excusal from a required course and incomplete requests—are straightforward enough. Category two seems designed to block efforts to use opt-outs to force the district or a teacher to redesign learning goals and measures of achievement.[129]

The most significant category of denials is category three, excusals that would "fundamentally alter the required curriculum."[130] Because the school district does not provide commentary accompanying any of the categories, we can make only educated guesses about the district's concern for fundamental alteration of the curriculum.

It seems reasonable to assume that this concern applies primarily to courses in science and social studies rather than language arts. In a typical English course, the teacher chooses for intensive study a set of books that demonstrate a variety of literary forms (*e.g.*, novel, short story, poetry) and genres (*e.g.*, science fiction, fantasy, realism, historical fiction). An opt-out from one book leaves open the possibility of assigning a different book from the same category. Though substitute books may yield slightly different lessons, and the substitution process may prove administratively disruptive, neither will necessarily compromise pedagogical objectives.

In contrast, an opt-out from assigned readings in science or social studies may substantively alter the content of the course, and perhaps the entire program of instruction in the subject across multiple grades. Consider opt-outs from material on the evolution of species in biology, or on the age of our planet in Earth and Space Science. The study of evolution is essential to exploring the nature of life today as well as to understanding the way that living things have changed and diversified over billions of years. Likewise, Earth's history and the processes that have shaped it cannot be understood without recognizing that the Earth is billions rather than thousands of years old. Lessons on

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[128] *Id.* § VI.G(1)–(4).

[129] The denial category of "content required by law," unless further explained, leaves open the constitutionally dubious move of trying to avoid *Mahmoud*-type claims by making certain reading assignments legally obligatory.

[130] Montgomery Cnty. Pub. Sch. Regul. IFD-RA § VI.G(3) (2024).

evolution or the age of the Earth may well conflict with some parents' sincere religious beliefs.[131] Removing these lessons, however, will have profoundly negative consequences for learning objectives throughout the science curriculum.

The same is true for material on race and slavery in American history, government, economics, and other social-studies courses. What students learn in each of these fields is profoundly shaped by the treatment in the curriculum of slavery and race relations. On these topics, we can easily imagine opt-out requests from the left as well as from the right.[132]

The pro-parent tilt in *Mahmoud* is sufficiently extreme that it is difficult to predict the outcome of free-exercise litigation if parents challenge a denial of opt-out rights in a case involving science or social studies. Defending a denial in court will thus require substantial resources and constitutional fortitude on the part of school administrators and elected school-board members, who might find it simpler (though not simple), or at least safer, to accommodate objectors.

The decision whether to fight a court battle will also be affected by the administrative and pedagogical costs of accommodation. In this regard, we note that the MCPS Regulation addresses in much less detail what occurs if a request

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[131] The conflict between creationist religious beliefs and the teaching of evolution in the public schools has occupied American courts for a century. The summer of 2025 marked the 100th anniversary of the famous trial of John Scopes for violating Tennessee's Butler Act, which prohibited teaching the scientific theory of evolution, or "any theory that denies the story of the Divine Creation of man as taught in the Bible . . . ." 49 Tenn. Code Ann. § 1922 (repealed 1967); Paige Williams, *Paige Williams on Marquis James's Preview of the Scopes Monkey Trial*, THE NEW YORKER (July 13, 2025), https://www.newyorker.com/magazine/takes/paige-williams-on-marquis-jamess-preview-of-the-scopes-monkey-trial. The prominent federal constitutional decisions include *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Edwards v. Aguillard*, 482 U.S. 578 (1987); and *Kitzmiller v. Dover Area School District*, 400 F. Supp. 2d 707 (M.D. Pa. 2005) (holding that public school violated Establishment Clause by teaching intelligent-design creationism). Professor Katskee was counsel for the plaintiffs in *Kitzmiller*.

[132] Consider, for example, the recent amendment to Florida's state social-studies standards requiring instruction on "how slaves developed skills which [sic] . . . could be applied for their personal benefit." Fla. Dep't of Educ., *Florida's State Academic Standards—Social Studies* SS.68.AA.2.3 (2023), https://www.fldoe.org/core/fileparse.php/20653/urlt/6-4.pdf. Many parents in Florida surely object, on religious grounds as well as on secular ones, to lessons teaching that slavery produced any beneficial effects. At the same time, some parents may share the Florida legislature's objection to teaching that slavery was unqualifiedly evil.

to be excused from instructional materials is approved. Here are the two pertinent provisions, in full:

> E. If the request is approved, the student's principal and teachers will be notified and the school will consult with the [district's] Division of Teaching and Learning to identify suitable alternative text(s), textbook(s) and/or assignment(s).
>
> F. Students who are excused from instruction under this regulation may be afforded the opportunity for other academic work during the period of time in which the student would otherwise be participating in the instruction the student is excused from.[133]

Notably, it is only after the district approves an excusal request that the classroom teacher and school principal are formally notified of the parents' request. Parents or the student may, of course, provide this more local notification themselves at any point, but they are also free to remain anonymous and silent at their own school up to the point when the opt-out is granted. Accordingly, a teacher may not learn about a request until several weeks into the marking period. By that time, the teacher may already be using the challenged material, and the lessons for the marking period may be set.

At this point, the disruptions attendant on approved excusals will show up with a vengeance. Students will be excused from class or parts of class. Where they will go is left unspecified. But if they remain in school, they will have to go *somewhere* outside their regular classroom, and they will need supervision. Moreover, if alternative work is to be assigned, the teacher or other school- or district-level personnel will have to select the alternative lessons and instructional materials. Someone will have to evaluate the student's work and integrate that evaluation with other evaluations for students in the class.[134] Similarly, tests for the class will have to be written with an eye to the opt-outs. Either material that any student is excused from will have to be

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[133] Montgomery Cnty. Pub. Sch. Regul. IFD-RA § VI.E–F (2024).

[134] *See* Brief for Amici Curiae American Association of School Super Intendents et al. in Support of Neither Party at 17–22, Mahmoud v. Taylor, 606 U.S. 522 (2025) (explaining that the most thorough account of the disruptions that will likely attend an opt-out regime).

excluded from all testing, or opt-out students will have to be given different tests from the rest of the class.

Consider as well a situation in which one parent objects on religious grounds to exposing her child to some instructional material, but the child's other parent objects to excusal from the lesson. This sort of disagreement about children's upbringing is commonplace in divorce and child-custody proceedings, especially (but not only) when the parents are of different faiths. Deciding between competing parental demands is difficult enough for family courts, which have the legal authority to resolve those disputes. School officials have neither the authority nor the institutional competence to adjudicate these issues.

In late October 2025, we learned of a response to a Maryland Public Information Act request, dated September 18, 2025, seeking data on curriculum opt-out requests in MCPS during the first marking period.[135] The Response shows that forty-three families filed requests. The forty-three families (some with more than one child) submitted a total of fifty-eight opt-out forms—forty-six in twenty different elementary schools, ten in six different middle schools, and two in one high school.

The Response lists 85 books as among the "Most Common" listed on the opt-out-request forms, and defines "Most Common" as appearing on five or more forms. Hence, the forty-three first movers in Montgomery County filed forms containing at least 425 (5 x 85) opt-out requests, an average of almost ten per family and perhaps greater.

The Response designates the most common themes for listed books in elementary schools as "LGBTQ+, Culture/Diversity, and Inclusion," and in middle schools as "LGBTQ+ and Social Justice." The list of Most Common Books reinforces the notion that opt-outs are not limited to LGBTQ+ themes. Approximately three-quarters of the books on that list appear to touch on LGBTQ themes, though at times only obliquely. The remainder (20 to 25 books) fall into various

[135] Montgomery Cnty. Pub. Schs., *Response to Maryland Public Information Act Request on Curriculum Opt-Out* (Sept. 18, 2025) https://www.documentcloud.org/documents/26182132-fy26-70-responsive-document/. All the data in this and the following two paragraphs are derived from the response to that request.

thematic categories, the most common of which is racial and ethnic diversity.[136]

For example, a common book for opt-out requests from the high-school curriculum, *All American Boys*,[137] is a young-adult novel about the connection of two teenagers, one black and one white, to an incident of police brutality. MCPS's Public Information Act Response does not identify any religious objection to the book; and as noted above, parents need not explain their objections. The list of Most Common Books for opt-out requests also includes *Charged: Prosecution and Mass Incarceration*, and such noteworthy titles as *Aladdin and the Wonderful Lamp*, *Alice's Adventures in Wonderland*, and *The Tempest*.

We filed our own Public Information Act request with MCPS for the second marking period, which began in early November. In a response dated December 1, we learned that sixteen families filed opt-out requests during that period.[138] The total number of forms filed was twenty-four, including seventeen in elementary schools, five in middle schools, and two in high schools. Twenty-nine books were listed as "Most Common," which means that sixteen families filed forms that included more than 145 requests, an average of about nine per family and perhaps more. The Response also discloses that one or more families opted out of eighty books.

In the second marking period, the most common themes for objection in elementary school remained "LGBTQ+, Culture/Diversity, and Inclusion." Of the twenty-nine most commonly listed books, twenty-seven were repeats from the list for the first marking period, including all the books involved in the *Mahmoud* litigation. A few books appear as new in the second marking period. In middle school, parents filed opt-out requests

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[136] In *Alan L. v. Lexington Public Schools*, 2025 U.S. Dist. LEXIS 267350 (D. Ma., Dec. 30, 2025), described in note ___ *supra*, the complaint also included objections to teaching about race, but the court did not address those in its preliminary injunction. *Id.* at *5 n.3; *see also* Ibanez v. Albemarle Cnty. Sch. Bd., 897 S.E.2d 300, 323-326 (Va. Ct. App. 2024) (rejecting federal and state constitutional claims by parents attempting to veto or opt out of anti-racism curriculum).

[137] JASON REYNOLDS & BRENDAN KIELY, ALL AMERICAN BOYS (2016).

[138] Maryland Public Information Request, Curriculum Opt Out Responses, Responsive Document FY 26-176 (on file with the authors and the First Amendment Law Review). The information in this and the following paragraph comes from that Response.

from *The Iliad, the Odyssey, and other Greek Stories*,[139] which may perhaps have drawn objections to references to Greek Gods. In high school, one or two parents sought opt-outs from a book entitled *The Magic Fish*,[140] a graphic novel about a boy coming out as gay in his Vietnamese immigrant family.

These results are early and sparse. It is far too soon to know whether the patterns might change, or whether the result of opt-out requests (in Montgomery County or elsewhere) might be the abandonment of certain books or lessons, contrary to Justice Alito's assertion that the *Mahmoud* litigation was not designed to control the curriculum and would not have that effect.[141] At some critical juncture, the scarcity of classroom space, teachers and other supervisors, and resources to acquire specialized instructional materials for individual students will mean that objectors will effectively wield a heckler's veto over portions of the curriculum.[142]

The concerns identified in this Part focus on MCPS, because that district is the defendant in *Mahmoud*. MCPS created the new Regulation and accompanying notice form in the shadow of the Supreme Court's decision. But in student age and curricular subject matter, the MCPS Regulation goes far beyond the Supreme Court's mandate.

The school district's regulatory action seems prudent in its broad outlines as a response to the radical provocation of *Mahmoud*. Nevertheless, we cannot know at this point how well the MCPS policies will match those chosen by the more than 10,000 school districts throughout the United States.[143] Nor can we predict the exact quality and quantity of disruptions that will follow the policy responses to *Mahmoud* in all those districts. Some districts may allow many fewer excuses and choose to fight

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[139] Core Knowledge Found., *CKLA Unite 4: The Iliad, the Odyssey, and other Greek Stories*, https://www.coreknowledge.org/free-resource/ckla-unit-4-the-iliad-and-the-odyssey-and-other-greek-stories/ (last visited Feb. 27, 2026).

[140] TRUNG LE NGUYEN, THE MAGIC FISH, (Random House 2020).

[141] Mahmoud v. Taylor, 606 U.S. 522, 568 (2025).

[142] In litigation over curriculum, parents frequently seek vetoes and opt-outs as alternative remedies. *See* Ira C. Lupu, *The Centennial of* Meyer *and* Pierce, *supra* note 68, at 198–215. Justice Alito suggests in *Mahmoud* that bundling the objectionable lessons into fewer class sessions might make opt-outs more efficient to administer. 606 U.S. at 567. That strategy may also make the lessons less effective, however, by reducing their pervasiveness over the school year.

[143] *Mahmoud*, 606 U. S. at 616 (Sotomayor, J., dissenting, citing Brief for Amici Curiae American Association of School Superintendents et al. in Support of Neither Party, representing 10,000 school districts).

demands for them. Some may proactively strike from the curriculum anything that they think might potentially offend anyone, leaving only scraps from which to fashion a curriculum. Some may act on assumptions that favor the majority faith, or the most litigious religious groups, over other religions and their adherents. In short, differences in demographics and in the wealth and political will of school districts may lead to differences in policy, administration, and the character of readings that might provoke opt-out requests.

Despite these possible differences, it is apparent that *Mahmoud* has handed a weapon to groups that want to purge school reading lists of materials that they dislike, even though the groups lack the numbers or political clout to win battles over curriculum and instructional materials through ordinary processes of school reform. *Mahmoud* transfers power away from school boards, which are democratically controlled, to individual parents, lawyers, and ultimately judges. In the name of the free exercise of religion, what look like pleas for accommodation may become engines of transformation. As we noted at the outset of this paper, the Supreme Court has never before intruded so radically on the process of public education and its governance.[144]

Mahmoud may also cut much deeper, undermining the long-standing purposes of the public schools. Public education is designed to be a shared experience that teaches and gives students the opportunity to practice the shared values necessary to live together in a politically and socially diverse, religiously pluralistic society. At their best, public schools respect differences while providing common vocabularies, understandings, and frames of reference. The educational system brings students together not to deprive them of the right to choose their own beliefs and paths in the world, but to allow them to chart their own course while also living alongside and in relative harmony with those who make different choices.

Once upon a time, the Supreme Court recognized that public education should "inculcate fundamental values necessary to the maintenance of a democratic political system . . . ."[145] A key aim, as the Court underscored, is to "prepare pupils for citizenship" by "inculcat[ing] the habits and manners of civility as values . . . indispensable to the practice of self-government in the

[144] *See supra* notes 2–7 and accompanying text.
[145] Ambach v. Norwick, 441 U.S. 68, 77 (1979).

community and the nation."[146] Achieving that aim requires advancing the "fundamental values" of "tolerance of divergent political and religious views" and respectful discourse with those with whom one disagrees.[147] If parents are now entitled to send their children to public school but insulate them from influences that differ from the parents' views, these critical lessons will be lost.

[146] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986) (quoting CHARLES A. BEARD & MARY RITTER BEARD, NEW BASIC HISTORY OF THE UNITED STATES 228 (1968)).
[147] *Id.*

CATHOLIC CHARITIES AND THE COMING WAR OVER RELIGIOUS EXEMPTIONS

Christopher C. Lund *

INTRODUCTION

Last term, the Supreme Court decided *Catholic Charities*. In many ways, the decision was modest: the Court was unanimous, its opinion short, and its ground of decision narrow. One could dismiss *Catholic Charities* as a routine example of error correction—which it certainly is. But under the surface, *Catholic Charities* raises some fascinating questions about the structure of religious exemptions and the way the law comprehends religious institutions and, more broadly, religious life.

Two competing visions have come into focus. One—pressed by the Wisconsin Supreme Court's dissent, by Justice Thomas in his solo concurrence, and by Becket (counsel for Catholic Charities)—sees every religiously motivated activity as deserving of the same degree of constitutional protection. Government cannot judge which religious activities, institutions, or roles are more religious or less religious. As a result, religious exemptions must be drawn broadly or not at all. They cannot draw distinctions based on degrees of religiosity. The Constitution forbids it.

The other vision rejects this. It believes law should retain the ability to differentiate among religious activities, institutions and roles, and that this is not a defect but a virtue. For only in this way can law give special protections to religion's core—to those things most vital to religious life and therefore most deserving of insulation from governmental influence and control.

Catholic Charities did not resolve, or even address, this clash of visions. Recognizing the depth of these waters, the Court sensibly stayed on the shore and decided the case on the easiest possible grounds. But the divide remains, and it will shape a new generation of litigation over religious exemptions.

This first vision—what I will call the strong position—should be rejected. It has surface appeal, rooted in legitimate concerns about governmental arrogance and courts deciding what forms of religion are "religious enough" to deserve

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protection. But that appeal comes at too great a cost. The strong position is inconsistent with our history and tradition; many existing statutes would have to be struck down as unconstitutional, and much Supreme Court doctrine would have to be substantially revised or abandoned. The strong position also rests on a contested conception of religious institutions that cannot plausibly claim to be universal. By constitutionalizing a single, flattened account of how religion is organized and lived, the strong position would freeze into constitutional law an abstract theory whose fit with religious self-understandings is unclear—and that runs counter to the way Congress and the Supreme Court have long proceeded. Finally, the strong position has a real downside—it discourages legislatures and courts from creating new religious exemptions and encourages them to narrow and eliminate existing ones. The strong position presents itself as a guardian of free exercise, but it is a Trojan horse: if religious exemptions constitutionally must be all-or-nothing, too often the answer will be nothing.

I. AN INTRODUCTION TO *CATHOLIC CHARITIES*

To a casual reader, *Catholic Charities* might seem an easy case. Wisconsin exempted religious organizations from unemployment tax as long as they are "'operated primarily for religious purposes.'"[1] Yet the Wisconsin Supreme Court held Catholic Charities did not meet that standard. That Court emphasized how Catholic Charities' work was "primarily charitable and secular"—Catholic Charities "provide[d] services to individuals with developmental and mental health disabilities," things like "job training, placement, and coaching, as well as services related to activities of daily living."[2] The Court stressed that Catholic Charities did not conduct "worship services, religious outreach, ceremony, [or] religious education" [3] in the course of its work. And most critically, the Court put weight on Catholic Charities' decision to serve all people and not to proselytize—those too were reasons Catholic Charities was not entitled to this religious exemption.[4]

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[1] Cath. Charities Bureau, Inc. v. Wis. Lab. & Indus. Rev. Comm'n, 605 U.S. 238, 241 (2025) (quoting Wis. Stat. § 108.02(15)(h)(2) (2023)).

[2] Cath. Charities Bureau, Inc. v. Lab. & Indus. Rev. Comm'n, 3 N.W.3d 666, 683 (Wis. 2024) (concluding that these "services that would be the same regardless of the motivation of the provider").

[3] *Cath. Charities*, 605 U.S. at 245 (quoting *Cath. Charities*, 3 N.W.3d at 676, 682).

[4] *Id.* at 245-46 (quoting *Cath. Charities*, 3 N.W. 3d at 682-83).

The United States Supreme Court reversed, focusing on this last part of the reasoning and deeming it unconstitutional.[5] Catholic Charities' decisions to serve everyone and not to push religion on people were religious choices, the Court stressed, grounded in Catholic doctrine. To exclude Catholic Charities on that basis, the Court explained, was essentially to punish Catholic Charities for being Catholic.[6]

Here is a striking thing, though. The claim of denominational discrimination was not Catholic Charities' primary legal theory. It was actually the third argument Catholic Charities made to the Court, one that only began on page 43 of their opening brief.[7] At oral argument, Justices from both sides seized on denominational discrimination as the easiest way to resolve the case.[8] Yet the main folks taking Catholic Charities' side—not just Becket (who represented Catholic Charities in the Court), but the dissent in the Wisconsin Supreme Court and Justice Thomas in his solo concurrence—did so on the basis of a different set of claims about what the Constitution requires of religious exemptions.

Those claims shall be the main focus of this piece. Part I summarizes the decision in *Catholic Charities*, while Part II situates it in the context of the Court's precedents about denominational discrimination (particularly *Larson* and *Gillette*). Part III explains the "strong position," while Part IV shows why it collides with church-autonomy doctrine and a host of statutory exemptions. Part V explains how denominational neutrality can exist without the strong position, and Part VI concludes.

II. THE PRINCIPLE OF DENOMINATIONAL DISCRIMINATION

For fifty years, two cases have anchored discussion about denominational discrimination in the context of religious exemptions—*Larson* and *Gillette*.[9] The two cases serve as polar opposites, in the sense that *Larson* found denominational

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[5] *See id.* at 254.

[6] The Supreme Court called this "textbook denominational discrimination." *Id.* at 248. The Court went on: Governments cannot "exclude[] religious organizations from an accommodation" because of "fundamentally theological choices driven by the content of [their] different religious doctrines." *Id.* at 252.

[7] *See* Brief for Petitioners at 43, *Cath. Charities*, 605 U.S. 238 (2025) (No. 24–154).

[8] *See* Oral Argument at 6:25–7:34, 20:26–24:14, 26:23–28:18, *Cath. Charities*, 605 U.S. 238 (2025) (No. 24-154).

[9] *See* Larson v. Valente, 456 U.S. 228 (1982); Gillette v. United States, 401 U.S. 437 (1971).

discrimination and *Gillette* didn't. But both are famously cryptic, illustrating how bedrock principles can be incontestable in concept but endlessly contestable in practice.[10]

Larson involved a Minnesota law requiring charitable organizations to register with the state and report certain things.[11] Minnesota had an exemption specifically for religious groups, but only if they met a 50 percent funding rule—that is, religious organizations were exempt only if more than half of their funds came from their members.[12] Minnesota's stated fear was of abusive fund-raising tactics; if a religious group got most of its money from non-members, Minnesota saw that as a red flag.[13]

Larson held Minnesota's 50 percent rule unconstitutional.[14] The heart of the case—why this was denominational discrimination at all—was tucked away in footnote 23:[15]

> [The Minnesota statute] makes explicit and deliberate distinctions between different religious organizations. We agree [that it] effectively distinguishes between "well-established churches" that have "achieved strong but not total financial support from their members," on the one hand, and "churches which are new and lacking in a constituency, or which, as a matter of policy, may favor public solicitation over general reliance on financial support from members," on the other hand.[16]

This language is somewhat cryptic. Certainly the Minnesota law drew distinctions between religious organizations. But whether it discriminated against particular *denominations* is different question. "Effectively" ends up being the key word here, and it captures well the puzzle that is *Larson*.

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[10] *See Larson*, 456 U.S. at 244 ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 146 n.143 (1992) ("This conclusion has voluminous support in the history of the First Amendment, and I know of no First Amendment theorist who disputes it.").

[11] *See Larson,* 456 U.S. at 230–31.

[12] *See id.* at 233.

[13] *See id.* at 248.

[14] *See id.* at 255.

[15] *See id.* at 246 n.23.

[16] *Id.*

Minnesota's rule did not single out any denomination on its face and the Court did not say that was its purpose, so *Larson* isn't a case of disparate treatment exactly.[17] But *Larson* also isn't simply 'a case of disparate impact. Justice White claimed so in his dissent,[18] but the Court rejected that view.[19]

Larson thus winds up being one of those strange cases that fall into the netherworld between disparate treatment and disparate impact. The obvious analogy here is *Geduldig*. Folks know *Geduldig* as the case about whether classifications on the basis of pregnancy should be treated as classifications on the basis of sex (which are constitutionally suspect).[20] But from a wider angle, *Geduldig* was about subsets—about lines partitioning a protected class (women) in ways that treat one part of the class (pregnant women) differently from the other (nonpregnant women). Like *Geduldig*, *Larson*, *Gillette*, and *Catholic Charities* are all examples of subset discrimination—a protected class (religious institutions) partitioned by a legal criterion treating one part of the class (exempt religious institutions) differently from the other (nonexempt ones).

Larson isn't an equal-protection case like *Geduldig*, of course. But its logic about subsets explains why facial neutrality can still threaten constitutional values. For treating *Larson* as a case of mere disparate impact would miss what makes it distinctive: criteria that define the scope of a religious exemption necessarily apply only to religious organizations. When such criteria are used to sort religious groups, they deserve some scrutiny. For criteria that are entirely sensible in distinguishing among organizations in general can become troubling when used to distinguish among religious organizations.

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[17] There was some evidence suggesting Minnesota's rule had been passed to go after the Unification Church, a religious movement founded in South Korea, sometimes derisively referred to as the Moonies. *See id.* 254–55 (noting that "[one] Senator, who apparently had mixed feelings about the proposed provision, stated, 'I'm not sure why we're so hot to regulate the Moonies anyway'"). Although the Supreme Court did not rest its conclusion on this basis, the Eighth Circuit saw it as intentional discrimination. *See* Valente v. Larson, 637 F.2d 562, 568 (8th Cir. 1981) ("Inexplicable disparate treatment will not generally be attributed to accident[.]").

[18] *See Larson*, 456 U.S. at 261 (White, J., dissenting) ("Some religions will qualify and some will not, but this depends on the source of their contributions, not on their brand of religion.").

[19] *See Larson*, 456 U.S. at 246 n.23 (majority opinion) (arguing that Minnesota's 50 percent rule "is not simply a facially neutral statute, the provisions of which happen to have a 'disparate impact' upon different religious organizations").

[20] *See* Geduldig v. Aiello, 417 U.S. 484, 492 (1974).

Law, for example, frequently distinguishes between small groups and large ones. Title VII does not apply to small employers; the Paycheck Protection Program did not apply to large ones.[21] Yet when size distinctions are placed inside of a religious exemption, they can be quite troubling. A religious group's size reflects how religiously mainstream it is. A religious exemption available only to large groups thus favors mainstream faiths over minority ones. Title VII's small-employer exception has an unfortunate disparate impact on religious groups, but no one thinks it unconstitutional.[22] But if Title VII's existing religious exemption was only available to small religious groups—say those with fewer than 15 employees—that would be a serious constitutional problem.[23]

Larson thus rightly rejects the categories of disparate treatment and disparate impact. But that renders its holding uncertain and unstable. *Larson* insists Minnesota's 50 percent

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[21] Title VII does not apply to employers with less than 15 employees. *See* 42 U.S.C. § 2000e(b). The Paycheck Protection Program did not apply to employers with more than 500 employees. *See* US Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136 (2020).

[22] Small religious groups are shielded by the exception, while larger ones are not. But the real constitutional dangers arise because of Title VII's so-called "single employer" doctrine, which says that when two businesses are heavily interrelated, "the number of employees of [the] two separate businesses may be combined to meet the fifteen-employee requirement." 1 LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 5.02[5] (2025). As I put it earlier:

> With hierarchical churches (like the Catholic Church), the parish and the higher church are deeply interrelated, so individual parishes become bound by Title VII. With congregational churches (like Baptist churches), there is no higher church—and so such churches become exempt from Title VII. To put it another way, small congregational churches are treated like small employers (exempt from the anti-discrimination laws), while small hierarchical churches are treated like small parts of a large employer (not exempt).

Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV. 1, 9–10 (2011) (decrying this as problematic, though not unconstitutional).

[23] And the same is true for other kinds of distinctions. In general, governments may have good reasons to favor well-established groups or those affiliated with larger parental organizations. But a religious exemption available only to well-established groups discriminates against new religions, just as a religious exemption available only to groups affiliated with larger ones discriminates against independent, congregational, and nondenominational faiths. All this fits easily with *Larson* itself. *See Larson*, 456 U.S. at 246 n.23.

rule "effectively" discriminates against particular religions.[24] But *Larson* gives no guidance for what counts as "effective" discrimination.[25] And *Larson*'s traditional foil, *Gillette*, does not help. *Gillette* involved the federal statute exempting religious objectors from the draft.[26] But it did not exempt all such objectors; it exempted only those who objected to "war in any form."[27] This had predictable denominational effects. Strict pacifists who completely rejected war, like Quakers and Jehovah's Witnesses, were exempt. Meanwhile, those from faiths with theological rules about when and how war could permissibly be fought, like Catholics, were not. Despite this, *Gillette* upheld the scheme.[28] This is why *Larson* and *Gillette* are so hard to square. *Larson* invalidated Minnesota's statute because it "effectively" discriminated against small and unpopular religions.[29] But the same thing was true in *Gillette*.[30] And *Gillette* defended the statute on the grounds that the war-in-any-form clause "on its face makes no discrimination between religions."[31] Yet that was true in *Larson* too.[32]

But *Catholic Charities* did not need to resolve the tension between *Larson* and *Gillette*, because both cases differ from *Catholic Charities* in a fundamental respect. *Larson* and *Gillette* both involved a religious exemption delimited by secular

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[24] *See Larson*, 456 U.S. at 255.

[25] The only other thing *Larson* says—that the statute is suspect makes "explicit and deliberate distinctions between different religious organizations," *Larson*, 456 U.S. at 247 n.23—is unhelpful, because virtually every religious exemption is this way.

[26] *See* Gillette v. United States, 401 U.S. 437 (1971).

[27] *Id.* at 447.

[28] *See id.* at 463.

[29] *Larson,* 456 U.S. at 247 n.23.

[30] In fact, *Gillette* repeatedly acknowledged how the statute "work[s] a de facto discrimination among religions." *See Gillette*, 401 U.S. at 451–52; *see also id.* at 452 ("Of course, this contention of de facto religious discrimination . . . cannot simply be brushed aside.").

[31] *Id.* at 452.

[32] Of course, the Court found Minnesota's reasons insufficiently compelling to survive strict scrutiny. But the crucial point is that the statute in *Gillette* was not even found to trigger strict scrutiny (which it would surely not have satisfied), while the one in *Larson* was. *See Gillette*, 401 U.S. at 462 (affirming the stated "*substantial* governmental interests" (emphasis added)); *Contra Larson*, 456 U.S. at 246 ("In short, when we are presented with a state law granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality.").

criteria.[33] Meanwhile *Catholic Charities* involved a religious exemption delimited by *religious* criteria. As the Supreme Court would later put it, the Wisconsin Supreme Court "*explicitly* differentiat[ed] between religions based on theological practices."[34] Thus, *Catholic Charities* mostly leaves *Larson* and *Gillette* alone, accepting *Larson* without talking about its facts,[35] and dismissing *Gillette* as "inapposite."[36]

III. CATHOLIC CHARITIES AND THE STRONG POSITION

Catholic Charities seems unimpeachably correct, certainly easier than *Larson* or *Gillette*. Finding the Wisconsin Supreme Court's decision to be infected by an unconstitutional rationale, the Court rightly sends the case back to the Wisconsin Supreme Court with directions to start over and do it right. The question becomes, what happens now?

Say, on remand, the Wisconsin Supreme Court denies Catholic Charities the religious exemption again. The Wisconsin Supreme Court could, say, point to how Catholic Charities hires outside the faith. In fact, the Wisconsin Supreme Court put weight on this fact the first time around, which the U.S. Supreme Court seemed to frown upon in its description of the facts—although it curiously did *not* show up as a constitutional problem in the Court's legal analysis.[37]

But more likely is this: Say, on remand, the Wisconsin Supreme Court concludes Catholic Charities doesn't qualify for a religious exemption simply because of the nature of work they do. Orphanages, nursing homes, facilities for the mentally ill, foster homes, halfway houses—all entities doing this sort of humanitarian and charitable work, the Wisconsin Supreme Court concludes, do not qualify for the exemption. It does not matter whether they are religiously motivated; it does not matter

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[33] That is, the 50 percent rule of *Larson* and the "war in any form" rule of *Gillette* distinguished between religious organizations on the basis of nonreligious criteria. *See Larson,* 456 U.S. at 233; *see Gillette,* 401 U.S. at 447.

[34] Cath. Charities Bureau, Inc. v. Wis. Lab. & Indus. Rev. Comm'n, 605 U.S. 238, 250 (2025) (emphasis added); *id.* at 251 ("facially differentiates among religions based on theological choices"); *id.* at 254 ("the government [here] distinguishes among religions based on theological differences.").

[35] *See Cath. Charities*, 605 U.S. at 250.

[36] *See id.* at 251.

[37] *Cath. Charities*, 605 U.S. at 245 ("[E]mployment with [Catholic Charities' subentities is] open to all participants regardless of religion." (quoting *Cath. Charities*, 3 N.W.3d at 683)).

how or if religion enters into their operation. No entity doing such work qualifies for an exemption, full stop.

Catholic Charities does not address this question. Certainly this hypothetical raises concerns about denominational discrimination. To see those concerns, consider how all this appears to a faith that puts charitable work at the core of their religious mission—say the Salvation Army. Denied an exemption, the Salvation Army would have a straightforward complaint: the government can deny that we are "operated primarily for religious purposes,"[38] but that's really just an attack on our faith commitments. Courts disqualifying religious organizations from this exemption because charitable or humanitarian work is not "religious enough" effectively discriminates against religions who center their faiths around that kind of work.

But now forget about denominational discrimination entirely. In the Supreme Court, Catholic Charities was most ably represented by Becket. And Becket, in their brief, took the position that this logic was flatly unconstitutional for a different set of reasons. Wisconsin simply cannot decide what is and is not religious behavior, Becket argued, for that violates church autonomy and entangles church and state.[39] Courts can deny a religious exemption if they conclude a religious institution isn't really religious or isn't really sincere about its religious commitments. But sincerity and religiosity are the only things appropriate for judicial inquiry.[40] And Becket maintained this position at oral argument. When Justice Jackson asked whether there would be a constitutional problem if Wisconsin's religious exemption excluded orphanages—all orphanages, regardless of

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[38] *Cath. Charities*, 605 U.S. at 241 (quoting WIS. STAT. § 108.02(15)(h)(2) (2023)).

[39] *See* Brief for Petitioners, *supra* note 9, at 38–39 ("Wisconsin has taken it upon itself to decide which activities can be religious and which ones can't. That is wrong. Wisconsin courts should not be in the business of deciding religious questions . . . Wisconsin's inquiry plainly crosses the line into impermissible entanglement."); *id.* at 18 ("Wisconsin has taken it upon itself to override the Catholic Church's beliefs about whether (for example) helping those with developmental disabilities is a religious act . . . That is entanglement forbidden by the Constitution. ").

[40] It is not that "courts can never divide the secular from the religious," the Becket Fund said, as "[c]ourts can constitutionally draw this line by focusing on the sincerity and religiosity of a claimant's beliefs." *Id.* at 40–41. Only this approach, the Becket Fund continued, "avoids impermissible entanglement by not second-guessing sincerely held religious beliefs." *Id.* at 41.

whether or how religious considerations enter into their operation—Becket said there would be.[41]

This is the question *Catholic Charities* does not answer. When the law offers an exemption, must it extend to every religiously motivated institution and activity? Or may it draw lines—excluding some institutions or activities—even when they are unquestionably sincere and unquestionably religious? Becket believes such line-drawing is flatly unconstitutional because such judgments inevitably turn on ad hoc and inappropriate governmental decisions about what is and is not "religious enough." This is, again, what I shall call the strong position.

IV. AGAINST THE STRONG POSITION

The Wisconsin Supreme Court's dissent portrays the strong position well. Like Becket, the dissent believes there was simply no way Catholic Charities could constitutionally be excluded from the religious exemption in the Wisconsin statute. Once it is established that Catholic Charities is religiously motivated, the inquiry is over. "It is the underlying religious motivation that makes an activity religious," Justice Bradley wrote, "no activities are inherently religious; religious motivation makes an activity religious."[42] For the government to go further and consider what the organization does—and for the government to use that answer to decide whether the organization's activities are religious *enough*—violates the First Amendment.[43]

The strong position has genuine appeal. It feels protective of religion, and it guards against governmental arrogance. There are several things unsettling about government giving exemptions to institutions that it deems sufficiently religious while denying them to those that it deems insufficiently so. First, government must develop a conception about what is and isn't sufficiently religious behavior. And then the government must apply that conception, denying exemptions to institutions that don't fit the government's mold. Is it really the government's place, and does the government really have the sense, to make such religious judgments? What is the downside of a simple, flat

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[41] *See id.* at 43–44.

[42] *Cath. Charities*, 3 N.W.3d at 705 (Bradley, J., dissenting), *rev'd*, 605 U.S. 238 (2025).

[43] As the dissent put it, courts simply "cannot choose which religiously motivated actions are, in their essence, religious . . . without violating the First Amendment." *Id.* at 722.

constitutional requirement that religious exemptions protect all religious organizations equally?

Here is the downside. The strong position necessarily implies that government cannot seek to give greater protection to religious roles and institutions with greater religious power and importance. Government must treat faiths as more-or-less homogeneous masses of religiosity without inner or outer regions, every part equally sacred and thus equally autonomous. But this has several consequences.

One consequence is doctrinal and *ex post*. The strong position would invalidate a lot of law, for many existing religious exemptions draw lines between religious organizations in the attempt to give heightened protection to institutions and roles closest to the core of religious life. Some of those exemptions were created by the Court itself; others were created by Congress and state legislatures. The strong position would render them all constitutionally suspect.

Another consequence is institutional and *ex ante*. The strong position creates perverse feedback effects. If legislatures, agencies, and courts feel like they cannot draw sensible boundaries to religious exemptions, they will be less inclined to make them in the first place and more inclined to eliminate them if they can. Precisely because religious exemptions are necessary, and because every religious exemption must have boundaries, legislatures must have flexibility in drafting them and courts must have flexibility in construing them. The strong position presents itself as a guardian of free exercise, but it could be a Trojan horse—taken inside the gates of the Court's jurisprudence, it could destroy religious freedom from within.

A final consequence is conceptual and theoretical. The strong position constitutionalizes a particular vision of religious institutions. In this vision, churches are undifferentiated wholes—uniform spheres of religiosity in which every activity, from sacramental worship to charitable work, is equally religious in character. But is this vision right? Is it so clear that it should be constitutionalized? Are there instead contexts in which religious faiths are better viewed as having parts that vary in terms of their religious significance? Religious exemptions are an invaluable part of church-state separation. Churches do not control the state; the state does not control churches. Regulation puts control over the church in the state's hands; exemptions relinquish that control. But in figuring out what exactly the state should relinquish, we need some theory about religious

institutions—buried in *Catholic Charities* are implied answers to the question of what the "church" is in the context of the separation of church and state.

A. The Strong Position and the Court's Church Autonomy Cases

Beckett began oral argument in *Catholic Charities* with a reference to the Court's ministerial exception cases, an excellent place to see the tensions between the strong position and the Court's jurisprudence.[44] Go back to *Hosanna-Tabor*, *Our Lady*, and the ministerial exception. Take a math teacher at a religious school, who loves her students deeply, but who teaches them algebra without ever saying a word to them about God. That math teacher may be deeply religiously motivated. But no matter how deep her religious motivations, she is not a minister for purposes of the ministerial exception. And neither is the janitor, nor the person serving the kids lunch, nor the administrative assistant to the vice principal. They all may have sincere and strong religious motivations; they all may see themselves as doing God's work in this world and they all may be right. But they are not "ministers" within the meaning of *Hosanna-Tabor* or *Our Lady*.

Doctrinally speaking, they are not ministers because they do not meet the Court's test for being a minister. Kristen Biel and Agnes Morrissey-Berru, the plaintiffs in *Our Lady*, were deemed ministers because they had "vital religious duties" as teachers, "[e]ducating and forming students in the Catholic faith."[45] It was not their *motivations*, but the *actions* they engaged in, that made them ministers—"they prayed with their students," "attended Mass with the[ir] students," and "guide[d] their students, by word and deed, toward the goal of living their lives in accordance with the faith."[46] The strong position insists that courts "cannot choose which religiously motivated actions are, in their essence, religious . . . without violating the First Amendment."[47] But if this were so, then the ministerial exception could not exist. Either no one would be a minister, or everyone religiously motivated would be a minister.

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[44] *See* Oral Argument, *supra* note 10, at 0:0–3:00.

[45] Our Lady of Guadalupe Sch. v. Morrissey-Berru, 591 U.S. 732, 756 (2020).

[46] *Id.* at 757; *see also id.* at 753 ("What matters, at bottom, is what an employee *does*.") (emphasis added).

[47] *Cath. Charities*, 3 N.W.3d at 722 (Bradley, J., dissenting) *rev'd*, 605 U.S. 238 (2025).

Hosanna-Tabor and *Our Lady* were premised on an idea—that while it is good to separate church and state in general, government should keep furthest away from the most important aspects of religious life. And precisely to protect those aspects, the Court gave itself the responsibility of drawing a line between the things that are at the "core" of religious life and the things that are not—notice how often the word "core" appears in *Our Lady*.[48]

Separation of church and state means that the state does not interfere with the church—and, in our pluralistic society, that means any religious faith. But every religious faith has a variety of religious roles and institutions within it, and some of those roles and institutions have more religious power and importance than others. And the more religious power and importance a religious role or institution has, the further the government should stay away from it and the worse it would be if the government fails to keep the necessary distance. It would indeed be bad if a federal court tried to reinstate Cheryl Perich, the Lutheran teacher in *Hosanna-Tabor*. But it would be worse if a court tried to reinstate the Rosh Yeshiva of a Jewish seminary or the Archbishop of New York.

The strong position treats religious faiths as homogenous—not in the sense that each faith is like the others, but rather in the sense that each faith is composed of parts all of the same kind. Churches here are seen as uniform spheres, without inner or outer regions, without degrees or gradations.

But different visions are possible. Instead we could see religions as sets of concentric circles reflecting different degrees of religious intensity. At the core lies the things most fundamental to a faith—things like worship, doctrine, governance (including leadership), and sacraments.[49] Circles

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[48] *See Our Lady*, 591 U.S. at 782–83 (Sotomayor, J., dissenting) ("*Hosanna-Tabor* was a recognition that educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the *very core* of the mission of a private religious school.") (emphasis added); *id.* at 738 ("The religious education and formation of students is the very reason for the existence of most private religious schools, and therefore the selection and supervision of the teachers upon whom the schools rely to do this work lie at the *core* of their mission.") (emphasis added); *id.* at 756 ("[T]hey both performed vital religious duties. Educating and forming students in the Catholic faith [that] lay at the *core* of the mission of the schools where they taught.") (emphasis added).

[49] These activities are not merely religiously motivated; they are, in some sense, the religion itself. This distinction—between what is religion itself and

then surround the core. An inner one might include institutions of religious transmission, like schools, colleges, seminaries, and all programs of religious education aimed at forming the next generation of the faithful. A circle further out might be parts of the church devoted to service and social justice—charities, hospitals, and social ministries. Still further out would be a circle for religiously affiliated enterprises, whose connection to the faith might be primarily historical, cultural, or economic.

It would do little good to describe the circles in more detail; they will vary too much from place to place, time to time, and faith to faith. The key lies in seeing how these two different visions generate different conceptions of church autonomy. If churches are seen as uniform spheres, then religious exemptions should extend to the whole church or none of it—the logic of the strong position. But if churches are seen as concentric circles, then another model of religious exemptions emerges. The innermost circles are places of the highest religious intensity. So as one moves away from the center, the church's interest in autonomy decreases and the state's interest in regulation grows. At some incalculable point, different for every law, we reach equilibrium between the two, which could be used to mark the outer boundary of the appropriate religious exemption. Sometimes the religious exemption might include the whole church, while other times the religious exemption will only protect the innermost parts, shielding the core but not the periphery.

This returns us back to the ministerial exception. *Hosanna-Tabor* and *Our Lady* reject the strong position not only in its implications but also in its foundations. *Hosanna-Tabor* and *Our Lady* do not treat religious schools as uniform objects; instead, they separate the school's general employees (who are in an outer circle) from the school's ministers (who are in the inner circle). The boundary line reflects the Court's

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what is merely religiously motivated—may sound strange. But, in fact, it runs through American law, because it is an organizing distinction between the Free Exercise Clause and the Establishment Clause. The Free Exercise Clause operates with a subjective conception of religion; all religiously motivated acts can claim protection. By contrast, the Establishment Clause operates with an objective conception of religion; government must only refrain from doing things that are religious from an objective (although admittedly constructed) point of view. Among other things, this explains why the prayers in *Lee v. Weisman* violate the Establishment Clause, while the LGBTQ-friendly books in *Mahmoud v. Taylor* do not—no matter how deeply those books contravened the religious beliefs of the plaintiff parents. *See* Lee v. Weisman, 505 U.S. 577 (1992); Mahmoud v. Taylor, 606 U.S. 522 (2025).

determination of the equilibrium point between the church's constitutional claim to autonomy and the state's constitutional authority to regulate, which becomes the doctrinal divide between ministers and non-ministers.[50]

And we see the same thing in the Court's earlier church-autonomy cases too. Before *Hosanna-Tabor* was *Catholic Bishop*, where the Court held that the National Labor Relations Board lacked jurisdiction over parochial schools for constitutional reasons.[51] *Catholic Bishop* applies to Catholic schools, but it has never applied to Catholic hospitals.[52] This distinction is not about religious motivation; the Catholic Church has religious reasons for operating both schools and hospitals, just as the people working in both often have religious reasons for doing so. Instead, the distinction comes out of *Catholic Bishop*'s desire to give special protection to Catholic schools, which play a special role in the perpetuation of Catholic life—teachers have a "critical and unique role. . . in fulfilling the mission of a [parochial] school,"[53] and the "*raison d'être* of parochial schools is the propagation of a religious faith."[54] This isthe concentric-circles model at work. Catholic schools fall into an inner circle, while Catholic hospitals fall into a circle further out. Recognizing this does not disparage Catholic hospitals or imply their work is secular or unimportant. It merely recognizes that Catholic schools are important sites of religious formation in ways that Catholic hospitals are not.

B. The Strong Position and Other Exising Religious Exemptions

This Court's church-autonomy cases reject the strong position in that they create religious exemptions whose boundaries are set in religious terms and that distinguish between

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[50] *See* Christopher C. Lund, *Free Exercise Reconceived: The Logic and Limits of* Hosanna-Tabor, 108 NW. U. L. REV. 1183, 1189 (2014) (noting how *Hosanna-Tabor* can be thought of balancing "categorically rather than case-by-case," and that "[d]ifferent balances between the governmental interest and the religious interest [can be] struck by drawing the line between ministers and non-ministers in different places").

[51] *See* N.L.R.B. v. Cath. Bishop of Chic., 440 U.S. 490, 507 (1979).

[52] *See* Susan J. Stabile, *Blame It on* Catholic Bishop*: The Question of NLRB Jurisdiction over Religious Colleges and Universities*, 39 PEPP. L. REV. 1317, 1342 (2013) ("Catholic hospitals are thus subject to the NLRA and to NLRB jurisdiction just as other hospitals."); *see also* Charlotte Garden, *Religious Employers and Labor Law: Bargaining in Good Faith?*, 96 B.U. L. REV. 109, 120 n.65 (2016) (finding the same conclusion and providing further citations).

[53] *Catholic Bishop*, 440 U.S. at 501.

[54] *Id*. at 503 (citations and quotations omitted).

religious positions and religious institutions on the basis of their internal importance to the religion in question. So, too, do religious exemptions created by Congress, administrative agencies, and executive branches.

Take *Hobby Lobby* and the Affordable Care Act. The Affordable Care Act had two kinds of religious exemptions. The first applied to religious non-profits generally, allowing them to refuse to provide contraceptive coverage and requiring their issuers and third-party administrators to do so in their place. But the second applied only to "churches, their integrated auxiliaries, and conventions or association of churches" and "the exclusively religious activities of any religious order," and it exempted them from the mandate altogether—their employees did not receive prohibited forms of contraception from anyone.[55] This second exception—call it the "church" exception for short—drew a religious line. It applied to some religious institutions but not others—even if they were religiously motivated. And so a number of religious organizations, including Catholic Charities, did not qualify simply because they were not churches.[56] The strong position sees this as a constitutional problem; Catholic Charities loses the church exception essentially because the government does not think it religious enough. Becket came close to calling the church exemption unconstitutional in its brief, and it seems to be the logical implication of their position.[57]

The strong position also cannot be squared with a variety of federal statutes. Take the religious exemption in the Employee Retirement Income Security Act (ERISA), which applies only to plans "established and maintained . . . by a church or by a

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[55] These facts are laid out well in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 698–99 (2014).

[56] *See* Cath. Diocese of Beaumont v. Sebelius, 10 F. Supp. 3d 725, 731 (E.D. Tex. 2014) ("The Diocese meets this definition and is thus exempt from the contraceptive mandate. Catholic Charities is not exempt."); *see also* Roman Cath. Archdiocese of Atlanta v. Sebelius, No. 1:12-CV-03489-WSD, 2014 WL 1256373, at *30 (N.D. Ga. Mar. 26, 2014) (rejecting the claim that the "religious employer exemption in the Final Rules violates the Establishment Clause because the Government grants an exception to 'houses of worship,' 'integrated auxiliaries,' and 'religious orders,' but does not exempt other religious organizations like . . . Catholic Charities").

[57] *See* Brief for Petitioners at 32, Cath. Charities Bureau, Inc. v. Wis. Lab. & Indus. Rev. Comm'n, 605 U.S. 238 (2025) (No. 24–154) (arguing that "[t]his narrow exemption [i.e., the church exception] created enormous problems for religious orders that were *not* engaged in 'exclusively religious activities' as defined by the government, including, for example, the Little Sisters of the Poor").

convention or association of churches."[58] A Baptist hospital might be decidedly Baptist, employing only Baptist chaplains, and acting in other ways consistent with Baptist beliefs. But it is not a "Baptist Church or association of Baptist churches," and therefore it is not entitled to the exemption.[59] Similarly, the Federal Unemployment Tax Act's (FUTA) religious exemption applies only to those employed by "a church or convention or association of churches," or employed by an organization "operated primarily for religious purposes" with such a parent.[60]

Tax law offers a flurry of examples. The church exemption in the Affordable Care Act (ACA) came originally from an Internal Revenue Code (IRC) provision exempting "churches, their integrated auxiliaries, and conventions or association of churches" and "the exclusively religious activities of any religious order" from having to file annual returns.[61] But beyond that, tax law has a striking variety of religious exemptions for all different categories of religious groups—ones for "religious organization[s]," "church[es]," "a church or a convention or association of churches," "church agenc[ies]," "religious sect[s]," "integrated auxiliaries" of churches, "religious order[s]," and "religious and apostolic association[s]."[62] And, at least sometimes, Congress clearly intended these different words to have different meanings—"Congress intended," the Federal Circuit once said, "a more restricted definition for a 'church' than for a 'religious organization.'"[63]

Finally, courts themselves use religious criteria in attempts to implement religious exemptions passed by legislatures. Take the religious exemption in Title VII, which exempts "religious corporation[s]" from charges of religious discrimination (and maybe sexual-orientation and gender-identity discrimination).[64]

The Supreme Court has never had a case on what "religious corporation" means. But the lower courts have all adopted multi-

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[58] 29 U.S.C. § 1002(33)(A).

[59] Chronister v. Baptist Health, 442 F.3d 648, 653 (8th Cir. 2006).

[60] 26 U.S.C. § 3309(b)(1).

[61] *Hobby Lobby*, 573 U.S. 682, 698 (2014) (noting that the relevant regulation, 45 C.F.R § 147.131(a), was drafted to mirror 26 U.S.C. § 6033(a)(3)(A)(i) & (iii)).

[62] Charles M. Whelan, *"Church" in the Internal Revenue Code: The Definitional Problems*, 45 FORDHAM L. REV. 885, 887–89 (1977).

[63] Found. of Hum. Understanding v. United States, 614 F.3d 1383, 1388 (Fed. Cir. 2010).

[64] *See* 42 U.S.C. § 2000e-1; *see generally* Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327 (1987) (upholding this exemption from Establishment Clause challenge).

factor tests that essentially seek to discover "whether the 'general picture' of the institution is primarily religious or secular."[65] This is a kitchen-sink approach, where "[a]ll significant religious and secular characteristics [are] weighed to determine whether the corporation's purpose and character are primarily religious."[66] So, for example, the Third Circuit considers the following:

> (1) whether the entity operates for a profit, (2) whether it produces a secular product, (3) whether the entity's articles of incorporation or other pertinent documents state a religious purpose, (4) whether it is owned, affiliated with or financially supported by a formally religious entity such as a church or synagogue, (5) whether a formally religious entity participates in the management, for instance by having representatives on the board of trustees, (6) whether the entity holds itself out to the public as secular or sectarian, (7) whether the entity regularly includes prayer or other forms of worship in its activities, (8) whether it includes religious instruction in its curriculum, to the extent it is an educational institution, and (9) whether its membership is made up by coreligionists.[67]

Again, from the point of view of the strong position, all of these specific factors are constitutional problems—all of them require "courts to make determinations of religiosity on an *ad hoc* basis."[68]

But this has been the practice of the federal courts in implementing Title VII's exemption for "religious corporation" for decades. And without it, courts would be unable to make any kind of distinction between religious institutions, however sensible. Courts could not differentiate between a Catholic monastery, a Catholic parish, a Catholic school, or a Catholic hospital. Yet there might be good reasons to give more control

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[65] E.E.O.C. v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 618 n.14 (9th Cir. 1988).

[66] *Id*. at 618.

[67] LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n, 503 F.3d 217, 226 (3d Cir. 2007); *see also* E.E.O.C. v. Kamehameha Schs./Bishop Est., 990 F.2d 458, 461–63 (9th Cir. 1993) [hereinafter "*Kamehameha Schs.*"] (adopting a similar six-part test).

[68] Cath. Charities Bureau, Inc. v. Lab. & Indus. Rev. Comm'n, 3 N.W.3d 666, 705 (Wis. 2024) (Bradley, J., dissenting).

over personnel to a Catholic parish and not a Catholic hospital. And there might be good reasons to give more autonomy to a deeply religious school than to one which is mostly secularized.[69]

C. The Ex Ante Problems of the Strong Position

This leads naturally into another problem for the strong position. If adopted, the strong position would create incentives for legislatures, agencies, and courts to invalidate, narrow, or not create certain kinds of religious exemptions. Insisting that everything or nothing be protected has an obvious consequence; sometimes the answer will be nothing.

To start, remember that religious exemptions come in two kinds. First, and probably more familiar, are generalized religious exemptions. Congress and about two dozen states have passed Religious Freedom Restoration Acts (RFRAs), and about a dozen other states have interpreted their state constitutions to effectively do the same thing.[70] These RFRAs establish a single general standard for conflicts between religious commitment and legal obligation, using familiar legal concepts like "sincerity," "substantial burden," "compelling governmental interest," and "least restrictive means."[71] With these RFRAs, legislatures can address, in a single stroke, all conflicts between religious liberty and governmental obligation, even ones they do not foresee, with a uniform legal standard giving the same protection to all religious faiths.

Second, and less familiar, are targeted religious exemptions. These create no universal standard; instead, they protect religious liberty in a specific legal domain, like within Title VII, Title IX, the ACA, ERISA, FUTA, or the IRC. The Supreme Court has itself created some of them—like *Hosanna-Tabor* in employment law and *Catholic Bishop* in labor law. But far more often they come from legislatures, and there are many of them, in both state and federal law.[72]

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[69] *See Kamehameha Schs.*, 990 F.2d 458, 463–64 (concluding that the Kamehameha Schools were no longer sufficiently religious to qualify for the Title VII exemption).

[70] S*ee, e.g.,* Christopher C. Lund, *Religious Liberty After Gonzales: A Look at State RFRAs*, 55 S.D. L. REV. 466, 473–78 (2010) (examining state RFRAs and state constitutional provisions in more detail).

[71] *See* Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418, 418 (2006).

[72] *See* James E. Ryan, Note, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1445–46 (1992) (estimating 2,000 of them).

Religious exemptions of the first kind are based on a *conflict* model—they mediate clashes between religious commitment and governmental obligation. But religious exemptions of the second kind are usually based on an *autonomy* model, seeking to separate church-and-state in a more general sense. For this reason, targeted religious exemptions are usually voluntary on the government's part. Consider *Catholic Charities* and the religious exemptions in the federal FUTA and Wisconsin's FUTA. These exemptions are not required by the Free Exercise Clause or by RFRA or by a state RFRA, and this would be true even if *Employment Division v. Smith* were overruled.[73] Given that Catholic Charities has no religious objection to paying unemployment tax, it probably cannot show a "substantial burden" within the meaning of RFRA, state RFRA, or the Free Exercise Clause even as it existed under *Sherbert/Yoder*. This matters—if the religious exemption in Wisconsin's FUTA goes beyond what Wisconsin will tolerate, Wisconsin could eliminate the whole thing tomorrow.

The first kind of exemptions (RFRA, state RFRAs, the Free Exercise Clause) aims to resolve conflicts, and the boundary of the exemptions is set by the boundary of the conflicts—exemptions can be properly sought by those, and only those, who experience a conflict between their sincere religious practices and their governmental obligations. But this is not true for targeted religious exemptions. Targeted religious exemptions must have a boundary set for them. Usually that boundary will be set in advance of any particular conflict by a legislature (or executive official or administrative agency). That boundary will sometimes be set—and sometimes *should* be set—in religious terms, not to encroach on religious liberty but to give special protection to the "core" of religious life.[74] Yet because the distinction between the core and the periphery can be hazy, this often means there is no logically compelled place to draw the boundary, which can also shift depending on the religious context and on the strength of

[73] *See generally* Employment Division v. Smith, 494 U.S. 872 (1990). The Court has considered, and apparently has not yet decided, whether to overrule *Smith* and return to the old *Sherbert/Yoder* compelling-interest standard. For more on this, *see* Christopher C. Lund, *Answers to Fulton's Questions*, 108 IOWA L. REV. 2075 (2023).

[74] *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 591 U.S. 732, 738, 753–54, 756 (2020).

the governmental interest behind the law.[75] Moreover, because we are talking about legislatures here, boundaries will never be set by purely Platonic principle anyway, but through a process of political contestation—the relative strength of opposing interest groups, administrative practicalities, legislative inertia, and sheer dumb luck will all have a role.

For all these reasons, legislatures need some freedom when they create religious exemptions of this second kind. For, if the Court forcibly expands those exemptions, it can have feedback effects. Legislatures may not be willing to exempt the Catholic parish from some requirement if it means having to exempt the Catholic hospital; legislatures will not always exempt Notre Dame if that requires exempting Georgetown too. Legislatures can narrow or repeal exemptions; more likely, they will simply not enact them because there is a strong new argument against them that did not exist before. And courts too have the capacity to push back. Some judges are hostile to religious exemptions, and they will use state Establishment Clauses to invalidate or narrow religious exemptions they find overly broad.[76]

V. FREE EXERCISE WITHOUT THE STRONG POSITION

Even though *Catholic Charities* does not adopt the strong position, it still raises a natural worry: after *Catholic Charities*, what alternative is left besides protecting everything or nothing? On that view, the strong position can seem less like an aggressive theory and more like an inevitable endpoint. That impression is mistaken. Denominational neutrality does not require constitutional flattening. Denominational neutrality can instead be secured through guardrails that block denominational preferences while still permitting legislatures and courts to draw

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[75] The first kind of exemptions involves an explicit weighing of interests—"substantial burden" acts as a measure of the religious interest, while "compelling government interest" and "least restrictive means" act as measures of the governmental interest. But the second kind of exemptions weighs interests only implicitly—in the sense that the boundaries of the exemptions reflect how interests have been balanced. *See* Lund, *supra* note 52, at 1189 (noting how *Hosanna-Tabor* can be thought of balancing "categorically rather than case-by-case," and that "[d]ifferent balances between the governmental interest and the religious interest [can be] struck by drawing the line between ministers and non-ministers in different places").

[76] *See, e.g.,* Woods v. Seattle's Union Gospel Mission, 481 P.3d 1060 (Wash. 2021) (reducing, on state Establishment Clause grounds, the broad statutory exemption for religious groups in Washington's employment discrimination laws to be nothing more than the ministerial exception).

sensible boundaries that respect genuine differences among religious traditions.

The Court's ministerial-exception decisions already supply a model for how those guardrails can be crafted. Start with how *Hosanna-Tabor* identified several factors relevant to ministerial status, some relating to whether the employee was given the title "minister."[77] But in *Our Lady*, the Court had to face a resulting problem. Because "many religious traditions do not use the title 'minister,' [that title] cannot be a necessary requirement," the Court said, as it would "risk privileging religious traditions with formal organizational structures over those that are less formal."[78] This makes sense. But note *Our Lady* was not saying titles were suddenly irrelevant and should simply be ignored. After all, Cheryl Perich's title as a commissioned minister remains a real reason she should fall within the ministerial exception. It is just that, for religions that do not use such titles, that particular factor should not be part of the analysis. The central question is whether the person has "vital religious duties."[79] In some faiths, formal titles will be evidence of vital religious duties; in other faiths, they will not. To give another example, *Our Lady* recognized that theological training may matter a lot to some denominations,[80] but it may not matter at all to others.[81] For the denominations where theological training matters, it should enter into the determination of whether someone is a minister; for the denominations where it doesn't, it shouldn't.

This does not require courts to decide what is "really" religious. Instead, it asks a more modest question: within a particular faith tradition, what does the group itself think of the role or institution at issue? Courts can defer to a religion's own account of what matters without insisting on the same organizational markers across faiths. That is line-drawing, but it is not theological ranking—and it avoids the flattening of religious differences that the strong position would impose.

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[77] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 192 (2012) ("[These are] the formal title given Perich by the Church, the substance reflected in that title, her own use of that title, and the important religious functions she performed for the Church.").

[78] *Our Lady*, 591 U.S. at 752.

[79] *Id*. at 756.

[80] *See id*. at 753 ("[T]he academic requirements of a position may show that the church in question regards the position as having an important responsibility in elucidating or teaching the tenets of the faith.").

[81] *See id*. ("[R]eligious traditions may differ in the degree of formal religious training thought to be needed in order to teach.").

Hosanna-Tabor and *Our Lady* handled this with care, emphasizing there can be no "rigid formula,"[82] no "inflexible requirements."[83] Courts should take "all relevant circumstances into account,"[84] recognizing some criteria will have "far less significance in some cases" and far greater significance in others.[85] By rejecting any universal metric, the Court maintained denominational neutrality without the flattening of religious differences required by the strong position.

A key guardrail, one running through *Hosanna-Tabor* and *Our Lady*, is that courts take religious groups as they find them. Courts do not impose their own view about what *should* count as important to a particular religion. Courts follow rather than lead, merely trying to discover what religions *themselves* actually believe to be important. In so doing, courts must always be attuned to the notion that religions can be genuinely different. Indeed, the ministerial exception itself reflects how judges have the intellectual capacity and the open-mindedness for this project. An Ohio court, for instance, applied the ministerial exception to bar the employment claims of a someone who had served as director of a Catholic cemetery, after the real theological importance of the position was presented to the Court.[86] And the Ninth Circuit applied the ministerial exception to bar the employment claims of an apprentice at a Zen Buddhist temple after the Court saw what that position involved.[87]

Courts have also been as careful as *Hosanna-Tabor* and *Our Lady* when working with other religious exemptions. Take *LeBoon*—the Third Circuit decision, discussed earlier, about when institutions qualify as "religious corporation[s]" entitled to invoke the religious exemption in Title VII. After laying out its nine-factor test, the Court said this:

> It is apparent from the start that the decision whether an organization is "religious" for purposes of the exemption cannot be based on its conformity to some preconceived notion of what

[82] *Hosanna-Tabor*, 565 U.S. at 190.
[83] *Our Lady*, 591 U.S. at 753.
[84] *Id.* at 758.
[85] *Id.* at 753.
[86] *See* Fisher v. Archdiocese of Cincinnati, 6 N.E.3d 1254, 1257 (Ohio Ct. App. 2014) ("The Archdiocese paid for Fisher to attend a four-year program in Catholic cemetery management at John Carroll University.").
[87] *See* Behrend v. San Francisco Zen Ctr., Inc., 108 F.4th 765, 770 (9th Cir. 2024) ("He lived and worked full time at the temple as a monk.").

> a religious organization should do, but must be measured with reference to the particular religion identified by the organization. Thus not all factors will be relevant in all cases, and the weight given each factor may vary from case to case. For instance, although the absence of a proselytizing effort may be a factor under certain circumstances, it will have no significance with a non-proselytizing religion—or thus with a determination whether a Jewish organization is religious.[88]

LeBoon here gets it right, for the same reasons *Our Lady* got it right. Take proselytizing, for instance. Proselytizing is a word that sets teeth on edge and understandably so; religious people almost never use it in describing their own actions, just as religious people almost never use the phrase "pervasively sectarian" to describe their own religious institutions. But proselytizing often just means something like "transmitting the faith," which was one important reason why this Court considered Cheryl Perich a minister.[89] So proselytizing *can be* a legitimate criterion, just not *always*. In *Catholic Charities*, the Wisconsin Supreme Court's opinion used proselytizing as a factor to be used generally in figuring out how religious an institution is, with no demonstrated awareness of the fact that some faiths have religious reasons for not proselytizing. In so doing, the court below committed a mistake both *Our Lady* and *LeBoon* avoided.

In this way, denominational neutrality can be secured without the strong position. Now some religious exemptions will still be unconstitutional. Title IX, for example, has an exemption for religious schools. But the exemption only extends to religious schools that are "controlled by a religious organization."[90] In other words, universities affiliated with a religious denomination qualify for the exemption, while independent and non-denominational universities do not. This treats hierarchical religious groups differently than

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[88] LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n, 503 F.3d 217, 226–27 (3d Cir. 2007).

[89] *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 192 (2012) ("Perich performed an important role in transmitting the Lutheran faith to the next generation.").

[90] 20 U.S.C. § 1681(a)(3).

congregational ones, a cardinal sin in the eyes of both our constitutional doctrines and our constitutional history. Now apparently this problem has been "solved" by ignoring the statute's terms and giving the religious exemption to all religious schools.[91] But this statute illustrates the point: we can maintain denominational neutrality without the untenable rigidity of the strong position.

CONCLUSION

There is more to *Catholic Charities* than meets the eye. While *Catholic Charities* rightly captures the law's commitment to denominational neutrality, it can be misread to demand a rigid uniformity inconsistent with the historic practice of religious exemptions, the Court's recent decisions about church autonomy, and the rich diversity of religious ways of life. When the time comes, the Court should reject the strong position in pursuit of a vision of religious liberty that is neutral among faiths yet sensitive to the diversity of religious life.

[91] *See* Kif Augustine-Adams, *Religious Exemptions to Title IX*, 65 U. KAN. L. REV. 327, 396 (2016) ("In the forty years since the Title IX regulations became effective, not once has OCR found insufficient control by a religious organization to deny an educational institution's claim to religious exemption.").