
THE COMPLEX ISSUE OF TAXPAYER-FUNDED CRISIS
RELIEF FOR RELIGIOUS ORGANIZATIONS: EXPLORING
THE BLURRING OF CHURCH AND STATE AND THE
POTENTIAL ROLE OF GERMANY’S CHURCH TAX

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I. INTRODUCTION 958

II. ESTABLISHMENT OF THE FIRST AMENDMENT AND THE
IMPOSSIBILITY OF STATE NEUTRALITY 966

III. “RELIGIOUS EQUALITY” AND FREE EXERCISE EXPANSION.... 969

 A. The Establishment Clause..... 970

 1. The Establishment Clause Applied: The
 Nondiscriminatory Promotion of Religion 971

IV. ADVANTAGES AND DISADVANTAGES OF THE PPP LOAN..... 976

V. EXAMINING GERMANY’S CHURCH TAX AND ITS POTENTIAL AS
A FRAMEWORK 979

 A. The German Church Tax System Protects Individual
 Religious Liberty More Effectively 982

 B. The U.S. and German Approaches to the Church-State
 Dynamic 983

 C. Criticisms of Germany’s Church Tax System 985

 D. Church Tax as a Blueprint for a Crisis Relief Program for
 Religious Organizations in the United States 987

VI. CONCLUSION 991

* J.D. Candidate, Benjamin N. Cardozo School of Law, 2024. I would like to thank the editors of the Cardozo International & Comparative Law Review for their thoughtful and meticulous feedback and suggestions. I would also like to thank Professor Edward Zelinsky for the inspiration that made this Note possible. Lastly, I would like to thank my friends and family who have provided unwavering support and love throughout my legal education.

I. INTRODUCTION

In March 2020, COVID-19 had a sudden and significant impact on public health, the economy, state and municipal governments, and businesses throughout the United States.¹ In response to the growing unemployment and an impending recession, Congress passed the Coronavirus Aid, Relief, and Economic Security (“CARES”) Act to stimulate the economy.² The CARES Act included the Paycheck Protection Program (“PPP”), the primary program used by the U.S. government to support small businesses after the economic downturn caused by the pandemic.³ Coordinated through the U.S. Small Business Administration (“SBA”), the PPP was designed to provide forgivable loans to small businesses adversely affected by the COVID-19 pandemic by protecting the salary of employees on their payrolls.⁴ However, as part of the U.S. government’s \$2 trillion economic relief plan, the SBA made an unprecedented statement in April 2020 that faith-based groups, including “pervasively religious” enterprises like churches and other houses of worship, would also be eligible for PPP loan consideration.⁵ In so doing, the SBA, acknowledging its self-contradiction, went against its previously enforced regulations that “bar the participation of a class of potential recipients based solely on their religious status,” instead “propos[ing] amendments to conform those regulations to the Constitution.”⁶ A few weeks later, the SBA again

¹ See *Impact of Opening and Closing Decisions by State*, JOHNS HOPKINS UNIV. & MED.: CORONAVIRUS RES. CTR., <https://coronavirus.jhu.edu/data/state-timeline/new-confirmed-cases/california> [<https://perma.cc/AJ9S-6QA6>] (Sept. 14, 2022, 6:58 AM). For example, on March 11, 2020, California public health officials imposed a limit of 250 people on public gatherings. *Id.* By March 15, all bars and nightclubs were ordered closed, and those with health risks were urged to isolate. *Id.* And, by March 19, the Governor ordered all individuals to stay at their place of residence. *Id.*

² 15 U.S.C. § 636(a) [hereinafter CARES Act].

³ *Id.* § 636(a)(36).

⁴ *Id.*

⁵ Melissa Sampson McMorrow, *SBA Clarifies that Houses of Worship and Other Faith-Based Organizations Are Eligible for Loan Programs and May Be Eligible for Relief Under the SBA Affiliation Rules*, NUTTER (Apr. 6, 2020), <https://www.nutter.com/trending-newsroom-publications-sba-clarifies-houses-worship-eligible-loan-programs> [<https://perma.cc/X7DJ-BG9R>].

⁶ U.S. SMALL BUS. ADMIN., FREQUENTLY ASKED QUESTIONS REGARDING PARTICIPATION OF FAITH-BASED ORGANIZATIONS IN THE PAYCHECK PROTECTION PROGRAM (PPP) AND THE ECONOMIC INJURY DISASTER LOAN PROGRAM (EIDL) 1 (2020), <https://www.sba.gov/sites/default/files/2020-06/SBA%20Faith-Based%20FAQ%20Final-508.pdf> [<https://perma.cc/LZ3U-N4SR>].

announced that it was also waiving its affiliation rules for faith-based organizations because they believed those rules would “‘substantially burden’ groups that are religiously committed to hierarchical forms of organization, and because it thought the affiliation rules would entangle courts in determinations about how religious organizations are structured. According to the SBA, its religious exemption is sanctioned by the Religious Freedom Restoration Act (RFRA) . . . and perhaps under the Free Exercise Clause of the First Amendment.”⁷ In contrast, similarly situated secular organizations did not receive the same exemption from the affiliation rules, thereby not treating all such similarly situated employers equally.⁸

Religious organizations’ eligibility to receive forgivable PPP loans is a recent illustration of the ongoing legal debate about the constitutionality of such forms of assistance.⁹ Scholars debate whether such assistance constitutes (a) government aid to religion, which violates the Establishment Clause of the First Amendment and is therefore unconstitutional; or (b) disaster relief that is neutral and provided on an equal footing with other nonprofit organizations, which is constitutional under the Free Exercise Clause of the First Amendment.¹⁰ While religious entities generally desire inclusion in such aid, they worry that being treated similarly to secular non-profit organizations risks losing other regulatory forms of religious exceptionalism and the ability to adhere to religious norms when they conflict with secular legal norms.¹¹

Legal scholars who argue the SBA’s policy shift was not only constitutional, but constitutionally required, rely on the U.S. Supreme Court’s recently emerging “nondiscrimination principle” towards

⁷ Micah Schwartzman, Richard Schragger & Nelson Tebbe, *The Separation of Church and State Is Breaking Down Under Trump*, THE ATLANTIC (June 29, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/breakdown-church-and-state/613498/> [https://archive.is/JDSEr]. The RFRA bars the federal government from imposing significant encumbrances on religion and the Free Exercise Clause has been understood to restrict governmental intervention in religious institutions’ internal affairs. *Id.*

⁸ *Id.*

⁹ See, e.g., Brenna Jean O’Connor, *Funding Faith: The Paycheck Protection Program’s Establishment Clause Violation*, 95 ST. JOHN’S L. REV. 895 (2021).

¹⁰ See Elliot Ergeson, Note, *One Nation Subsidizing God: How the Implementation of the Paycheck Protection Program Revealed the Deteriorating Wall Between Church and State*, 106 MINN. L. REV. 2653, 2654-55 (2022).

¹¹ Thomas C. Berg, *Religious Freedom Amid the Tumult*, 17 U. ST. THOMAS L.J. 735, 737 (2022).

religion.¹² This term describes the recent evolution of the Supreme Court's equality jurisprudence surrounding the Establishment and Free Exercise Clauses of the First Amendment ("religion clauses"), which generally includes religious entities in government sponsored programs if they do not "involve the Government in advancing religion per se."¹³ In advancing the nondiscrimination principle, the Court heavily relies on the Free Exercise Clause of the First Amendment.¹⁴ Some critics argue that the Court's strong reliance on the Free Exercise Clause prevents adequate consideration of the Establishment Clause, which should be equally considered.¹⁵ In *Espinoza v. Montana*, for example, the Supreme Court in 2020 ruled that laws excluding religious actors, solely because they are religious, from a general public program and funding, are subject to strict scrutiny.¹⁶ Under such scrutiny, the Supreme Court found a Montana law excluding religious schools from public benefits unconstitutional.¹⁷ Thus, some argue that without the SBA exemption, religious organizations would be unfairly denied public benefits that secular organizations receive, resulting in discrimination based on their religious affiliation.¹⁸

In contrast, others argue that direct governmental funding to pay clergy salaries and maintain houses of worship violates the Establishment Clause and demonstrates that the United States has made another step toward government sponsorship of religious institutions.¹⁹ It is contended that the "nondiscrimination principle" has become a significant aspect of numerous Free Exercise complaints in federal courts, regardless of the diversity or complexity of the issues and themes involved.²⁰ Since 2017, the Court has acknowledged a right to equal

¹² Elizabeth Totzke, Note, *The Catholic Church and the Paycheck Protection Program: Assessing Nondiscrimination After Trinity Lutheran and Espinoza*, 96 NOTRE DAME L. REV. 1699, 1700 (2021).

¹³ Mark Chopko, *The Constitutionality of Providing Public Funds for U.S. Houses of Worship During the Coronavirus*, 10 LAWS 1, 1 (2021).

¹⁴ Totzke, *supra* note 12, at 1710.

¹⁵ See Faraz Sanei, *Reclaiming Establishment: Identity and the 'Religious Equality Problem'*, 71 U. KAN. L. REV. 4, 14-15, 17-32 (2022).

¹⁶ *Espinoza v. Mont. Dep't of Revenue*, 591 U.S. 464 (2020).

¹⁷ *Id.* at 473-87.

¹⁸ Totzke, *supra* note 12.

¹⁹ Nelson Tebbe, Micah Schwartzman & Richard Schragger, Opinion, *The Quiet Demise of the Separation of Church and State*, N.Y. TIMES (June 8, 2020), <https://www.nytimes.com/2020/06/08/opinion/us-constitution-church-state.html>.

²⁰ Sanei, *supra* note 15, at 22-23 (discussing the application of the Free Exercise Clause's "nondiscrimination principle" in the COVID-19 shutdown orders and the

access to public funding benefits based on religious identity.²¹ It has not explicitly stated, however, despite indications to the contrary, that restricting public benefits for religious purposes constitutes religious discrimination and violates Free Exercise rights.²² Some argue that such a ruling would undermine the Establishment Clause by requiring government funding for religious purposes, which contravenes established legal precedent.²³

Additionally, some raise concerns that the Court's new "nondiscrimination principle" may undermine the Religion Clause's unique structural feature, which regards religious conduct as constitutionally distinctive and requires a certain degree of separation between church and state.²⁴ For that reason, religious organizations' exemption from the PPP loan affiliation requirement received tremendous backlash.²⁵ Some argue that the SBA's decision amounts to preferential treatment for the Catholic Church, as the SBA created the religious exemption with the Catholic Church and its affiliated entities in mind.²⁶ While various religious organizations of different faiths became eligible for PPP loans due to the exemption, critics maintain that the Catholic Church's exclusive lobbying efforts resulted in this exemption.²⁷ They also highlight the SBA's feature of a local diocese as its primary illustration of the exemption, stating that "[w]ithout this preferential treatment many Catholic diocese would have remained ineligible because . . . between their head offices, parishes and other affiliates, their employees surpassed the 500-person cap."²⁸ This exemption allowed churches with significantly more than 500 employees to qualify for PPP loans, which was not available to similarly situated secular organizations.²⁹

The "nondiscrimination" principle involves an equal protection method of analysis, which is not relevant in the context of interactions

controversy surrounding the classification of religious services as "non-essential" (versus "essential") services).

²¹ *Id.* at 1.

²² *Id.* at 72.

²³ *Id.* at 32-33.

²⁴ *See id.* at 10.

²⁵ *See* Chopko, *supra* note 13.

²⁶ *See* Reese Dunklin & Michael Rezendes, *Catholic Church Lobbied for Taxpayer Funds, Got \$1.4B*, AP (July 10, 2020, 1:03 PM), <https://apnews.com/article/dab8261c68c93f24c0bfc1876518b3f6>; Ergeson, *supra* note 10, at 2674.

²⁷ Dunklin & Rezendes, *supra* note 26.

²⁸ *Id.*

²⁹ *Id.*

between church and state.³⁰ This mode of analysis requires “equal treatment” and entails the state treating all religions and secular institutions in the same way to maintain social stability.³¹ Consequently, equal treatment is largely “context-specific and of doubtful usefulness in measuring difference over time or across cultures.”³² One of the problems with the idea of “nondiscrimination” or “equal treatment” in the context of the separation of church and state is that it requires ignoring the unique needs of different religious organizations.³³ This can lead to economically advantaged religious groups seeking the same privileges as less advantaged ones.³⁴ This can be observed in the case of the Church of Scientology, which is known for its controversial tax-exempt status.³⁵ Despite being one of the wealthiest churches in the world, with a net worth of \$2.5 billion in 2022, it was able to receive \$10 million in forgivable PPP loans during the pandemic due to the policy change.³⁶

The inherent problem with the application of the nondiscrimination principle in the funding context is that the government distributes billions of dollars from taxpayers to religious enterprises for the purpose of funding clergy members’ salaries under the PPP. Individuals of different religious beliefs consequently fund religious institutions that they do not belong to, such as the Church of Scientology.³⁷ Forcing individuals of different or no faith to finance religious organizations violates religious freedom and poses greater First Amendment issues than simply disallowing government funding for such organizations.³⁸ Furthermore, secularists protest that there is no good reason for taxpayers to subsidize the discriminatory practices of religious organizations.³⁹

³⁰ Sanei, *supra* note 15, at 10.

³¹ KERRY O’HALLORAN, STATE NEUTRALITY: THE SACRED, THE SECULAR AND EQUALITY LAW 51 (2021).

³² *Id.* at 27.

³³ *Id.* at 58.

³⁴ *Id.* at 29.

³⁵ See Eric Levai, *Scientology Took 98 Federal Loans for \$10 Million During Pandemic*, DAILY DOT, <https://www.dailydot.com/debug/scientology-ppp-98-loans-10-million/> [<https://perma.cc/HP6D-JJMD>] (June 1, 2021, 12:58PM); Taylor C. Holley, *Auditing Scientology: Reexamining the Church’s 501(c)(3) Tax Exemption Eligibility*, 54 TEX. TECH L. REV. 345 (2022).

³⁶ Levai, *supra* note 35.

³⁷ Ergeson, *supra* note 10, at 2680.

³⁸ *Id.*

³⁹ O’HALLORAN, *supra* note 31, at 40.

Of course, the need for PPP loans to fund religious organizations and exempt them from the affiliation requirement was due to the unique and unprecedented nature of the economic crisis caused by COVID-19. Nevertheless, it is worth questioning whether a church's tax-exempt status or any other privileges they receive as a religious organization should prevent them from being eligible to receive government relief funds, which are funded by taxpayers' money.⁴⁰ Churches were eligible for loans under the CARES Act because the program was available to private nonprofit institutions.⁴¹ That being said, it begs the question of whether or not churches ought to have been the intended beneficiaries of PPP loans.

Although legally recognized as 501(c)(3) charitable organizations, churches are not typically regarded as businesses because of their unique legal standing as religious entities.⁴² As such, they are already afforded several federal tax benefits.⁴³ Is it sensible to allocate funds designated to support small businesses to religious organizations? Although churches may have experienced increased financial pressure because of COVID-19,⁴⁴ should the government be using taxpayer money to bail them out? In using taxpayer money to fund these religious organizations, is individual liberty violated? While churches were legally eligible to receive PPP loans as charitable organizations, questions remain about whether they were the intended beneficiaries of the relief funds and whether their tax-exempt status and other privileges should prevent them from receiving government-backed financial support. The allocation of taxpayer money to fund religious organizations raises concerns about individual liberty and the appropriateness of using government resources to aid these institutions.

Furthermore, religious entities were permitted to participate in the PPP under the evolving nondiscrimination principle.⁴⁵ But would the Establishment Clause be violated if SBA funds meant to assist the personnel of these houses of worship, including clergy who principally perform sacral duties? Religious organizations require employees and

⁴⁰ See Patrick D. N. Perkins, *Crisis Legislation: Analyzing the Noble Quest of the Paycheck Protection Program to Save Small Businesses*, 101 NEB. L. REV. 945, 960 (2022).

⁴¹ 15 U.S.C. § 9009(b).

⁴² Perkins, *supra* note 40, at 960.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ See Ergeson, *supra* note 10, at 2654.

are impacted by the same economic effects of the pandemic as other businesses and nonprofits.⁴⁶ Therefore, the state can credibly argue that its goal in this situation is strictly secular.⁴⁷ But do these types of direct payments primarily advance religion? Answering this question is challenging. The federal government must, at a minimum, take appropriate steps to prevent the diversion of funds to essential religious uses due to the fact that these are taxpayer-funded payments and the recipients involved are religious institutions.⁴⁸ This then raises the issue of whether these policies could be adopted without excessively involving the government in the internal workings of these religious groups.⁴⁹

While religious entities have a constitutional right to participate in the PPP under the evolving nondiscrimination principle, the potential violation of the Establishment Clause and the challenge of preventing the diversion of funds to essential religious uses highlight the need for the federal government to carefully balance secular goals with respect for the internal workings of pervasively religious organizations. Navigating this balance has become more difficult because the line dividing “sacred” and “secular” is becoming less clear as diverse religious and cultural beliefs become more prevalent in modern democratic societies.⁵⁰

While the PPP represented a novel program for assisting small businesses through an economic crisis, it will likely not be the last crisis.⁵¹ Leading epidemiologists warn that the probability of a large COVID-19-like pandemic occurring grows rapidly every year.⁵² They stress that the next pandemic may result in a more serious health catastrophe, which would lead to a more serious economic crisis.⁵³ Thus, scientists caution that the possibility of increasingly common

⁴⁶ Berg, *supra* note 11, at 746-47.

⁴⁷ *See id.* at 739.

⁴⁸ Perkins, *supra* note 40, at 995-99.

⁴⁹ Ergeson, *supra* note 10, at 2659-60.

⁵⁰ O'HALLORAN, *supra* note 31, at 44.

⁵¹ *See* Jalal Poorolajal, *The Global Pandemics Are Getting More Frequent and Severe*, 21 J. RSCH. HEALTH SCI., Winter 2021, at 1.

⁵² *See generally* Marco Marani, Gabriel G. Katul, William K. Pan & Anthony J. Parolari, Michael Penn, *Intensity and Frequency of Extreme Novel Epidemics*, 118 PROC. NAT'L ACAD. SCI., no. 35, 2021.

⁵³ *See* Priya Joi, *New Study Suggests Risk of Extreme Pandemics Like COVID-19 Could Increase Threefold in Coming Decades*, VACCINESWORK (Sept. 5, 2022), <https://www.gavi.org/vaccineswork/new-study-suggests-risk-extreme-pandemics-covid-19-could-increase-threefold-coming> [<https://perma.cc/6NGG-HJBK>].

pandemics should raise the urgency of creating proper efforts to properly prepare for them now.⁵⁴ Thus, programs like the PPP are expected to become increasingly necessary over time.⁵⁵ Legal scholars criticize the U.S. government for not preparing crisis aid mechanisms in advance, unlike other countries, resulting in avoidable costs.⁵⁶ The successes and failures of the PPP offer valuable lessons for improving future crisis relief programs,⁵⁷ as another crisis is inevitable.⁵⁸

While not unconstitutional, religious organizations' receipt of PPP funds and exemption from the CARES Act's affiliation requirement were not constitutionally mandated either. The emerging nondiscrimination principle allows religious entities to receive tax-funded relief and excused them from the affiliation requirement under the CARES Act that a firm only have 500 employees or fewer in order to be eligible to receive funding.⁵⁹ But this Note argues that avoiding closure by benefiting larger and more established religious organizations while leaving smaller and minority-owned religious institutions without adequate support hindered the program's purpose of providing aid to small businesses facing financial hardship due to COVID-19. This Note discusses elements of Germany's "church tax" and posits that when the United States implements a crisis aid program in the future, taking insight from certain components of Germany's church tax system could help preserve religious institutional autonomy and

⁵⁴ Cary A. Phillips, Astrid Caldas, Rachel Cleetus, Kristina A. Dahl, Juan Declet-Barreto, Rachel Licker, L. Delta Merner, J. Pablo Ortiz-Partida, Alexander L. Phelan, Erika Spanger-Siegfried, Shuchi Talati, Christopher H. Trisos & Colin J. Carlson, *Compound Climate Risks in the COVID-19 Pandemic*, 10 NATURE CLIMATE CHANGE 586, 587 (2020); Jonathan Smith, *Q&A: Future Pandemics Are Inevitable, but We Can Reduce the Risk*, EUR. COMM'N: HORIZON – THE EU RSCH. & INNOVATION MAG. (Dec. 16, 2021), <https://projects.research-and-innovation.ec.europa.eu/en/horizon-magazine/qa-future-pandemics-are-inevitable-we-can-reduce-risk> [<https://perma.cc/DD9S-65XD>].

⁵⁵ See Phillips et al., *supra* note 54, at 587-88.

⁵⁶ David Autor, David Cho, Leland D. Crane, Mita Goldar, Byron Lutz, Joshua Montes, William B. Peterman, David Ratner, Daniel Villar & Ahu Yildirmaz, *The \$800 Billion Paycheck Protection Program: Where Did the Money Go and Why Did It Go There?*, 36 J. ECON. PERSPS. 55, 57 (2022).

⁵⁷ See generally Susan C. Morse, *Emergency Money: Lessons from the Paycheck Protection Program*, 55 U. MICH. J.L. REFORM 175 (2021).

⁵⁸ See Smith, *supra* note 54.

⁵⁹ U.S. SMALL BUS. ADMIN., FREQUENTLY ASKED QUESTIONS REGARDING PARTICIPATION OF FAITH-BASED ORGANIZATIONS IN THE PAYCHECK PROTECTION PROGRAM (PPP) AND THE ECONOMIC INJURY DISASTER LOAN PROGRAM (EIDL) 4 (2020), <https://www.sba.gov/sites/default/files/2020-06/SBA%20Faith-Based%20FAQ%20Final-508.pdf> [<https://perma.cc/VG6Q-Q92C>].

individual religious liberty against coercion. In other words, adopting Germany's framework would involve a system of opt-out public finance. In Germany, individuals who object to the funding of specific religious organization groups may avoid it by "opting out." Such a re-envisioning for U.S. crisis relief programs could protect individual religious liberty more effectively because, given increased secularism and religious diversity, contribution is bound by preference affiliation and completely voluntary.⁶⁰ The resulting structure could achieve something unprecedented in U.S. crisis relief programs: the creation of a stable combination of representative and direct democracy in the arena of public finance.

This Note's analysis proceeds in four parts. Part II discusses the growing impossibility of achieving "state neutrality" which is a key element of the principle of nondiscrimination in religion. It also discusses the increase in religious diversity and secularism worldwide and its effect on the relationship between church and state. Part III explores how the Supreme Court's Religion Clause jurisprudence concerning religious organizations receiving government benefits has evolved. Part IV discusses the PPP, including its advantages and disadvantages. Part V examines Germany's "Church Tax" system and its potential use in the United States to mitigate the impact of a future crisis and prevent further deterioration of the Establishment Clause in future crisis relief programs.

II. ESTABLISHMENT OF THE FIRST AMENDMENT AND THE IMPOSSIBILITY OF STATE NEUTRALITY

The First Amendment envisions freedom to practice and engage in religion without restriction.⁶¹ While the U.S. Constitution grants unparalleled religious freedom, increasing regulation over religion has proven essential.⁶² There are several reasons for the increase in regulation of religion in the United States. First, a global increase in religious diversity requires greater regulation.⁶³ In the United States, the number of distinct religious groups has grown from fewer than 40

⁶⁰ See generally STEVEN KETTELL, *SECULARISM AND RELIGION* (2019), <https://oxfordre.com/politics/abstract/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-898>.

⁶¹ Derek H. Davis, *Regulatory Restraints on Religious Freedom in the USA*, in *LIMITATIONS OF RELIGIOUS FREEDOM: ON STEREOTYPES, PREJUDICE AND SOCIAL DISCRIMINATION* 147, 147 (Gerhard Besier ed., 2021).

⁶² *Id.*

⁶³ *Id.* at 147-48.

before 1900 to over 1,500 by the early twenty-first century.⁶⁴ It is unlikely that the founding fathers anticipated such a broad scope of religious diversification.⁶⁵ The need for regulation across various sectors becomes more pronounced as population expands, resulting in heightened state oversight of religious institutions.⁶⁶ This is further fueled by the willingness of many religious groups to accept state benefits, which makes them vulnerable to increased state monitoring.⁶⁷

Finally, due to the changing role, expressions, and expansion of secularism globally, religion is becoming increasingly regulated.⁶⁸ As secularism has become more widespread, there has been an increased emphasis on protecting human rights, including the rights of minority groups, women, and LGBTQ individuals.⁶⁹ Religious institutions and practices that are seen as infringing on these rights are being increasingly scrutinized and regulated.⁷⁰ Many secular societies view religion as a private matter that should not be allowed to interfere with public life or the rights of others.⁷¹

While no country completely separates church and state,⁷² the United States continues to be the most religious Western industrialized country.⁷³ Even though no political party in the United States officially adopts a certain religion as its platform, religion still plays a significant part in its politics.⁷⁴ Many politicians use religious language and

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 148.

⁶⁷ Davis, *supra* note 61, at 148.

⁶⁸ O'HALLORAN, *supra* note 31, at 39; see also *A Closer Look at How Religious Restrictions Have Risen Around the World*, PEW RSCH. CTR. (July 15, 2019), <https://www.pewresearch.org/religion/2019/07/15/a-closer-look-at-how-religious-restrictions-have-risen-around-the-world/> [https://perma.cc/C94W-PKSR].

⁶⁹ O'HALLORAN, *supra* note 31, at 72, 176, 365.

⁷⁰ *Id.* at 28.

⁷¹ See generally KETTELL, *supra* note 60.

⁷² *Id.* at 2.

⁷³ Dalia Fahmy, *Americans Are Far More Religious Than Adults in Other Wealthy Nations*, PEW RSCH. CTR. (July 31, 2018), <https://www.pewresearch.org/fact-tank/2018/07/31/americans-are-far-more-religious-than-adults-in-other-wealthy-nations/> [https://perma.cc/F5A6-XZ39].

⁷⁴ Rebecca Leppert & Dalia Fahmy, *10 Facts About Religion and Government in the United States*, PEW RSCH. CTR. (July 5, 2022), <https://www.pewresearch.org/fact-tank/2022/07/05/10-facts-about-religion-and-government-in-the-united-states/> [https://perma.cc/H48X-NVZM].

imagery in their campaigns to appeal to religious voters.⁷⁵ Furthermore, religious groups can organize and mobilize their members to vote and support political candidates who share their values, making them powerful interest groups in political elections.⁷⁶

The political mobilization of fundamentalist and evangelical political groups that uphold conservative beliefs has been particularly relevant to issues of gender and family, influencing members' beliefs on issues such as abortion, same-sex marriage, and the role of government.⁷⁷ These groups have not historically dominated U.S. politics, but they have often served as important coalition partners in particular policy campaigns.⁷⁸ Today, their role in U.S. politics has grown, as demonstrated by the overruling of *Roe v. Wade*, a decision against which evangelicals long lobbied.⁷⁹

A 2020 study reported that about half of its U.S. respondents said the Bible should have at least "some" influence on U.S. laws, and that over a quarter said it should have a "great deal" of influence.⁸⁰ Within the Christian demographic, roughly two-thirds advocate for the Bible to exert some degree of influence on U.S. laws. This sentiment is notably stronger among White evangelical Protestants, with nearly nine out of ten sharing this perspective.⁸¹ In contrast, secular Americans

⁷⁵ Christopher Weber & Matthew Thornton, *Courting Christians: How Political Candidates Prime Religious Considerations in Campaign Ads*, 74 J. POL. 400, 402-03 (2012).

⁷⁶ See generally CLYDE WILCOX & CARIN ROBINSON, *ONWARD CHRISTIAN SOLDIERS?: THE RELIGIOUS RIGHT IN AMERICAN POLITICS* (4th ed. 2018).

⁷⁷ See KIMBERLY J. MORGAN, *WORKING MOTHERS AND THE WELFARE STATE, RELIGION AND THE POLITICS OF WORK-FAMILY POLICIES IN WESTERN EUROPE AND THE UNITED STATES* 21, 65, 139, 143 (2006).

⁷⁸ See, e.g., MICHAEL J. McVICAR, *THE RELIGIOUS RIGHT IN AMERICA* 6 (2018), <https://oxfordre.com/religion/view/10.1093/acrefore/9780199340378.001.0001/acrefore-9780199340378-e-97?mediaType=Article>.

⁷⁹ See Daniel Silliman, *Goodbye Roe v. Wade: Pro-Life Evangelicals Celebrate the Ruling They've Waited for*, CHRISTIANITY TODAY (June 24, 2022, 9:00 AM), <https://www.christianitytoday.com/news/2022/june/roe-v-wade-overturn-abortion-supreme-court-ruling-pro-life.html> [<https://perma.cc/8F3S-KYF7>].

⁸⁰ See generally Michael Lipka, *Half of Americans Say Bible Should Influence U.S. Laws, Including 28% Who Favor It over the Will of the People*, PEW RSCH. CTR. (Apr. 13, 2020), <https://www.pewresearch.org/fact-tank/2020/04/13/half-of-americans-say-bible-should-influence-u-s-laws-including-28-who-favor-it-over-the-will-of-the-people/> [<https://perma.cc/R7CY-LTTF>].

⁸¹ *Id.*

tend to oppose biblical influence on U.S. laws.⁸² The statistics highlight different groups' varying perspectives on the influence that religion should have on U.S. laws. This has significant implications for political discourse and policymaking, as politicians may seek to appeal to certain religious groups by taking their preferred stance on certain laws.⁸³

III. "RELIGIOUS EQUALITY" AND FREE EXERCISE EXPANSION

The Free Exercise Clause protects the religious beliefs, and to a certain extent, the religious practices of all individuals.⁸⁴ This Part will discuss how the Court has come to heavily rely on the Free Exercise Clause as a "cure-all" for resolving "religious equality" claims at the expense of adequate consideration of the Establishment Clause.⁸⁵ It explains how the Free Exercise Clause has evolved from mainly protecting the rights of religious minorities in a small number of circumstances to a overinflated antidiscrimination clause aimed at guaranteeing complete substantive equality between religious and nonreligious people, entities, and institutions.⁸⁶

The Court has been unable to establish a consistent interpretation of the religion clauses in the doctrines created under them.⁸⁷ As such, religion clause cases cannot be understood through single a formula, but instead require observation from several different jurisprudential viewpoints.⁸⁸

⁸² Roughly three-quarters in this group say the Bible should hold little-to-no sway, including 86% of self-described atheists who say the Bible should not influence U.S. legislation at all. *Id.*

⁸³ Weber & Thornton, *supra* note 75, at 411.

⁸⁴ See generally Bradley Girard & Gabriela Hybel, *The Free Exercise Clause vs. the Establishment Clause: Religious Favoritism at the Supreme Court*, AM. BAR ASS'N (July 5, 2022), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/intersection-of-lgbtq-rights-and-religious-freedom/the-free-exercise-clause-vs-the-establishment-clause/.

⁸⁵ Sanei, *supra* note 15.

⁸⁶ See generally *id.* at 17-32; Ergeson, *supra* note 10, at 2674-76.

⁸⁷ Sanei, *supra* note 15, at 24-30.

⁸⁸ See generally Krisitin M. Engstrom, *Establishment Clause Jurisprudence: The Souring of Lemon and the Search for a New Test*, 27 PAC. L.J. 121, 143-59 (1995).

A. The Establishment Clause

The Establishment Clause provides, “Congress shall make no law respecting an establishment of religion.”⁸⁹ These words have been interpreted as limiting governmental action of two types: (1) action that discriminates between religions, and (2) action that promotes religion in general.⁹⁰ The Supreme Court has intensely debated the content and extent of the second category.⁹¹

In 1971, the Court in *Lemon v. Kurtzman* aimed to simplify its Establishment Clause jurisprudence into a three-part formula, which came to be known as the *Lemon* test.⁹² Under the *Lemon* test, the governmental action (1) must have a secular purpose, (2) must have a primary effect that neither advances nor inhibits religion, and (3) may not foster an excessive entanglement with religion.⁹³ The *Lemon* test’s first element does not mean that a law must have a solely secular objective.⁹⁴ Rather, the government must offer a legitimate and nonfrivolous secular purpose for its action.⁹⁵ The Court is increasingly disregarding the *Lemon* test, which makes it somewhat unreliable as a measure of constitutionality.⁹⁶

The *Lemon* test’s functionality has been significantly weakened by numerous criticisms, revisions, failures to apply it in establishment decisions, and other tests employed by the Court in Establishment Clause jurisprudence.⁹⁷ In accordance with the above, the Court did not use the *Lemon* test in one of its most recent ventures into the Establishment Clause.⁹⁸ In *Kennedy v. Bremerton School District*, the

⁸⁹ U.S. CONST. amend. I.

⁹⁰ *Establishment Clause*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/establishment_clause [https://perma.cc/EC4L-VDZM] (last visited Jan. 31, 2024).

⁹¹ See generally Marci A. Hamilton & Michael McConnell, *The Establishment Clause*, NAT’L CONST. CTR., <https://constitutioncenter.org/the-constitution/amendments/amendment-i/interpretations/264> [https://perma.cc/LU6Q-C83V].

⁹² *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

⁹³ *Id.*

⁹⁴ Richard L. Pacelle Jr., *Lemon Test*, FREE SPEECH CTR., <https://firstamendment.mtsu.edu/article/lemon-test/> [https://perma.cc/FT6Z-WMHQ] (Jan. 19, 2024).

⁹⁵ *Id.*

⁹⁶ *Id.*; Sanei, *supra* note 15, at 24; Ergeson, *supra* note 10, at 2663; Noah Feldman, Opinion, *Supreme Court Is Eroding the Wall Between Church and State*, PIONEER PRESS (June 29, 2022, 7:53 PM), <https://www.twincities.com/2022/06/29/noah-feldman-supreme-court-is-eroding-the-wall-between-church-and-state/> [https://perma.cc/69SJ-PB6L].

⁹⁷ Pacelle, *supra* note 94.

⁹⁸ See *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 510 (2022).

Court discarded the *Lemon* test as the test for Establishment Clause violations, asserting that it was “abstract and ahistorical.”⁹⁹ Instead the Court now distinguishes between acceptable and unacceptable government conduct based on history and original intent of the Constitution’s drafters.¹⁰⁰ In dissent, Justice Sonia Sotomayor advocated for the *Lemon* test’s continued use:

Today’s decision goes beyond merely misreading the record. The Court overrules *Lemon v. Kurtzman* and calls into question decades of subsequent precedents that it deems “offshoot[s]” of that decision. In the process, the Court rejects longstanding concerns surrounding government endorsement of religion and replaces the standard for reviewing such questions with a new “history and tradition” test. In addition, while the Court reaffirms that the Establishment Clause prohibits the government from coercing participation in religious exercise, it applies a nearly toothless version of the coercion analysis, failing to acknowledge the unique pressures faced by students when participating in school-sponsored activities. This decision does a disservice to schools and the young citizens they serve, as well as to our Nation’s longstanding commitment to the separation of church and state.¹⁰¹

The *Kennedy* case epitomizes a sustained pattern in which the Court has diminished the significance of the Establishment Clause’s role in restricting governmental action, as underscored by Justice Sonia Sotomayor’s dissent advocating for the continued use of the *Lemon* test.

1. The Establishment Clause Applied: The Nondiscriminatory Promotion of Religion

Nondiscriminatory promotion of religion can manifest in two ways. The first is governmental action intended to advance religion in general.¹⁰² A law promoting religion belongs in this category even

⁹⁹ *Id.*

¹⁰⁰ *Id.*; Sanei, *supra* note 15, at 24.

¹⁰¹ *Kennedy*, 597 U.S. at 546-47 (Sotomayor, J., dissenting) (citations omitted).

¹⁰² Steven G. Gey, *Reconciling the Supreme Court’s Four Establishment Clauses*, 8 U. PA. J. CONST. L. 725, 779 (2006); *see also* Berta Esperanza Hernández-Truyol, *Awakening the Law: Unmasking Free Exercise Exceptionalism*, 72 EMORY L.J. 1061, 1072 (2023).

if it is denominationally neutral.¹⁰³ The second is a policy that was not intended to advance religion but still had that effect.¹⁰⁴ In sum, this includes laws that provide support for religion through impartial criteria.¹⁰⁵

Whether governmental activity violates the Establishment Clause depends on the theory used.¹⁰⁶ Cases involving the promotion of religion involve two conflicting theories: the nonpreferentialist and separationist models.¹⁰⁷ The separationist theory holds that the government cannot sponsor, aid, or promote religion or religious institutions.¹⁰⁸ While application of this theory varies, its overall effect is to discourage such assistance.¹⁰⁹ Under the separationist theory, the government is thus prohibited from promoting religion over nonreligion or providing direct support to religious institutions.¹¹⁰ Conversely, the nonpreferentialist theory posits that the government can subsidize religious organizations and promote religion without restriction if such subsidies are not biased towards a particular religion or religious organization.¹¹¹ Under the nonpreferentialist theory, the government is therefore free to promote religion generally, discriminate against nonreligion, and assist religious institutions.¹¹²

Today, the Court moves towards the nonpreferentialist theory. Initially, this move seemed limited to situations where the government support is given to the student (or parent) rather than the school directly.¹¹³ Government support to religious entities has significantly broadened, however, exemplified by the implementation of the recent PPP loan program that provided direct aid to religious organizations.¹¹⁴ In *Zobrest v. Catalina Foothills School District*, the Supreme

¹⁰³ *Establishment of Religion*, JUSTIA US L., <https://law.justia.com/constitution/us/amendment-01/02-establishment-of-religion.html> [<https://perma.cc/S8T7-H2QA>] (last visited May 19, 2024).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Girard & Hybel, *supra* note 84.

¹⁰⁷ See Gey, *supra* note 102, 754-56, 765-70.

¹⁰⁸ *Id.* at 766-67.

¹⁰⁹ *Id.* at 769.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 770; see also John R. Vile, *Nonpreferentialism*, FREE SPEECH CTR., <https://firstamendment.mtsu.edu/article/nonpreferentialism/> [<https://perma.cc/JS97-K2HD>] (Jan. 8, 2024).

¹¹² Gey, *supra* note 102, at 755.

¹¹³ Emily R. Hill, *Religious Values in Liberal Democracy*, RELIGIONS, Dec. 14, 2020, at 4.

¹¹⁴ McMorrow, *supra* note 5.

Court ruled that a government program could pay for a sign-language interpreter to assist a hearing-impaired student attending a “pervasively sectarian” Catholic school without violating the Establishment Clause.¹¹⁵ Two elements were decisive in the Court’s analysis: (1) the program was religiously neutral;¹¹⁶ and (2) the government funding flowed directly to the student rather than the school.¹¹⁷ Thus, the individual’s private need was a barrier between the state and the sectarian organization.¹¹⁸ The Court’s holding meant that the government cannot be held responsible for an individual’s decision to spend government funds in a sectarian setting rather than a public-school environment.¹¹⁹

Cracks in the developing Establishment Clause jurisprudence were exposed by the Court’s later judgment in *Mitchell v. Helms*, however.¹²⁰ The federal program at issue in *Mitchell* granted federal funds to state and local educational organizations for their purchase of classroom supplies, all of which had to be secular, which they could then lend to public and private schools within their jurisdictions.¹²¹ Therefore, if a computer was purchased through the program, it could be loaned to a parochial school, but it could not be used to teach religious topics.¹²²

Writing for a plurality of justices, Justice Clarence Thomas took a nonpreferentialist approach, finding that the federal program violated *Lemon*’s second prong, the primary effects test.¹²³ The plurality believed that the effects test should only be evaluated in light of two questions related to the concept of “neutrality.”¹²⁴ The first criterion for determining the effect of government aid turned on “whether the aid itself has an impermissible content” and elaborated that “[w]here the aid would be suitable for use in a public school, it is also suitable for use in any private school.”¹²⁵ The second criterion for determining the effect of government aid requires a court to consider whether the

¹¹⁵ *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 13-14 (1993).

¹¹⁶ *Id.* at 10.

¹¹⁷ *Id.* at 13-14.

¹¹⁸ *Id.* at 10-13.

¹¹⁹ *Id.* at 10.

¹²⁰ *Mitchell v. Helms*, 530 U.S. 793 (2000).

¹²¹ *Id.* at 801.

¹²² *Id.* at 805.

¹²³ *Id.* at 807-08, 829-36.

¹²⁴ *Id.* at 809.

¹²⁵ *Id.* at 822.

“criteria for allocating the aid ‘creat[e] a financial incentive to undertake religious indoctrination.’”¹²⁶ Moreover, “to say that a program does not create an incentive to choose religious schools is to say that the private choice is truly ‘independent.’”¹²⁷ If the answer to either of these questions was “yes,” it would break the effects test and the principle of neutrality. Conversely, if the answer to both was “no,” the program would be considered neutral (i.e., nonpreferential) and thus constitutional.¹²⁸ In this case, the first question was answered negatively because the program did not promote religion.¹²⁹ The tools and materials purchased through the program were secular and not meant for sectarian purposes.¹³⁰ As for the second question, there was no evidence that the aid recipients were chosen based on their religious beliefs.¹³¹ The financial assistance was given solely based on a school’s student enrollment numbers.¹³² In other words, the government program was constitutional because it was “neutral.”¹³³

The plurality also concluded that, from a constitutional standpoint, the possibility that the parochial schools would divert the equipment for sectarian purposes was an effect that was irrelevant.¹³⁴ There was no Establishment Clause violation if the *government* did not take part in that diversion: “[A] government computer or overheard projector does not itself inculcate a religious message, even when it is conveying one.”¹³⁵ Essentially, the plurality concluded that private actors, rather than the government, would be responsible for any sectarian usage of the materials.¹³⁶ Finally, the plurality implied that even direct financial aid to sectarian institutions may be acceptable as long as the government itself is not promoting the sectarian mission of the school, even though this was not at issue in the case.¹³⁷

Justice Sandra Day O’Connor’s concurring opinion described the plurality’s rationale as one of “unprecedented breadth.”¹³⁸ She

¹²⁶ *Mitchell*, 530 U.S. at 795.

¹²⁷ *Id.* at 814.

¹²⁸ *Id.* at 809-10.

¹²⁹ *Id.* at 823.

¹³⁰ *Id.* at 831-32.

¹³¹ *Id.* at 829-30.

¹³² *Mitchell*, 530 U.S. at 829-30.

¹³³ *Id.* at 829-35.

¹³⁴ *Id.* at 824.

¹³⁵ *Id.* at 823.

¹³⁶ *Id.*

¹³⁷ *Id.* at 819 n.8.

¹³⁸ *Mitchell*, 530 U.S. at 837 (O’Connor, J., concurring).

concluded that the aid program was legal, but she vehemently disagreed with the plurality's treatment of neutrality with "singular importance" and their claim that diverting government aid for sectarian purposes would be constitutionally permissible.¹³⁹ In her opinion, the latter would amount to an unconstitutional enforcement of religion, whereas the former was only one element to take into account in the "impermissible effect" analysis.¹⁴⁰

In Justice David Souter's dissenting opinion, he thoroughly rebutted both the plurality's neutrality model and the notion that allocating public funds to religious institutions may be constitutional in certain circumstances.¹⁴¹ The crucial issue in Justice Souter's dissent was whether the assistance aided the school's secular or religious objective.¹⁴² This question could be answered through consideration of various factors, such as the government's impartiality in the aid distribution process; the type of aid (such as cash, services, books or equipment); the aid's direct or indirect route from the government to the religious institution; the likelihood that the aid would be diverted to sectarian purposes; the possibility that it would result in lower traditional spending on religious institutions; and the relative importance of the aid to the recipient.¹⁴³ Unlike Justice O'Connor's concurrence, Justice Souter emphasized the ease with which a computer could be diverted for religious purposes, which ultimately led him to conclude that financial assistance of this nature was unconstitutional.¹⁴⁴

In June 2022, the Court declared in *Carson v. Makin* that the state of Maine could not bar religious institutions from receiving public financing for the sole reason that they are religious.¹⁴⁵ It decided that the First Amendment's Free Exercise Clause was violated by Maine's "nonsectarian" restriction for otherwise widely accessible tuition aid payments to parents who reside in school districts without their own secondary school.¹⁴⁶ In other words, the Court decided that as long as

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 840-42.

¹⁴¹ *Id.* at 869, 885 (Souter, J., dissenting).

¹⁴² *Id.* at 885-99.

¹⁴³ *Id.*

¹⁴⁴ *Mitchell*, 530 U.S. at 904-07 (Souter, J., dissenting).

¹⁴⁵ *Carson v. Makin*, 596 U.S. 767, 789 (2022).

¹⁴⁶ *Id.* *Carson* was cited as support in Justice Alito's dissenting opinion in *Yeshiva Univ. v. YU Pride All.*, 143 S. Ct. (Mem) 1, 1 (2022) ("At least four of us are likely to vote to grant certiorari if Yeshiva's First Amendment arguments are rejected on appeal, and Yeshiva would likely win if its case came before us. A State's imposition of its own mandatory interpretation of scripture is a shocking development that calls

parents were permitted to use public funds to support their child's secular education, Maine's policy that forbade parents from using tuition assistance programs to send their kids to religious schools constituted discrimination in violation of the Free Exercise Clause.¹⁴⁷ This decision expands the Court's 2020 decision in *Espinoza v. Montana Department of Revenue* by requiring taxpayers to support a distinctively religious activity—namely, religious education.¹⁴⁸

IV. ADVANTAGES AND DISADVANTAGES OF THE PPP LOAN

PPP loans have not only been criticized for potentially violating the Establishment Clause by granting taxpayer funds to religious organizations, but also for benefiting larger and more established religious organizations while leaving smaller and minority-owned religious institutions without adequate support.¹⁴⁹ Despite the SBA's aim of providing economic support to *small* businesses in need, many large religious institutions that did not require financial assistance received funding, while smaller organizations in dire need were unable to obtain aid.¹⁵⁰ Including religious organizations as beneficiaries of the PPP loan and exempting them from the affiliation requirement contradicted SBA's promotion of the nondiscrimination principle.

According to the SBA, only 2,368 of the 123,083 PPP loans were granted to religious groups identified as Black or African American.¹⁵¹ This represents an excessively small share of the total loans, given that Black or African American communities were disproportionately affected by the pandemic in terms of health outcomes and economic effects.¹⁵² Additionally, only 5,000 PPP loans were granted to religious

our for review. The Free Exercise Clause protects the ability of religious schools to educate in accordance with their faith.”).

¹⁴⁷ Sanei, *supra* note 15, at 9.

¹⁴⁸ *Carson*, 142 S. Ct. 1987.

¹⁴⁹ Autor et al., *supra* note 56, at 57.

¹⁵⁰ *Id.* at 56-57.

¹⁵¹ Bob Smietana, *Some Churches Got Mega PPP Loans. A Few Got Tiny Ones.*, RELIGION NEWS SERV. (Nov. 8, 2021), <https://religionnews.com/2021/11/08/some-churches-got-mega-ppp-loans-a-few-got-tiny-ones/> [https://perma.cc/KVW5-E4DZ].

¹⁵² See Jeffrey Wang & David Hao Zhang, *The Cost of Banking Deserts: Racial Disparities in Access to PPP Lenders and Their Equilibrium Implications*, (Harv. Bus. Sch., Working Paper, Apr. 29, 2021), <https://scholar.harvard.edu/sites/scholar.harvard.edu/files/dhz/files/geographyppp.pdf> [https://perma.cc/LH2G-2JRY] (discussing how the PPP disproportionately disadvantage minority communities due to disparities in access to enrolled lenders, particularly in areas with higher Black populations, highlighting the need to address

groups that identified as part of a religious or ethnic minority.¹⁵³ This starkly contrasts with the number of PPP loans received by larger religious organizations, many of which were able to secure millions of dollars in funding due to the SBA's announcement that religious organizations were exempted from the 500-worker maximum affiliation requirement.¹⁵⁴

While the PPP undeniably saved millions of jobs, the program was faced with balancing speed and precision in policy-making and accessibility and equity issues for smaller and minority-owned religious organizations.¹⁵⁵ Vague guidelines and excessive administrative discretion enabled loan firms to violate program regulations, especially when there was a pre-existing relationship between the lender and borrower.¹⁵⁶ This relationship was more common among larger religious institutions, which were therefore able to secure more PPP.¹⁵⁷ As

distributional inequities in financial assistance); *see also* Samantha Artiga, Rachel Garfield & Kendal Orgera, *Communities of Color at Higher Risk for Health and Economic Challenges due to COVID-19*, KFF, (Apr. 7, 2020) <https://www.kff.org/disparities-policy/issue-brief/communities-of-color-at-higher-risk-for-health-and-economic-challenges-due-to-covid-19/> [<https://perma.cc/7XB2-8WRQ>] (discussing the disproportionate health and financial impacts of the COVID-19 outbreak on communities of color).

¹⁵³ Smietana, *supra* note 151 (“The loan data reflects the larger reality of the divide between very large congregations and small congregations For some smaller congregations, navigating the PPP loan process was difficult and the results disappointing.”).

¹⁵⁴ Ashley Schwartz-Lavares, Faith Abubey & Haley Yamada, *The Inequities of PPP: Megachurches, Large Corporations Receive Money Ahead of Small Businesses*, ABC NEWS (Jan. 18, 2021, 10:54 PM), <https://abcnews.go.com/US/inequities-ppp-megachurches-large-corporations-receive-money-ahead/story> [<https://perma.cc/HJ6J-D7DA>] (“Megachurches, where pastors are sometimes worth millions of dollars, were also able to qualify for PPP. Data from the SBA showed churches led by Evangelical TV stars received anywhere from \$250,000 to \$5 million in loans. Multi-millionaire Joel Osteen’s Lakewood Church received \$4.4 million in PPP loans, while Robert Jeffress’ First Baptist Dallas received \$2.2 million and Joyce Meyers Ministries received \$5 million.”).

¹⁵⁵ Susan C. Morse, *Emergency Money: Lessons from the Paycheck Protection Program*, 55 U. MICH. J.L. REFORM 175, 176 (2021).

¹⁵⁶ *Id.* at 187-95; *see also* Daniel Rabetti, *Non-Information Asymmetry Benefits of Relationship Lending* (Coller Sch. of Mgmt., Tel Aviv Univ., Working Paper, 2022), https://www.communitybanking.org/~media/files/communitybanking/2022/session1_paper3_rabetti.pdf [<https://perma.cc/DRX5-4NXG>].

¹⁵⁷ Reese Dunklin & Michael Rezendes, *Sitting on Billions, Catholic Dioceses Amassed Taxpayer Aid*, AP (Feb. 4, 2012), <https://apnews.com/article/catholic-church-get-aid-investigation-39a404f5c82fea84902cd16f04e37b2> [<https://perma.cc/VNF3-SGYK>]; *see also* Allen N. Berger, Mustafa U. Karakaplan & Raluca A. Roman, *Whose Bailout Is It Anyway? The Roles of Politics in PPP Bailouts of Small Businesses vs. Banks*, J. FIN. INTERMEDIATION, July 25, 2023, at

a result, it appears that preferential treatment was given to larger religious organizations, further exacerbating the program's lack of fairness.¹⁵⁸

The program also had a first-come first-served approach with no set-asides for minority-owned organizations or groups requiring extra time to apply.¹⁵⁹ This made it easier for larger organizations to secure loans, while smaller groups, particularly those belonging to ethnic or racial minorities, faced greater challenges accessing loans despite their urgent need for financial support.¹⁶⁰ Such groups are often hampered by limited financial resources, a lack of connections to financial institutions, and discrimination.¹⁶¹ Although the absence of special designations might seem fair, it ultimately disadvantages those groups, resulting in lack of true equity.¹⁶² Treating all religions the same is problematic due to their diversity in size, type, and longevity. The program's failure to acknowledge these disparities highlights its inequities and raises concerns about systemic discrimination in the loan application process.¹⁶³

These hurdles and delays during the early rollout of the PPP had tangible effects. Studies have found that the loans received during April and May 2020 had a more significant effect on employment than those issued later.¹⁶⁴ This is because the loans were most conducive to saving businesses early in the pandemic, but because of the administrative issues discussed, most of the loans went to larger organizations with connections to lenders.¹⁶⁵ These loans came at the expense of

1-3, 17 (discussing how political factors significantly influenced the allocation of PPP funds, with national political influences directing more funds towards banks and local political influences favoring small businesses, while some banks were able to influence the distribution of funds through political lobbying); Smietana *supra* note 151.

¹⁵⁸ See Dunklin & Rezendes, *supra* note 157. According to an AP investigative report, more than 200 Roman Catholic dioceses in the United States received a total of \$3 billion in PPP loans from the federal government. *Id.* While some dioceses may have been struggling financially due to the pandemic, many of them had significant reserves that could have been used to weather the storm. *Id.* For example, the report states that at least forty dioceses had cash and investment reserves of more than \$100 million. *Id.*

¹⁵⁹ Morse, *supra* note 57, at 178.

¹⁶⁰ *Id.* at 219-20.

¹⁶¹ Wang & Zhang, *supra* note 152.

¹⁶² Morse, *supra* note 57, at 219-20.

¹⁶³ Wang & Zhang, *supra* note 152.

¹⁶⁴ Autor et al., *supra* note 56, at 62.

¹⁶⁵ *Id.*

smaller businesses who went out of business due to not receiving the loans during this time frame.¹⁶⁶ According to estimates, only a small portion of PPP funds went directly to workers who would have lost their jobs without the program.¹⁶⁷ Most of the PPP funds went to the top quintile of households.¹⁶⁸ In other words, many of the loans went to businesses that would have survived and kept their employees even without PPP.¹⁶⁹

To aid the businesses most in need, Congress directed the final installment of PPP loans in 2021 towards companies that had experienced revenue losses.¹⁷⁰ This aid came too late for many small businesses that were unable to access aid initially and were forced to close, however.¹⁷¹ Overall, the targeted approach utilized in other countries, which provided support where it was most needed, was more effective than the broad U.S. approach.¹⁷² The targeted approach in other countries was possible because they already had programs in place.¹⁷³ The United States could benefit from building similar administrative capacity for future emergencies, resulting in a more efficient and calibrated response.¹⁷⁴

V. EXAMINING GERMANY'S CHURCH TAX AND ITS POTENTIAL AS A FRAMEWORK

As discussed, including religious organizations in the PPP loan program raised legal and ethical questions due to their unique status as religious institutions and tax-exempt entities. Further, the implementation of the PPP program during the COVID-19 pandemic highlighted the need for targeted policies and programs to effectively address the needs of smaller and minority-owned businesses. Considering these issues, Germany's "church tax" system offers a

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 71-72. The PPP preserved between two and three million job-years of employment over fourteen months, at a cost of \$169,000 to \$258,000 per job-year retained. *Id.* at 56.

¹⁶⁸ *Id.* at 56-57.

¹⁶⁹ *Id.*

¹⁷⁰ Jim Probasco, *What Was Third-Round Paycheck Protection Program (PPP) Funding?*, INVESTOPEDIA, <https://www.investopedia.com/your-guide-to-the-paycheck-protection-program-ppp-and-how-to-apply-4802195> [<https://perma.cc/ZJ9M-KRG7>] (Aug. 8, 2023).

¹⁷¹ Autor et al., *supra* note 56, at 55.

¹⁷² *Id.* at 77-78.

¹⁷³ *Id.* at 78.

¹⁷⁴ *Id.*

promising model for a separate crisis relief program in the United States for the funding of religious organizations. This model would better protect individual liberty and ensure that smaller and minority religious organizations, the organizations in the most need of such relief, receive sufficient funds. But such a system must be carefully designed to comply with the First Amendment and respect religious freedom principles.

Germany allows some religious institutions to tax their members.¹⁷⁵ The tax, referred to as the “church tax,” is collected by the state on behalf of religious organizations or by the religious organizations themselves.¹⁷⁶ Such a tax accords with the nation’s constitutionally established practice of handling its “large, lasting religious organizations as ‘public law corporations.’”¹⁷⁷ The German constitution, the Basic Law, forbids the establishment of a state church, prohibits religious discrimination, and provides for freedom of faith and conscience and the practice of one’s religion.¹⁷⁸

Americans familiar with the U.S. Constitution might find it odd that Europeans endorse the separation of church and state, yet still pay taxes to the church. In reality, church-and-state separation is deeply rooted in the history of the church tax.¹⁷⁹ The tax was implemented as a self-sufficient source of funding during the nineteenth century when various European governments reduced financial aid to religious leaders.¹⁸⁰ Certain Europeans contend that the church tax actually reinforces the separation of church and state because it provides a distinct financial resource for religious organizations to utilize as they choose, without depending on government funding.¹⁸¹

¹⁷⁵ Stephanie Hoffer, *Caesar as God’s Banker: Using Germany’s Church Tax as an Example of Non-Geographically Bounded Taxing Jurisdiction*, 9 WASH. U. GLOB. STUD. L. REV. 595, 596 (2010).

¹⁷⁶ EDWARD J. EBERLE, CHURCH AND STATE IN WESTERN SOCIETY: ESTABLISHED CHURCH, COOPERATION AND SEPARATION 28 (2011).

¹⁷⁷ Hoffer, *supra* note 175, at 595.

¹⁷⁸ GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GG] [Basic Law], art. 140, translation at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html [<https://perma.cc/2WRG-S5BX>] (referring to Article 137(1) of the Weimar Constitution).

¹⁷⁹ *Id.* at 599-600.

¹⁸⁰ *Id.* at 597.

¹⁸¹ *In Western European Countries with Church Taxes, Support for the Tradition Remains Strong*, PEW RSCH. CTR. (Apr. 30, 2019), <https://www.pewresearch.org/religion/2019/04/30/in-western-european-countries-with-church-taxes-support-for-the-tradition-remains-strong/> [<https://perma.cc/BA8A-JUNE>].

The German church tax is decentralized and operates within specific regions, taxing individuals based on their voluntary group affiliations, instead of geographical location.¹⁸² The church tax taxes a percentage the paychecks of members of the respective religious organizations that are enrolled in the congregation's taxing jurisdiction.¹⁸³ For native Germans, church tax is frequently deducted automatically, often beginning from a young age when they are baptized and subsequently become members of a specific church, resulting in tax payments to that church once they start earning income as adults.¹⁸⁴ Foreigners relocating to Germany may indicate their association with a church during the registration process at a local citizen's office.¹⁸⁵ People who are not registered members of a "church tax"-collecting denomination do not have to pay the tax.¹⁸⁶ The tax is normally not collected by the government, although religious organizations may choose for the government to do so.¹⁸⁷ Congregations often opt for an income tax that is withheld from state wages and paid back to the taxing entity.¹⁸⁸ The tax is used to support the activities of the religious organizations, such as the construction and maintenance of churches and social services.¹⁸⁹

The church tax is set apart from other forms of taxation because it is based on voluntary group affiliation rather than geographical location.¹⁹⁰ Importantly, the tax is avoidable if one renounces their religious affiliation or switches to a congregation that does not impose the tax, which is accomplished by completing simple paperwork.¹⁹¹ Given this relatively simple opt-out procedure, it would seem that relatively

¹⁸² Hoffer, *supra* note 175, at 596.

¹⁸³ Anne Walther, *Church Tax in Germany: What Is It and Do I Have to Pay It?*, LINGODA, <https://blog.lingoda.com/en/church-tax-germany/> [https://perma.cc/KN26-CL8V] (Apr. 21, 2023).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Church Tax (Kirchensteuer)*, VW+KN, <https://www.german-tax-consultants.com/german-taxes/church-tax-kirchensteuer.html> [https://perma.cc/4VZ6-VZHA] (last visited May 19, 2024).

¹⁸⁷ Hoffer, *supra* note 175, at 627.

¹⁸⁸ *Id.* at 605-06.

¹⁸⁹ *Id.* at 630.

¹⁹⁰ *Id.* at 596.

¹⁹¹ *Church Tax (Kirchensteuer)*, *supra* note 186 ("Members of a religious community under public law may formally declare their wish to leave the community to state (not religious) authorities. With such a declaration, the obligation to pay church taxes ends. Some communities refuse to administer marriages and burials of (former) members who had declared to leave it.").

few people would choose to continue paying the tax. Yet, while “[t]here is evidence that some Europeans are leaving the church tax system . . . there does not appear to be a mass exodus.”¹⁹² Church taxpayers who responded to a Pew survey believed they were either fulfilling their obligation to pay taxes or acknowledging a broader societal responsibility to do so, despite the possibility that their individual characteristics, such as being retired, unemployed, or having low income, could exempt them from paying.¹⁹³ In fact, almost two thirds of Germans are formally affiliated with congregations that collect taxes,¹⁹⁴ despite German society’s secular nature.¹⁹⁵ This shows that, even with the possibility of free-riders, an opt-out financing system for religious organizations’ crisis-relief programs is possible.

A. The German Church Tax System Protects Individual Religious Liberty More Effectively

The German system demonstrates how a government program can effectively protect individual religious liberty. By allowing religious organizations to levy taxes on their members, the German system effectively recognizes the sovereignty and autonomy of these organizations.¹⁹⁶ This, in turn, allows individuals to exercise their religious beliefs and practices freely, without interference from the government.¹⁹⁷ The system also allows for individual choice and agency, as those who do not practice religion are not forced to help fund religious organizations. Moreover, members of religious organizations are not forced to pay the tax or remain part of the organization if they object to its teachings or practices.¹⁹⁸ They have the freedom to opt out and join another organization or to disclaim their membership altogether, providing a mechanism for dissent and enabling individuals to fund religious organizations that are consistent with their beliefs and values.¹⁹⁹ The German government does not have jurisdiction over this variance between a person’s individual beliefs and the teachings of their

¹⁹² *In Western European Countries with Church Taxes, Support for the Tradition Remains Strong*, *supra* note 181.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ Hoffer, *supra* note 175, at 629.

¹⁹⁷ *See id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

religion.²⁰⁰ It is solely the individual's decision to determine whether the difference warrants leaving.²⁰¹

The church tax system thus helps ensure that individuals are not coerced or compelled to act against their beliefs or values, while also allowing diversity of religious expression and practice.²⁰² While the church tax may seem contradictory to Americans who value strict church-and-state separation, it is generally viewed differently in Germany, where it is seen as a system that supports religious institutions while maintaining their independence from government control.²⁰³

B. The U.S. and German Approaches to the Church-State Dynamic

Germany and the United States approach the church-state relationship differently. The German approach, which necessitates a high degree of cooperation between the state and religion, appears to directly contradict the United States' concept of religious liberty.²⁰⁴ The German approach to the church-state dynamic is rooted in "positive neutrality," which requires the state to engage with religious groups in order to protect and promote religious freedom.²⁰⁵ Religious organizations are recognized as "public corporations," which means they have certain legal rights and obligations.²⁰⁶ They are entitled to certain financial benefits, such as tax exemptions and state funding, but they also have to comply with certain regulation laws, such as labor and social security laws.²⁰⁷

Additionally, while the German system may seem to give more power to religious institutions, it is important to note that this power is tempered by legal protections for individual rights and liberties. The German constitution guarantees freedom of religion and conscience and prohibits any form of discrimination on the basis of religion.²⁰⁸ In practice, this means that religious organizations in Germany are subject to the same legal and regulatory frameworks as any other

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² See Hoffer, *supra* note 175, at 629.

²⁰³ *Id.*

²⁰⁴ EBERLE, *supra* note 176, at 3.

²⁰⁵ *Id.* at 83; see also Rafael Palomino, *Religion and Neutrality: Myth, Principle, and Meaning*, 2011 BYU L. REV. 657, 678-79 (2011).

²⁰⁶ EBERLE, *supra* note 176, at 27.

²⁰⁷ *Id.* at 185.

²⁰⁸ GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GG] [BASIC LAW], art. 4(1)-(2).

organization and cannot wield undue influence over government policy or individual rights.²⁰⁹ This contrasts with the United States' non-discrimination principle, where religious organizations receive the same public benefits as similarly situated secular organizations, but are not subject to the same regulatory frameworks.

As discussed, the U.S. Supreme Court understands the Establishment Clause to require separation of church and state, although application of the principle has yielded mixed results—sometimes it prohibits state aid of religion and sometimes it supports such aid.²¹⁰ The Establishment Clause has been historically centered on freedom of religious beliefs or conscience.²¹¹ However, application of the modern nondiscrimination principle has resulted in significant amounts of public funding being directed towards religion.²¹² While the full extent of PPP loan recipients and the amounts they received is not yet known, some analysts suggest that religious organizations received a disproportionate amount of the aid, given their share of the overall business sector.²¹³ This has raised questions about the impact of nondiscrimination programs on the relationship between religion and government, and the extent to which such programs can inadvertently favor certain groups over others.²¹⁴

²⁰⁹ See EBERLE, *supra* note 176, at 3.

²¹⁰ See Sanei, *supra* note 15, at 10.

²¹¹ *Id.* at 47.

²¹² See Totzke, *supra* note 12, at 1703.

²¹³ Ron Shevlin, *PPP Loans: Who Got What and How Well Did the Loans Perform?*, FORBES (July 13, 2020), <https://www.forbes.com/sites/ron-shevlin/2020/07/13/ppp-loans-who-got-what-and-how-well-did-the-loans-perform/> [<https://perma.cc/96YL-JYQE>]; David Yanofsky, *Here's What We Know Is Wrong with the PPP Data*, QUARTZ (July 13, 2020), <https://qz.com/1878225/heres-what-we-know-is-wrong-with-the-ppp-data> [<https://perma.cc/B4DE-PUL5>]. Public data on PPP loan recipients may not fully capture the number and amounts of loans given to religious organizations due to errors and inconsistencies in the data. While the SBA released data on loan recipients, some information on loans under \$150,000 was initially missing. Lydia DePillis, *Judge Orders the Release of Data on Emergency Loans for Small Businesses*, PROPUBLICA (Nov. 6, 2020, 12:29 PM), <https://www.propublica.org/article/judge-orders-the-release-of-data-on-emergency-loans-for-small-businesses> [<https://perma.cc/S7BD-BX49>]. More detailed data was released later, but there are still concerns about accuracy and completeness. One analysis estimated that religious organizations received \$7.3 billion in PPP loans. Benjamin Fearnow, *Religious Organizations Receive \$7.3 Billion in PPP Loans, Megachurches Amass Millions*, NEWSWEEK, <https://www.newsweek.com/religious-organizations-receive-73-billion-ppp-loans-megachurches-amass-millions-1515963> [<https://perma.cc/Z3VF-5XQ9>] (July 7, 2020, 11:08 AM)

²¹⁴ See DePillis, *supra* note 213.

Debates concerning the balance between the principle of nondiscrimination and the protection of individual liberty of conscience are ongoing in the United States, particularly as the discussion relates to public funding for religious organizations.²¹⁵ Despite approaching the relationship between church and state differently, the governments of both Germany and the United States are involved to a certain degree, with taxpayers funding religious institutions in each country. However, unlike German practices, most modern nondiscrimination programs in the United States, such as the PPP loan, do not offer potential dissenters (taxpayers who fund public benefits) the choice to opt out.²¹⁶

C. Criticisms of Germany's Church Tax System

Germany's church tax system is not free from imperfections. Although the modern German church tax system helps to preserve organizational autonomy and individual choice, as well as providing a significant source of revenue for religious organizations, it has not yet adequately responded to the critical challenge of increased religious

²¹⁵ Sanei, *supra* note 15, at 46-51.

²¹⁶ See generally *id.* at 66-70, discussing the legal complexities surrounding the distribution of public funds to private educational institutions, particularly those with religious affiliations, and the government's duty to ensure equitable treatment in these allocations. Sanei suggests that modern nondiscrimination programs, like the PPP loan, do not offer dissenters, such as federal taxpayers, the option to abstain from funding initiatives that may support religious entities, even if they object on ideological grounds. For instance, while taxpayers may contribute to public funds that are then allocated to programs supporting religious education, they typically lack the ability to selectively opt-out of financing these specific endeavors. This lack of opt-out provisions can lead to situations where dissenters indirectly support religious education, contrary to their beliefs. The author underscores the legal challenges in implementing frameworks that attempt to segregate secular and religious components within educational contexts, highlighting the difficulty for dissenters to ensure their funds aren't indirectly channeled into religious activities. This lack of opt-out choice becomes particularly salient in instances where exemptions are made for religious institutions, as seen during public health crises like the COVID-19 pandemic. The author cites instances during the COVID-19 pandemic where exemptions were made for religious institutions in public health measures, potentially favoring them over secular counterparts (such as the religious organizations being exempted from the PPP loan affiliation requirements, while secular organizations did not receive the same exemption). Ultimately, the author highlights how these instances raise concerns about the potential use of taxpayer funds to support religious activities and the need for clarity in differentiating between religious status and practice to ensure the protection of dissenters' rights and adherence to principles of religious freedom and separation of church and state.

diversity in German society.

First, the church tax recognizes only a few religious organizations—mainly organizations that are Catholic, Protestant, or Jewish, in addition to certain humanist groups—as recipients of the church tax.²¹⁷ Not recognizing “non-traditional” religious organizations is problematic in a diverse and multi-faith society in that it reinforces a hierarchy of privileged religions.²¹⁸ Further, while Muslim groups in Germany possess the right to impose a tax on their members, they choose not to do so.²¹⁹ Some German politicians proposed a “mosque tax” to counter the influence of foreign donors from countries like Turkey who may attempt to promote more extreme interpretations of Islam.²²⁰ It is contended that Germany’s proposal for a “mosque tax” is not rooted upon the incentive to nourish religious diversity and help Islam in Germany become more independent, but stems from “party policy and strategic calculations” to “divide[] and assimilate[]” the German Muslim population.²²¹ Second, the system is facing declining participation rates.²²² Younger generations are less likely to be affiliated with a recognized religious community and therefore less likely to pay the church tax.²²³ This trend pressures churches to find new funding sources and adapt to changing demographics. Third, there is limited transparency and accountability in the allocation of funds generated by the church tax system.²²⁴ Religious organizations are not required to report on how they spend the funds they receive, which may lead to the misuse or

²¹⁷ *In Western European Countries with Church Taxes, Support for the Tradition Remains Strong*, *supra* note 181 (noting that “[o]ther registered religious organizations – including those representing Mennonites, Jehovah’s Witnesses and a Muslim group – also are legally permitted to collect the tax, but do not do so”).

²¹⁸ Tariq Mahmood, *Anti-Essentialism, Multiculturalism and the ‘Recognition’ of Religious Groups*, 6 J. POL. PHIL. 378, 393-94 (1998).

²¹⁹ *In Western European Countries with Church Taxes, Support for the Tradition Remains Strong*, *supra* note 181.

²²⁰ *Germany Mulls Introducing ‘Mosque Tax’ for Muslims*, DEUTSCHE WELLE (Dec. 26, 2018), <https://www.dw.com/en/germany-mulls-introducing-mosque-tax-for-muslims/a-46866041> [<https://perma.cc/ZK7U-VASD>].

²²¹ Ali Harun Balkaya, *Germany’s Islam Conference: A Secular Affair*, TRTWORLD, <https://www.trtworld.com/europe/germany-s-islam-conference-a-secular-affair-25044> [<https://perma.cc/Y4Q8-RYUC>] (last visited Feb. 2, 2024).

²²² *In Western European Countries with Church Taxes, Support for the Tradition Remains Strong*, *supra* note 181.

²²³ *Id.*

²²⁴ Hoffer, *supra* note 175, at 606.

mismanagement of public funds.

It is thus evident that the church tax system in Germany is not without shortcomings. In taking notice of these limitations, however, this Note's proposal for a crisis-relief program for religious organizations acknowledges these shortfalls and advances potential remedies that account for them.

D. Church Tax as a Blueprint for a Crisis Relief Program for Religious Organizations in the United States

While the relationships between church and state in Germany and the United States differ, elements of Germany's church tax system may be used as a model for a U.S. crisis relief program for religious institutions. This proposal considers the shortcomings of the German system and proposes potential solutions for potential implementation in the United States. Briefly put, it would offer aid during economic crises without forcing taxpayers to fund religious groups in which they are not part. People could also choose to opt out without consequences. This would avoid any Establishment Clause violations, a concern with the PPP loan's application to religious groups.

The proposal also allows members of larger religious organizations or secular individuals to voluntarily donate a portion of their proceeds to smaller and minority religious organizations that may not be able to rely solely on their own congregants for sufficient funding during times of crisis. This portion of the funds would be "set aside" and designated for these organizations. By ensuring that religious institutions of all sizes have access to the necessary resources when needed, religious diversity is promoted and First Amendment violation concerns are prevented. Careful planning is required to implement this program, however.

To start, it is crucial to create a crisis relief program that is entirely separate from any government-funded initiatives. This program's purpose would be to offer financial aid exclusively to religious groups that are experiencing financial difficulties due to a crisis like a pandemic or natural disaster. Essentially, the requirements triggering disbursement would be like those of the PPP loan during the COVID-19 pandemic. This program would operate similarly to Germany's "church tax" system, wherein members of religious organizations could choose to contribute a portion of their income to their respective church. However, these donations would be earmarked specifically for crisis relief and could only be used for that purpose. The amount of

the contribution could be based on a percentage of the member's income, or a fixed amount decided by the program's organizers. Additionally, individuals could donate more than the set amount if they wish to do so. Unlike the German system, this program would be open to non-religious individuals also so that they have the option to contribute if they choose to do so.

Second, to comply with the First Amendment, any crisis relief program for religious institutions must be voluntary.²²⁵ Individuals who do not wish to support their own religious institution or any other should be able to opt out or opt out without penalty. Unlike the German church tax, opting out would not result in the individual being excluded from their church or restrict their participation in church activities.²²⁶ Instead, the proposed program would be funded entirely by voluntary donations from members of religious organizations or other individuals who choose to contribute. Participants could also allocate a portion of their contribution to the "set-aside" fund that provides financial assistance to smaller or minority religious organizations in need, although this would be entirely optional. Thus, those who prefer to donate exclusively to their own religious institution would be free to make that decision themselves.

While a system of opt-out taxation seems improbable at first blush, the high participation rate in Germany's system indicates that its basic structure is not without merit. In the United States, certain communities whose members have a strong sense of togetherness and are willing to contribute to public goods, a similar level of participation could be achieved. For instance, religious congregations in the United States often rely on voluntary donations from their members to sustain their programs and initiatives.²²⁷ This demonstrates that people are willing to contribute to causes they care about, meaning that an opt-out taxation system could potentially mobilize this willingness to help support religious organizations during a crisis. Additionally, given that the United States is the most religiously devoted among

²²⁵ Sanei, *supra* note 15.

²²⁶ See Melissa Eddy, *German Catholic Church Links Tax to the Sacraments*, N.Y. TIMES (Oct. 5, 2012), <https://www.nytimes.com/2012/10/06/world/europe/german-church-ties-tax-to-sacraments-after-court-ruling.html>.

²²⁷ Dwyer Gunn, *Churches Versus Synagogues: Voluntary Donations Versus Dues*, FREAKONOMICS (Oct. 19, 2010), <https://freakonomics.com/2010/10/churches-versus-synagogues-voluntary-donations-versus-dues/> [<https://perma.cc/8Y9Z-Y9DZ>].

Western industrialized nations,²²⁸ it could likely garner extensive participation. Further, unlike the German system, which is limited to members of “traditional” religious organizations, this program would be open to all individuals and acknowledged religious organizations in the United States. Moreover, this program would be limited to crisis relief rather than general funding, so less funds would be required than in the German system.

Third, as mentioned earlier, a certain percentage of the funds would be designated as set-asides to which individuals can choose to contribute. These set-asides would be specifically designated for smaller minority organizations that would be selected based on criteria such as financial need, membership count, and location. This needs-based system would ensure that smaller and less established minority religious organizations receive the funds they need without banks or political relationships acting as barriers, as was the case with PPP loan distribution.²²⁹

Fourth, it is necessary to establish clear eligibility guidelines, which were lacking in the PPP loan. The guidelines should determine the duration of the program and set a minimum threshold of impact caused by the economic crisis for the funds to be disbursed. Although the program will be open to all religious organizations, the organizations must demonstrate that they have been impacted by the economic crisis and have a plan for utilizing the funds to meet their needs through an application process. If they fail to meet this threshold, they will not be considered eligible for the crisis relief funds.

Extra paperwork will not be required for institutions applying for additional funds provided in the set-asides, as their need will be assessed through the initial application process. Thus, an explicit monetary threshold must be established to determine which congregations require the additional funds and how much they should receive. It is crucial to note that determinations of the organizations’ need should be based on secular factors such as the size and scope of the organization’s services rather than religious affiliation. Once eligibility is established, funds will be distributed to religious organizations based on their congregation size, budget, or level of financial distress. Any excess funds reserved for a congregation will be kept for future purposes. In other words, only the necessary amount determined by the eligibility factors will be granted to each religious organization. Religious

²²⁸ Fahmy, *supra* note 73.

²²⁹ See Wang & Zhang, *supra* note 152.

organizations that find themselves with surplus funds during the economic crisis could opt to donate a portion of those funds to the set-aside, provided they obtain consent from their donors before doing so.

Sixth, an autonomous oversight committee would be responsible for managing and allocating funds to religious organizations. This committee would be a government agency, such as the SBA, to separate the funds from government involvement. The agency would ensure that funds are used appropriately and in accordance with the program's guidelines and that the program operates in a transparent and accountable manner. The agency would evaluate applications and distribute funds accordingly while also monitoring and assessing the program's progress in achieving its objectives, including tracking the number of donations received for each religious organization, the funding provided to minority religious organizations, and the program's impact on these organizations. The agency would establish an estimated level of need that would dictate a minimum funding amount for each religious organization, and if they determined that a religious organization was at risk of falling short of that minimum, they could issue a warning. A minimum would also be estimated for the set-aside, based on the estimated level of need of the smaller minority religious organizations collectively.

The program could promote involvement and transparency by providing frequent reports on the distribution of funds and their effect on religious organizations. Moreover, those who contribute to the set-aside would receive information on the religious institutions that benefited from them, after being allocated based on overall necessity. The agency may also establish measures to guarantee the proper usage of funds and impartial allocation, such as obliging participating religious organizations to submit regular reports on the expenditure of funds and conducting audits to ensure compliance. Furthermore, the program should be widely advertised through a variety of platforms, including social media, email newsletters, and local media. This will support awareness of the program and inspire people to provide support to both their own religious organizations and to the minority religious organizations. Religious institutions might do this by publicizing the program to their congregations during services. Likewise, to promote inclusivity and equity, outreach efforts should be made to ensure that all minority religious organizations are aware of the program and know how to apply for funding.

VI. CONCLUSION

All in all, the issue of whether religious organizations should receive taxpayer-funded crisis relief, such as the PPP loan, has become increasingly complex. This issue raises concerns about the blurring of the separation of church and state, particularly with the Supreme Court's development of the nondiscrimination principle. It also raises questions about whether direct funding of religious activities is a unique occurrence due to the COVID-19 pandemic or whether it is the start of a trend towards regular government-provided relief. Looking to Germany's church tax as a model for future programs may be useful in altering this trajectory and protecting individual religious liberty against coercion. Although Germany and the United States approach the church-state dynamic differently, both countries value religious freedom, tolerance, and individual rights. Thus, given the high possibility of a future crisis, adopting Germany's tax system as a blueprint for a crisis relief program for religious institutions could be a valuable approach in mitigating the impact of future crises and preventing any further deterioration of the Establishment Clause of the First Amendment.