Nomos and Narrative in New York: Expanding Religious Liberty Rights, Hasidic Yeshivas, and New York Education Law

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In 1983, Robert Cover challenged the U.S. Supreme Court's approach to conflicts between the law of the state and the religious commitments of "insular communities." Over 40 years later, Cover's call remains urgent, and is of special relevance in New York. In Brooklyn and the Lower Hudson Valley, Hasidic yeshivas with tens of thousands of students seek dispensation from state policy that requires all students to receive a basic secular education. Meanwhile, federal religious liberty jurisprudence, significantly changed since 1983, still fails to satisfyingly arbitrate between the commitments of religious communities and the law of the secular state.

Part I of this Note sets the theoretical and doctrinal stage. It explains the intervention made by Professor Cover in Nomos and Narrative*, outlines the free exercise maximalism of today's Supreme Court, and proposes how Cover's ideas could be used to redeem a religious liberty jurisprudence gone awry. Specifically, as part of determining when the law of the insular religious community must bend before the law of the state, Part I argues that courts should inquire into whether the state's law is paideic (world-creating) or merely regulatory. Part II applies these ideas to the pressing case study of Hasidic education in New York. It provides the reader with an overview of Hasidic education and the current legal landscape. It also cautions that current doctrine is ill-equipped to handle the dilemma. Finally, Part III encourages New York government to articulate its compulsory education law as a world-creating commitment of the state and urges the courts to recognize the legitimacy and necessity of such a claim.*

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INTRODUCTION

Just over 40 years ago, the U.S. Supreme Court decided *Bob Jones University v. United States*.[1] Civil rights lawyers and other advocates correctly celebrated *Bob Jones* as a major win for multiracial democracy in America.[2] In an 8-1 decision, the Supreme Court upheld the Internal Revenue Service's (IRS) revocation of tax-exempt status from Bob Jones University on account of the school's racially discriminatory policies, despite its claims to a religious free exercise exemption.[3]

Professor Robert Cover, however, worried about *Bob Jones*' downstream implications—not because of what the Court had

1. 461 U.S. 574 (1983).

2. *See, e.g.*, Phil Gailey, *Bob Jones, In Sermon, Assails Supreme Court*, N.Y. TIMES, May 25, 1983 at A23, [https://perma.cc/U2NL-PSDZ] (describing "some lawyers in the [U.S. Department of Justice] civil rights division greeting the ruling with backslapping elation" and the positive reaction of Jack Greenberg, then-director of the NAACP Legal Defense and Educational Fund).

3. *Bob Jones Univ.*, 461 U.S. 574 at 602–04.

decided,[4] but because of what the Court had left unsaid. In particular, Cover thought that the Court had left insular religious communities—for instance, the Amish, Mennonites, ultra-Orthodox Jews, etc.[5]—without adequate guidance as to whether their own religious commitments would be forfeit any time they came into conflict with a government policy that was "not wrong" (particularly in the realm of education).[6] In his seminal article *Nomos and Narrative*, Cover argued that the Court's jurisprudence should do more to protect insular communities' commitments against supersession by the secular law of the state.[7] Perhaps, Cover wrote, secular law should only prevail against religious law where the former represents a fundamental commitment of the state itself.[8] According to Cover, such a jurisprudence would protect insular religious communities from unnecessary intrusions upon their deeply held beliefs, and would elevate deserving state interests (such as a rejection of racial discrimination throughout public life) to the level of a constitutional commitment.[9]

In light of recent doctrinal developments in religious liberty jurisprudence, this Note revisits Cover's approach to conflicts between religious and secular law. Over the past decade, the Supreme Court has transformed the United States' religious liberty jurisprudence. It has eased the way for religious claimants to obtain free exercise exemptions from government regulations and has limited state and local governments' ability to withhold public funding from religious institutions. In part, these changes were made possible by the Court's adoption of an expansive understanding of anti-religious discrimination.[10] Taken together, the expansion of free exercise exemptions and increased limitations on a state's ability to withhold public funds functionally

4. *See* Robert Cover, *Court Has High Aim, Bad Plan on Bias*, N.Y. TIMES, July 11, 1983 at A15 [https://perma.cc/7AUX-JJFR] ("The Court's decision and opinion were therefore welcome.").

5. Robert Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV 66–68 (1983).

6. *Id.* at 66.

7. *Id.* at 66–68.

8. *Id.*

9. *Id.*

10. *See infra* Part I.B; *see also* Richard Schragger et al., *Reestablishing Religion*, 91 U. CHI. L. REV. (forthcoming 2024) at 2, 9–28, 50–55.

create a new religious right to public resources without government regulation.[11]

Meanwhile, in New York City and the Lower Hudson Valley, the incongruous requirements of an insular religious community's core commitments and secular government's education policy have generated a legal and political showdown.[12] New York's Hasidic Jewish communities—which are committed to intensive childhood religious education—frequently deny their children anything more than a modicum of secular education.[13] This practice is glaringly noncompliant with New York's compulsory education law.[14]

Guided by Cover's clarion call and using the conflict between Hasidic schools (*yeshivas* or *yeshivot*, in Yiddish[15]) and the New York state government as a case study, this Note makes two recommendations. First, it urges the Supreme Court to retreat from its current religious liberty jurisprudence, in favor of an approach that better allows the state and federal governments to uphold certain fundamental secular commitments, even where application of the law conflicts with a religious commitment.[16] Second, it urges New York to more clearly articulate such a fundamental commitment to basic secular education for all. That commitment is owed both to the children currently denied basic secular education and to the communities that the state may subsequently prevent from fulfilling some of their religious commitments.

Together, these recommendations aim to give courts the tools to adjudicate more fairly between the needs of a pluralist, democratic society and the sometimes-conflicting needs of that

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11. *See infra* Part I.B; *see also* Schragger et al., *supra* note 10, at 2, 9–28, 50–55 ("When these two lines of doctrine are brought together, they create a legal structure in which the state is required to give religious entities preferential treatment as compared with secular counterparts."). Schragger et al. call this new regime "structural preferentialism." *See* Schragger et al., *supra* note 10 at 9.

12. *See infra* Part II.

13. *See infra* Part II.A.

14. *See* N.Y. Educ. L. Ch. 16, tit. IV, art. 65; *see also infra* note 185.

15. Frequently, in Yiddish, *heder* is used to refer to Hasidic primary education and *yeshiva* for secondary education. *Compare Heder*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/heder [https://perma.cc/5VX5-YU9V] *with Yeshiva*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/yeshiva [https://perma.cc/ZPZ3-5X8Z]. For clarity's sake, and to conform to usage in other secular publications, this Note uses "yeshiva" to refer to both.

16. As this Note discusses in further detail, *see infra* Part I.C, it does not suggest that a fundamental commitment should be a bright-line standard by which to measure conflicts between secular law and religious law, but rather that it should be a prominent factor for judicial consideration.

society's insular religious communities. Neither recommendation, on its own, guarantees an equitable outcome. A more express commitment by New York State to basic secular education relies on a federal jurisprudence willing to give weight to that commitment. Conversely, a jurisprudence recognizing the possibility that fundamental state commitments can supersede religious ones requires New York to more clearly elevate its commitment to secular education. Recognizing these constraints, this Note hopes to provide a roadmap for future treatment of New York's Hasidic yeshivas, and for other situations in which government comes into conflict with religious communities.

Accordingly, this Note proceeds in three parts. Part I discusses the theory of *Nomos and Narrative* and corresponding doctrinal developments. Part I.A begins with an introduction to Cover's famous article. Part I.B then discusses recent developments in American religious free exercise jurisprudence. Part I.C analyzes this new jurisprudence using the language and ideas of *Nomos and Narrative*, drawing from Cover's intellectual toolbox to distill and critique the implications of these doctrinal developments. Next, Part II presents New York's Hasidic yeshivas and their conflict with the enforcement of the state's education law as a practical application of the theories described in Part I, arguing that current religious liberty doctrine is ill-equipped to address this conflict. Finally, Part III recommends applying Cover's frameworks to the yeshiva matter, in order to generate an outcome that guarantees children's rights to education while also respecting the religious commitments of New York State's Hasidic communities.

I. RELIGIOUS LIBERTY LAW 40 YEARS AFTER *NOMOS AND NARRATIVE*

A. *NOMOS AND NARRATIVE*—ROBERT COVER'S CHALLENGE TO THE SUPREME COURT

In his 1983 article, *Nomos and Narrative*, Cover introduced the frameworks of paideic and imperial law, and of jurisgenesis and jurispathos.[17] Paideic law is the law of the community (especially in insular religious communities), and serves predominantly as "a

17. *See* Cover, *supra* note 5, at 4.

system of meaning rather than an imposition of force."[18] A primary purpose of paideic law is to inculcate community members into a *nomos*.[19] A nomos, in turn, is a "normative universe" (i.e., a place of narrative and meaning, whose inhabitants are journeying from this fallen world toward the world to come).[20] Once understood as part of a societal narrative, even the driest legal text "becomes not merely a system of rules to be observed, but a world in which we live."[21]

Paideic law is the world-creating law that bridges the gap between society as it is and society as it ought to be.[22] It includes, for instance, laws of dietary restrictions and Sabbath observance, as well as laws governing interpersonal ethics or commitments to charity and social justice.

Imperial law, meanwhile, is the more familiar, more mundane law of the state, "in which law is first and foremost a system of power."[23] Imperial law is "world-maintaining"[24]—the regulatory police power that is familiar to any law student. Cover was clear, however, that paideic law and imperial law are ideal types, which in practice intermingle.[25]

Two related concepts are jurisgenesis and jurispathos. Jurisgenesis is the act of creating law, and jurispathos is the act of

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18. *Id.* at 11–19; *see also* Christine Hayes, *Commentary on Robert M. Cover, "The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*", *in* THE NEW JEWISH CANON: IDEAS AND DEBATES 1980–2015 145, 147 (Yehuda Kurtzer and Claire Sufrin eds., 2020) (introducing the ideas and stakes of a "dense and erudite" piece of writing).

19. *See* Cover, *supra* note 5, at 12–13.

20. *See id.* at 4–5.

21. *Id.* As Cover further asserted, "[n]o set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each decalogue a scripture." *Id.*

22. *See id.* at 9–10, 12–13. In explaining this mediative function of law, Cover juxtaposed the biblical injunction to forgive debts every seventh year with the revelatory image of the lion lying down with the lamb. *Id.* at 9 ("Our visions hold our reality up to us as unredeemed. By themselves the alternative worlds of our visions—the lion lying down with the lamb, the creditor forgiving debts each seventh year, the state all shriveled and withered away—dictate no particular set of transformations or efforts at transformation."). In a sense, debt forgiveness and heaven on earth are two sides of law's bridge. *See id.* ("But law gives a vision depth of field, by placing one part of it in the highlight of insistent and immediate demand while casting another part in the shadow of the millenium [*sic*].").

23. Hayes, *supra* note 18, at 145; *see also* Cover, *supra* note 5, at 13 (introducing imperial law).

24. Cover, *supra* note 5, at 13.

25. *See id.* at 14 ("[N]o normative world has ever been created or maintained wholly in either the paideic or the imperial mode. I am not writing of types of societies, but rather isolating in discourse the coexisting bases for the distinct attributes of all normative worlds.").

killing law.[26] In other words, jurispathos occurs when someone in a position of power—a judge, for example—decides that one law (and its claims on peoples' behaviors and relationships) must give way to another law.[27] Choosing one set of legal claims over another, of course, implies the violence of enforcement; behind every legal judgment from a representative of the secular state sits the state's power to violently enforce that judgment, regardless of whether physical force is actually used.[28]

As Cover emphasized, these frameworks gain special salience when a judge exercises jurispathic powers in the field of education.[29] When a judge decides that the state's commitments regarding secular education should trump an insular religious community's competing commitment, that judge engages in jurispathos—effectively "killing" the religious educational commitment.[30]

Cover wrote *Nomos and Narrative* in the immediate aftermath of *Bob Jones*, in which (as discussed *supra*) the Supreme Court held that the constitutional right to religious free exercise did not prevent the IRS from revoking a religious university's tax exempt status on the grounds that the university's policies contravened a compelling government interest.[31] In response to *Bob Jones*, Cover noted that while the secular state's education law is primarily imperial—that is, regulatory and enforcement-focused—it can also be paideic, by fulfilling a world-creating function. In other words, when the state makes law in the field of education it promotes a constructive vision for the world as it should be.[32] Cover

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26. *See id.* at 11–19 (for discussion of jurisgenesis), 40–44 (for discussion of jurispathos); *see also* Hayes, *supra* note 18, at 145–47 (summarizing each).

27. *See* Cover, *supra* note 5, at 40 ("Courts, at least the courts of the state, are characteristically 'jurispathic.' . . . [The origin of and justification for a court] is understood to be the need to suppress law, to choose between two or more laws, to impose upon laws a hierarchy.").

28. For Cover's (also seminal) article on of the role of violence in the law, see Robert Cover, *Violence and the Word*, 95 YALE L. J. 1601 (1986).

29. *See* Cover, *supra* note 5, at 60.

30. *See id.* at 60 ("The problem is exemplified in the Supreme Court's treatment of competing claims concerning the education of children and youth.").

31. Specifically, the Court held that the IRS was constitutionally permitted to revoke Bob Jones University's tax-exempt status on the basis of the school's policy of forbidding interracial romantic relationships among its students. *See* Bob Jones Univ. v. United States, 461 U.S. 574, 602–04 (1983).

32. *Cf.* SAUL ALISNKY, RULES FOR RADICALS xix (1989) ("That we accept the world as it is does not in any sense weaken our desire to change it into what we believe it should be—it is necessary to begin where the world is if we are going to change it to what we think it should be.").

characterized the United States' interest in eradicating racial discrimination from public life, including at religious universities, as having the potential to fulfill a statist paideic role.[33] Education law, especially when it concerns racial pluralism and nondiscrimination, is a world-creating law of vision and meaning, as much as it is a world-maintaining law of regulatory power.[34]

Nevertheless, Cover expressed displeasure with the Court's reasoning in *Bob Jones*. Despite his agreement with the case's outcome, Cover believed that the majority's opinion left religious communities with little guidance on how to predict when state law would supplant the communities' internal commitments.[35] In the wake of *Bob Jones*, he wrote, "[t]he insular communities . . . are rightly left to question the scope of the Court's decision: are [they] at the mercy of each public policy decision that is not wrong? If the public policy [in *Bob Jones*] has a special status, what is it?"[36]

Over 40 years after Cover posed these questions, it is safe to say that the Supreme Court has practically ignored his call for clarity.[37] The Court has instead opted for other doctrinal paths, as the remainder of Part I explains. Part I.B summarizes the recent

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33. *See* Cover, *supra* note 5, at 65–68 ("[T]he Chief Justice countered the claim of insularity with a narrative of redemption. . . . [T]he Court found that discrimination against blacks in an otherwise tax-exempt religious school contradicted the central redemptive narrative of the struggle for racial equality and for desegregation of the nation's schools."). Cover also, however, acknowledges a danger of a statist paideia, warning of the majority using the state to impose its religious vision upon religious dissenters. *See id.* at 62 ("There must, in sum, be limits to the state's prerogative to provide interpretive meaning when it exercises its educative function. . . . The state might become committed to its own meaning and destroy the personal and educative bond that is the germ of meanings alternative to those of the power wielders.").

34. Inasmuch as the state's education law seeks to correct for America's original sin of race-based slavery, education law in the service of creating multiracial democracy—of fulfilling, finally, the promise of our guiding legal documents such as the Declaration of Independence and U.S. Constitution—is truly inventing "a new world." *See id.* at 65–68 ("[T]he critical factor explaining the decision in *Bob Jones University* is the power of a redemptive constitutionalism that stakes its own claim to reform the life of the schools. Precisely because the school is the point of entry to the paideic and the locus of its creation, the school must be the target of any redemptive constitutional ideology.").

35. *See id.* at 66–68.

36. *Id.* at 66.

37. Federal and state courts, justices, and judges have infrequently, and then only briefly, cited to *Nomos and Narrative*. *See, e.g.*, Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 342 n.3 (1987) (Brennan, J., concurring) (supporting the proposition that to its members, a large religious community "represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals"); *In re* Zyprexa Injunction, 474 F. Supp. 2d 385, 396 (E.D.N.Y. 2007) (discussing civil disobedience); Davenport v. Garcia, 834 S.W.2d 4, 16 n.33 (Tex. 1992) (contextualizing historical importance of Texas's state constitution "being one of the few state constitutions that were derived from its own independent, national constitution").

evolution of federal religious liberty jurisprudence. Part I.C then describes how these cases signify that the Court has implemented an expansive and formalist nondiscrimination doctrine (rather than one that focuses on the competing commitments of religious communities and the secular state), creating a glide path for a religious claimant to either procure exemption or to require government funding for its religious activities.[38]

B. THE SUPREME COURT'S CHANGING RELIGIOUS LIBERTY JURISPRUDENCE—FREE EXERCISE EXEMPTIONS AND GOVERNMENT FUNDING

This section discusses two areas in which the Supreme Court has expanded free exercise rights.[39] First, the Court has expanded access to religious exemptions from various laws and regulations. Second, the Court has expanded access to government funding for religion. Both trends, as alluded to here but described in more detail in Part I.C, include a heightened judicial willingness to find—indeed, arguably hunt for—government discrimination against religion.

Employment Division v. Smith, a 1990 decision which established that the government need not grant a religious exemption to a law that is "neutral" and "of general applicability," set the stage for recent developments in the doctrine of free exercise exemptions.[40] *Smith*'s central holding was that a law that is "neutral" and "generally applicable" does not—merely by virtue of mandating conduct in conflict with an individual's religious commitments—violate an individual's free exercise rights.[41] But

38. *See* Schragger et al., *supra* note 10, at 9–21.

39. The United States' commitment to free exercise—most basically understood as the right to practice religion—stems from the First Amendment, which begins by decreeing that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I. The First Amendment's commitment to free exercise is bound up with a proscription of laws "respecting an establishment of religion," typically understood as representing a commitment to government abstention from support of or interference with religion. Together, the Establishment and Free Exercise Clauses make up the First Amendment's "Religion Clauses." The two clauses are implicitly in tension with one another and either, "if expanded to a logical extreme, would tend to clash with the other." Walz v. Tax Comm'n, 397 U.S. 664, 668–69 (1970).

40. 494 U.S. 872, 879–82 (1990).

41. *Id.* at 879. As the Court put it, "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Id.* (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (Stevens, J.,

as subsequent case law emphasized, if the law failed this inquiry into neutrality and general applicability, the court would apply strict scrutiny, which in turn would likely result in the exemption's being granted.[42] For nearly 30 years after *Smith*, the Supreme Court applied its central holding to strike down a government regulation only once,[43] in *Church of the Lukumi Babalu Aye v. City of Hialeah*.[44]

Smith is widely considered the low-water mark of free exercise doctrine;[45] supporters of expanded religious liberty rights have

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concurring)). *See also* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993) ("[O]ur cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice."). In *Smith*, the Supreme Court found that an Oregon law prohibiting possession of peyote, a controlled substance, was neutral and generally applicable. *See Smith*, 494 U.S. at 878.

42. *See Lukumi*, 508 U.S. at 546 ("A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. . . . A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases."). Prior to *Smith*, *Sherbert v. Verner* had required the application of strict scrutiny to any law that substantially burdens a person's religious practice. 374 U.S. 398, 403, 406–09 (1963) (requiring compelling state interest to justify burden on appellant's religious practice). *Smith* sharply circumscribed *Sherbert*, limiting the application of strict scrutiny to government actions that fail to be neutral and of general applicability. *Smith*, 494 U.S. at 879–82; *see also* Fulton v. City of Phila., 593 U.S. 522, 533–34 (2021) ("*Smith* held that laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable. . . . *Smith* later explained that the [law] in *Sherbert* was not generally applicable" and so remained subject to strict scrutiny even under *Smith*.). For the proposition that strict scrutiny in such cases is particularly well set up to be fatal in fact, see Zalman Rothschild, *Free Exercise's Lingering Ambiguity*, 11 CAL. L. REV. ONLINE 282, 284 n.13 (2020).

43. *See* Schragger et al., *supra* note 10, at 15; Douglas Laycock & Steven T. Collins, *Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. 1, 5 (2016).

44. 508 U.S. 520 (1993). The question presented was whether municipal ordinances that sharply restricted animal sacrifice violated the free exercise rights of a Santería church. *See id.* at 525–28. The Santería faith, which grew out of the convergence of Christian Catholicism, various African religions, and various indigenous Caribbean religions, includes ritual animal sacrifice among its practices. *See id.* at 524–25. Focusing on the legislative record, which established that the City Council's efforts were focused specifically on Santería practices, and the practical impact of the ordinances, which fell nearly exclusively on the practice of Santería, the Court ruled that the ordinances were not neutral and generally applicable; rather, they targeted particular religious practices that the city found distasteful. *See id.* at 534–39, 545–47. Applying strict scrutiny, the Court found that even to the extent that the government articulated compelling government interests, including promoting public health and avoiding animal cruelty, the ordinances were not sufficiently narrowly tailored to achieving those interests. *Id.* In other words, the regulations amounted to a religious gerrymander, impermissibly proscribing a specific religious activity and thereby discriminating against a religious tradition. *See id.* at 534–37, 542.

45. *See, e.g.*, Laycock & Collins, *supra* note 43, at 1, 6 (describing the years between *Smith* and *Lukumi* as "bleak for religious liberty").

encouraged its abandonment.[46] While the Court has not yet overturned *Smith*, its decisions in recent years have increasingly cabined the case[47] by articulating new ways for free exercise claimants to successfully pursue a religious liberty exemption from government-imposed legal obligations.[48] For this Note's purposes, cases enshrining these new pathways to religious liberty exemptions can be loosely divided into three main categories. First, the Court has been increasingly willing to find unconstitutional anti-religious animus (i.e., discrimination) in the government's application of a facially neutral and generally applicable law.[49] Second, the Court has adopted—although arguably only partially—an "equal value" standard for neutrality and general applicability, which rejects the government's ability to grant exemptions to a law for secular reasons, while withholding (i.e., discriminating against) religious exemptions.[50] Third, the Court has held that where an administrator or executive has the power to grant an individualized exemption to a regulation, it must grant such an exemption if requested for religious reasons.[51]

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46. *E.g.*, Michelle Boorstein, *Religious Conservatives Hopeful New Supreme Court Majority Will Redefine Religious Liberty Precedents*, WASH. POST (Nov. 3, 2020), https://www.washingtonpost.com/religion/2020/11/03/supreme-court-religious-liberty-fulton-catholic-philadelphia-amy-coney-barrettt/ [https://perma.cc/5MVE-XE6B].

47. Richard Schragger & Micah Schwartzman, *Religious Freedom and Abortion*, 108 IOWA L. REV. 2299, 2317–18 (2023) ("[R]ecent cases have interpreted free exercise expansively and limited *Smith* substantially or not applied it at all. . . . *Smith* persists, but its scope has been narrowed significantly."); Nelson Tebbe, *The Principle and Politics of Equal Value*, 121 COLUM. L. REV. 2397, 2422 n.145 (2021) (collecting sources); Douglas Laycock & Thomas C. Berg, *Protecting Free Exercise Under* Smith *and After* Smith, 2020–21 CATO SUP. CT. REV. 33, 33–38 (describing the recent strengthening of *Smith*'s "protective rule," i.e., the increasing ways in which exemptions can now be granted under *Smith*, but without formally overruling *Smith*.).

48. *See, e.g.*, Schragger et al., *supra* note 10, at 15–18 (describing a multi-pronged "abandonment" of *Smith*); Jim Oleske, *Fulton Quiets Tandon's Thunder: A Free Exercise Puzzle*, SCOTUSBLOG (Jun. 18, 2021), https://www.scotusblog.com/2021/06/fulton-quiets-tandons-thunder-a-free-exercise-puzzle/ [https://perma.cc/JSR3-6V5Z] (discussing the Court's recent past decisions' impact on and potential future options for overruling or hollowing out *Smith*).

49. *See, e.g.*, Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L. REV. 133, 134–54 (2018) (discussing Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 584 U.S. 617 (2018)).

50. *See, e.g.*, Tebbe, *supra* note 47; Alexander Gouzoules, *Clouded Precedent:* Tandon v. Newsom *and Its Implications for the Shadow Docket*, 70 BUFF. L. REV. 87, 91–93 (2022) (assessing the staying power of this new doctrine).

51. *See, e.g.*, Schragger et al. *supra* note 10, at 15–16 ("[T]he more important shifts in free exercise doctrine have focused on the concept of general applicability. . . . In effect, the Court [in *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021)] held that the government had to grant a religious exemption because it could have granted one, even though it had never done so.").

In 2018's *Masterpiece Cakeshop*, the Court brought the first exemption category to light by holding that a law, even if facially neutral and generally applicable, cannot be applied in a way that demonstrates animus (or hostility) toward religion.[52] There, Jack Phillips, the owner of the eponymous cakeshop, cited his religious objections to same-sex marriage in refusing to create a wedding cake for Charlie Craig and Dave Mullins, a same-sex couple.[53] Craig and Mullins filed a discrimination complaint with state authorities, alleging a violation of the Colorado Anti-Discrimination Act.[54] Phillips appealed rulings against him at every administrative and judicial level, eventually reaching the U.S. Supreme Court.[55]

There, a 7-2 majority ruled for Phillips.[56] Although Colorado's anti-discrimination statute did not itself violate the neutrality principle, the Court found that the Colorado Civil Rights Commission had applied the law prejudicially, which did violate the neutrality principle, and with it Phillips' free exercise rights.[57] In support of this finding, the Court pointed to statements made during the Commission's deliberations, during which a member compared Phillips' beliefs to faith-based defenses for slavery and the Holocaust.[58] Administrators, the Court held, "cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices."[59]

Initially regarded as a narrow opinion,[60] *Masterpiece Cakeshop* has since had a profound impact on free exercise jurisprudence.

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52. 584 U.S. 617, 625, 638–40 (2018).

53. *Id.* at 625–27.

54. *See id.* at 628. Upon investigation, the Colorado Civil Rights Division found probable cause of a violation and appropriately referred the matter to the Colorado Civil Rights Commission. *See id*. at 628–29. After a formal hearing before a state administrative law judge, decision, and appeal, the Commission ultimately affirmed in full a ruling in favor of Craig and Mullins. *See id.*

55. *See id*. at 629–30.

56. *See id*. at 619.

57. *See* 584 U.S. at 638–39.

58. *See id*. at 635.

59. *Id*. at 638. The Court's interpretation of the record has been heavily criticized, with some observers contending that it "misread the facts to find intentional hostility in the application of civil rights law where none existed." *See* Kendrick & Schwartzman, *supra* note 49, at 135; s*ee also* ANDREW SEIDEL, AMERICAN CRUSADE: HOW THE SUPREME COURT IS WEAPONIZING RELIGIOUS FREEDOM 53–56 (2022) (ebook) (describing the Court's characterization of the Colorado civil rights commissioner's statements as "unfounded" and "so disingenuous as to be dishonest").

60. Chad Flanders & Sean Oliveira, *An Incomplete Masterpiece*, 66 UCLA L. REV. DISCOURSE 154, 156–57 (2019); *see also* Kendrick & Schwartzman, *supra* note 49, at 149

For example, dissenting from the Court's decision in the 2021 case *Dr. A. v. Hochul* (denying a request for a court-mandated free exercise exemption to New York State's COVID-19 vaccine requirement for healthcare workers),[61] Justice Gorsuch implied that even "slight suspicion" of "animosity to religion or distrust of its practices"—as articulated in *Masterpiece*—removes the case completely from the *Smith* neutrality and general applicability inquiry.[62] According to Justice Gorsuch, such a finding should mean that the government action is automatically "set aside" as "unconstitutional as applied to" the party or parties seeking religious exemption.[63] In *Dr. A.*, he argued, statements from Governor Kathy Hochul—that there was no "sanctioned religious exemption [to vaccination] from any organized religion," that "everybody from the Pope on down is encouraging people to get vaccinated," and that "God wants" people to get vaccinated—demonstrated animus.[64] Six months later, Justice Gorsuch articulated this position again in a footnote to his majority opinion in *Kennedy v. Bremerton School District*, treating his interpretation of *Masterpiece Cakeshop* as a doctrinal *fait accompli*, although not necessary to decide the case at hand.[65] Specifically, Justice Gorsuch wrote that when "'official expressions of hostility' to religion accompany laws or policies burdening religious exercise," the Supreme Court will "'set aside' such policies without further inquiry."[66]

The search for impermissible anti-religious animus is thus one way a court may now find evidence of an unconstitutional denial of a free exercise exemption.[67] Another is by finding that the

(2018) ("It is not clear, however, whether the Court's adoption of this approach will have significance beyond the facts of *Masterpiece*.").

61. 142 S. Ct. 552 (2021).

62. *Id.* at 555 (Gorsuch, J., dissenting) (citing *Masterpiece Cakeshop*, 584 U.S. at 638–39).

63. *Id.*

64. *Id.*

65. 597 U.S. 507, 525 n.1 (2022) (quoting *Masterpiece Cakeshop*, 584 U.S. at 639).

66. *Id.* (quoting *Masterpiece Cakeshop*, 584 U.S. at 639). At least one federal court has treated "official expressions of hostility to religion"—as articulated in the *Bremerton* footnote—as a third track by which a plaintiff can trigger a strict scrutiny analysis, alongside the two *Smith* tracks of lack of neutrality and a lack of general applicability. *See* Doe No. 1 v. Att'y Gen. of Indiana, 630 F. Supp. 3d 1033, 1044 (S.D. Ind. Sept. 26, 2022), *rev'd and remanded sub nom*, Doe v. Rokita, 54 F.4th 518 (7th Cir. 2022), *reh'g denied sub nom*. Doe No. 1 v. Rokita, 2022 WL 17980064 (7th Cir. Dec. 28, 2022), *cert. denied*, 143 S. Ct. 2437 (2023).

67. The corollary, of course, is that free exercise exemptions have one more path by which to succeed.

government has impermissibly discriminated against religion's role in society—specifically, by granting exemptions to laws or regulations for other, secular purposes, to the exclusion of religious exemptions.[68] In legal practice and academia, this concept has a number of different names.[69] This Note uses the terms "equal value" or "equal value doctrine," which refer to the idea that if a religious exemption is not granted alongside a secular exemption, that religious exercise has been impermissibly "devalued."[70]

By any name, equal value represents a break with past free exercise jurisprudence, at least to the extent adopted by the Supreme Court.[71] The "conventional understanding" of *Smith*'s neutrality and general applicability inquiry is that it protects against intentionally anti-religious government action.[72] But secular exemptions to otherwise neutral and generally applicable laws are everywhere in our highly regulated world, and critics charge that without a clear limiting principle, the equal value doctrine makes it nearly impossible for many laws to survive the *Smith* inquiry.[73] The concern is that a maximalist application of equal value would require governments to grant religious exemptions to any law that included a nonreligious exemption.

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68. *See* Tandon v. Newsom, 593 U.S. 61, 62 (2021); *see also* Tebbe, *supra* note 47, at 2399 (describing the concept).

69. *See, e.g.*, Elizabeth Reiner Platt et al., *We the People (of Faith): The Supremacy of Religious Rights in the Shadows of a Pandemic*, L. RTS. AND RELIGION PROJECT, 12–13 (2021) (referring to "comparability"); Vikram David Amar & Alan E. Brownstein, *Exploring the Meaning of and Problems With the Supreme Court's (Apparent) Adoption of a "Most Favored Nation" Approach to Protecting Religious Liberty Under the Free Exercise Clause: Part One in a Series*, VERDICT L. ANALYSIS AND COMMENTARY FROM JUSTIA (Apr. 30, 2021) (referring to "most-favored nation" doctrine and explaining that it derives from the arena of international trade, "in which some nations are entitled to be treated at least as well as any other nation is being treated").

70. *See* Tebbe, *supra* note 47, at 2399.

71. Gouzoules, *supra* note 50, at 91 (arguing that *Tandon v. Newsom* "articulated a dramatic reinterpretation of the longstanding *Smith* standard."); Schragger et al., *supra* note 10 at 50 (arguing that *Tandon* "has eviscerated *Employment Division v. Smith*, even without formally overruling it.").

72. Jim Oleske, *Tandon steals Fulton's thunder: The most important free exercise decision since 1990*, SCOTUSBLOG (Apr. 15, 2021), https://www.scotusblog.com/2021/04/tandon-steals-fultons-thunder-the-most-important-free-exercise-decision-since-1990/ [https://perma.cc/V92T-276K]. *But see generally* Rothschild, *supra* note 42 (contrasting "narrow" and "broad" views of the general applicability inquiry).

73. *See, e.g.*, Platt et al., *supra* note 69, at 12–13 ("A sampling of the types of laws that currently contain limits or exemptions includes school vaccination mandates (medical exemptions), employment and housing antidiscrimination laws (exemptions for small employers and landlords), minimum wage laws (exemptions for tipped and contract workers), gun laws (exemptions for security guards) and traffic laws (exemptions for emergency and high occupancy vehicles).").

Under this conception of the equal value approach, every individual could, by claiming a religious exemption, "become a law unto himself."[74]

Fraternal Order of Police Newark Lodge Number 12 v. City of Newark illustrates the equal value doctrine in action by providing an example of an impermissible devaluation of religion.[75] In 1999, the Third Circuit—with then-Judge Samuel Alito writing the majority opinion—ruled in favor of two Sunni Muslim police officers seeking exemptions from the Newark Police Department's "no-beard" rule. The court held that because the department offered a secular medical exemption to its policy, its failure to provide a corresponding religious exemption was "sufficiently suggestive of discriminatory intent to trigger heightened scrutiny under *Smith* and *Lukumi*."[76]

Equal value made its Supreme Court debut in April 2021. In *Tandon v. Newsom*, worshippers sought injunctive relief against California's ban on private gatherings of more than three households, which had been instituted as a public health measure to curb the spread of COVID-19.[77] The Court held in a per curiam

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74. Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 879 (1990) (quoting Reynolds v. United States, 98 U.S. 145, 166–67 (1878)). Although "[t]he possibility of free exercise claimants asserting sham claims should not preclude the development of free exercise jurisprudence recognizing the legitimacy of free exercise exemptions in appropriate circumstances . . . the risks of sham claims are not immaterial." Amar & Brownstein, *supra* note 69.

75. 170 F.3d 359 (3d Cir. 1999) *cert. denied*, 528 U.S. 817 (1999); *see also*, *e.g.*, Tebbe, *supra* note 47, at 2410–12; Amar & Brownstein, *supra* note 69 (citing *Fraternal Order of Police*).

76. *Fraternal Order of Police*, 170 F.3d at 364–66. The Third Circuit distinguished this case from *Smith*, noting that in the latter, Oregon also provided a medical exemption to its policy: possession of a controlled substance was legal if prescribed by a medical practitioner. *Id.* at 366 (citing *Smith*, 494 U.S. at 874). But the *Fraternal Order* court maintained that whereas Newark Police Department's secular medical exemption undermined its governmental interest in fostering a uniform appearance, Oregon's secular medical exemption did not necessarily undermine its "interest in curbing the unregulated use of dangerous drugs." *Fraternal Order*, 170 F.3d at 365–66. The court held that Oregon's secular exemption was more like the police department's exemption for undercover officers, who were not held out to the public as examples of law enforcement, and therefore did not undermine the purpose of the department's no-beard rule. *See id.* at 366–67. In other words, the government may grant a secular exemption but withhold a religious exemption—without impermissibly "[making] a value judgment in favor of secular motivations"—when the secular exemption "does not undermine" the government's stated interest in the regulation. *Id*.

77. 593 U.S. 61 (2021) (per curiam). Given *Tandon*'s status as an emergency docket decision, without the benefit of full briefing or oral argument, there is some debate about the equal value doctrine's binding precedential authority. *See* Gouzoules, *supra* note 50, at 123 (describing a mixed level of adoption among the lower courts). *But see* Stephen I. Vladeck, *The Most-Favored Right: Covid, the Supreme Court, and the (New) Free Exercise*

opinion that "government regulations are not neutral and generally applicable . . . whenever they treat *any* comparable secular activity more favorably than religious exercise."[78] Because the state allowed gatherings of over three households for secular activities such as indoor restaurant dining, it was obligated to provide similar exemptions for religious worship.[79]

The final piece of the new religious exemptions puzzle is *Fulton v. City of Philadelphia*'s rule that an executive's or administrator's ability to disperse individualized exemptions to a regulation—even if never used—means that a law is not neutral and generally applicable toward religion.[80] In *Fulton*, petitioner Catholic Social Services of Philadelphia (CSS), a religious foster care agency,

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Clause, 15 N.Y.U. J.L. & LIBERTY 699, 734 (2022) (arguing that a majority of the Court viewed it—and other COVID-19 shadow docket cases—as binding precedent).

78. *Tandon*, 593 U.S. at 62 (emphasis in original). Whether a secular activity is "comparable" to religious exercise is determined by the deleterious effect that the regulation seeks to avoid, *id.*, not, as Justice Kagan urged in dissent, by similarities between the exempted secular activity and the non-exempted religious activity, *see id.* at 65–66 (Kagan, J., dissenting). Thus, the state's ban on gatherings of more than three households as applied to worshippers was evaluated by its exemptions for activities like grocery shopping—something that, according to the Court, could spread COVID-19 just as easily a private worship—and not by its lack of exemptions for secular household gatherings. *See id.*

79. *See id. Tandon* built upon other COVID-era cases like *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14 (2020) (per curiam), which resulted in an emergency injunction suspending enforcement of a New York executive order capping attendance at religious services, as the order applied to applicants. *See Tandon*, 593 U.S. at 62–63. In *Roman Catholic Diocese*, applicants were two groups representing Catholic churches and Orthodox synagogues; because the state applied no attendance cap to a lengthy list of "essential businesses," its restrictions on houses of worship were found to be fatally lacking in neutrality. 592 U.S. at 16–18. Earlier COVID-19 cases in which the equal value discussion percolated—specifically, debate over the correct secular comparators to houses of worship—include *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613–14 (2020) (denying application for injunctive relief granting a free exercise exemption from a California executive order capping attendance at places of worship). *Compare South Bay United Pentecostal*, 140 S. Ct. at 1613 (Roberts, C.J., concurring) ("Similar or more severe restrictions apply to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time. And the Order exempts or treats more leniently only dissimilar activities, such as operating grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods."), *with South Bay United Pentecostal*, 140 S. Ct. at 1614 (Kavanaugh, J., dissenting) ("The basic constitutional problem is that comparable secular businesses are not subject to a 25% occupancy cap, including factories, offices, supermarkets, restaurants, retail stores, pharmacies, shopping malls, pet grooming shops, bookstores, florists, hair salons, and cannabis dispensaries.") *and* Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2612 (2020) (Kavanaugh, J., dissenting) (referring favorably to the idea that "[Supreme Court] precedents grant 'something analogous to most-favored nation status' to religious organizations") (quoting Douglas Laycock, *The Remnants of Free Exercise*, 1990 S. CT. REV. 1, 49–50 (1990)).

80. 593 U.S. 522, 533, 537 (2021).

sought an exemption from the nondiscrimination requirements of Philadelphia's "standard foster care contract," which required CSS to certify same-sex couples as foster parents.[81] The Court, with Chief Justice Roberts writing for the majority, focused on the Philadelphia Human Services Commissioner's "sole discretion" to excuse foster agencies from the nondiscrimination provision.[82] It found that this discretion constituted a built-in "mechanism for individualized exemptions" to the nondiscrimination requirement.[83]

Because the Commissioner retained the power to make discretionary exemptions, the nondiscrimination provision was "not generally applicable."[84] And because the provision was not generally applicable, the denial of a religious exemption amounted to impermissible discrimination against religion.[85] "We have never," the Court admonished, "suggested that the government may discriminate against religion when acting in its managerial role."[86]

In addition to religious exemptions, the Supreme Court has recently broadened its recognition of free exercise rights to government funding. From the mid-twentieth to the early twenty-first centuries, the Establishment Clause was the locus of constitutional contention over government funding of religion.[87]

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81. This contract provision was contrary to CSS's Catholic ideals. *See id.* at 526–31. The contract in question was for CSS to provide foster care services, such as placement of foster children with foster parents, on Philadelphia's behalf. *Id.* at 529–30. Philadelphia also pointed toward nondiscrimination requirements of its Fair Practices Ordinance. *Id.* at 538. This latter aspect of the case, however, was resolved based on the Court's interpretation of public accommodations law, *id.* at 540, and is therefore not directly relevant for this Note.

82. *See id.* at 534–36.

83. *Id.* at 533.

84. *Id.* at 537.

85. *See* 593 U.S. at 540, 543.

86. *Id.* at 536. The case accordingly fell entirely out of *Smith*'s authority and into a strict scrutiny analysis, which it ultimately failed. *Id.* at 541 ("Because the City's actions are therefore examined under the strictest scrutiny regardless of *Smith*, we have no occasion to reconsider that decision here.").

87. For example, in 1947's Everson v. Board of Education, 330 U.S. 1 (1947), the question before the Court was whether government could legally reimburse parents for the expense of bussing their children to parochial schools. The Court answered in the affirmative. As recently as 2002's Zelman v. Simmons-Harris, 536 U.S. 639 (2002), the Court answered a similar question—whether the state of Ohio could put public funds toward sectarian school tuition costs—the same way. In both cases, the overarching issue was whether a government was permitted to send taxpayer funds toward religious institutions, without unconstitutionally supporting religion in violation of the Establishment Clause. *See Everson*, 330 U.S. at 8; *Zelman*, 536 U.S. at 643–44, 649. Accordingly, the challenges

Over the past decade, however, the framing of these cases has flipped. As a constitutional matter, government funding for religious education is no longer an Establishment Clause issue, but rather a Free Exercise Clause issue.

A recent trio of cases illustrates this switch. In *Trinity Lutheran v. Comer*, *Espinoza v. Montana Department of Revenue*, and *Carson v. Makin*, the question has not been whether government is permitted to send taxpayer funds toward religious institutions, but rather whether government must allow taxpayer funds to be used at those institutions when such funds are available for use at similarly situated, nonreligious institutions.[88] In each case, the plaintiffs alleged unconstitutional government discrimination on the basis of religion,[89] and in each, the Supreme Court ruled in favor of the plaintiffs. In *Trinity Lutheran*, the Court held that a church could not be disqualified, based on its status as a church, from receiving a government grant for playground refurbishment offered by the Missouri Department of Natural Resources.[90] In *Espinoza*, the Court held that Montana could not stop a family from using a publicly funded scholarship (intended for use at a nonpublic school) at a religious school.[91] In *Carson*, the Court reaffirmed *Espinoza*, and went one step further. At issue in *Carson* was Maine's tuition voucher program. Given the sparsely distributed population in parts of Maine, public schools are few and far between in certain areas, and the voucher program provided tuition assistance to families that opted to send their children to nonpublic schools instead.[92] Maine contended that money from the voucher program could not be used to fund attendance at religious schools for fear of violating the Establishment Clause.[93] Plaintiffs—Maine parents who wished to use the voucher program to pay for their children's tuition at

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in these cases came from taxpayers alleging unconstitutional use of public funds. *See Everson*, 330 U.S. at 8; *Zelman*, 536 U.S. at 648.

88. *See* Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449 (2017); Espinoza v. Mont. Dep't of Revenue, 591 U.S. 464 (2020); Carson *ex rel* O. C. v. Makin, 596 U.S. 767 (2022).

89. *See Trinity Lutheran*, 582 U.S. at 449–48; *Espinoza*, 591 U.S. at 471; *Carson*, 596 U.S. at 771.

90. *See Trinity Lutheran*, 582 U.S. 449.

91. *See Espinoza,* 591 U.S. at 487.

92. *See Carson*, 596 U.S. at 773–74.

93. *See id.* at 774–75.

religiously affiliated schools—argued that this denial violated their free exercise rights.[94]

The Court rejected the First Circuit's holding that the recently decided *Espinoza* case did not govern the situation in *Carson*. While both cases dealt with free exercise claims against a state's prohibition on families putting government funding toward tuition at religious schools, the First Circuit had opined that *Espinoza* only applied where the state denied application of government funding to tuition based solely on the school's religious status (i.e., the very fact that it was a parochial school).[95] Maine, the First Circuit found, was denying funding based on the school's intended religious use of those funds in its educational program (i.e., the teaching of religious doctrine).[96] The Supreme Court rejected this "status-use" distinction. It clarified that just as a state could not deny a family's use of public funds for tuition money because of the recipient school's religious status, the state also could not deny a family's use of public funds for tuition money because of religious content in the recipient school's curriculum.[97] Status- and use-based denials alike, the Court held, constituted impermissible government discrimination against religion, and, as such, violated the Free Exercise Clause.[98] The Court summarized that a state may not "exclude religious persons from the enjoyment of public benefits on the basis of their anticipated religious use of the benefits."[99] Gone, therefore, are the days where the question before the Court would be whether the state could fund religious activity. Now, the question is whether the state must fund

94. *See id.* at 776.

95. *See id.* at 777.

96. *See id.* at 785–86.

97. *See id.* at 786–788. For more on the short-lived "status-use" distinction, see generally Michael Bindas, *Using My Religion:* Carson v. Makin *and the Status/Use (Non)distinction*, 2021–2022 CATO SUP. CT. REV. 163.

98. *See Carson*, 596 U.S. at 787–88.

99. *Id.* at 789. In *Trinity Lutheran*, *Espinoza*, and *Carson* alike, the respective government defendants justified their policy of denying certain funds to religious groups at least in part on antiestablishment grounds, including constitutional commitments against the government funding of religion (also known as no-aid commitments). *See Trinity Lutheran*, 582 U.S. at 462–63; *Espinoza*, 591 U.S. at 464, 470; *Carson*, 596 U.S. at 781. Missouri and Montana based their defenses on their respective state constitution's antiestablishment provisions (Blaine Amendments), whereas Maine based its defense on the federal Constitution's Establishment Clause. In each case, however, the Supreme Court rejected this argument. *See Trinity Lutheran*, 582 U.S. at 467; *Espinoza*, 591 U.S. at 488–89; *Carson*, 596 U.S. at 781. These three cases therefore highlight a shift in the balance of power between the Establishment Clause and the Free Exercise Clause in educational funding cases; free exercise has won the tug-of-war.

religious activity—or risk impermissibly discriminating against religion.[100] The answer, increasingly, is yes.

It is important to read the expanding right to government funding of religion in light of the expanding right to free exercise exemptions in *Masterpiece Cakeshop*, *Tandon*, and *Fulton*. Together, these rights effectively create a religious entitlement to government resources without government regulation. In a recent article, Professor Michael A. Helfand asked whether or not Maine could, after *Carson*, nevertheless condition a school's eligibility to ultimately receive public money upon compliance with Maine's antidiscrimination law.[101] He answered that while there is presumably no constitutional issue with such a condition in and of itself, the religious school might still be able to induce a free exercise exemption from such conditions, if it could prove a lack of neutrality or general applicability in the antidiscrimination law.[102] This result—a religious institution receiving government resources while simultaneously being free from government

100. Unfortunately, this Note lacks space for an expanded discussion of the role of Locke v. Davey, 540 U.S. 712 (2004) and the concept of the "play between the joints" of the Religion Clauses in this development—that is, the idea that there are times when the government may fund religious activity without violating the Establishment Clause but can also legitimately choose not to fund such activity without violating the Free Exercise Clause. *See generally* Thomas C. Berg & Douglas Laycock, Espinoza*, Government Funding, And Religious Choice*, 35 J.L. & RELIGION 361, 368–70 (2020) *and* Michael Bindas, *supra* note 97, at 187 (discussing recent Supreme Court treatment of *Lock v. Davey*). *Compare Trinity Lutheran*, 582 U.S. at 458 ("[W]e have recognized that there is 'play in the joints' between what the Establishment Clause permits and the Free Exercise Clause compels.") (citation omitted), *with Carson*, 596 U.S. at 789 (Breyer, J. dissenting) ("The majority also fails to recognize the 'play in the joints' between the two Clauses.") (citation omitted), *and Carson*, 596 U.S. at 808–09 (Sotomayor, J. dissenting) ("From a doctrinal perspective, the Court's failure to apply the play-in-the-joints principle here leaves one to wonder what, if anything, is left of it. . . . Today, the Court leads us to a place where separation of church and state becomes a constitutional violation.") (citations omitted).

101. *See* Michael A. Helfand, *There Are No Unconstitutional Conditions on Free Exercise*, 98 NOTRE DAME L. REV. REFLECTION S50, S64–67 (2023).

102. *See id.* Helfand offers this hypothetical to make the larger point that in such a situation, the "unconstitutional conditions doctrine" does no separate doctrinal work from that of the Free Exercise Clause. *See id.*

regulation—equates to a "preferred funding regime"[103] for religion.[104]

Such a regime for religion is normatively problematic, especially in the context of religious schooling. In his article *When Religion and the Public-Education Mission Collide*, Professor Derek W. Black sounded a post-*Carson* alarm bell, arguing that the Supreme Court has destabilized the future of public education in favor of taxpayer-funded, but democratically unaccountable, religious education.[105] Black wrote that while the Supreme Court has, historically, "repeatedly emphasized the centrality of public education to the nation's democratic project and individuals' chances in life,"[106] its recent jurisprudence aligns with a political project that systematically defunds public schools in favor of nonpublic religious schools.[107] These nonpublic religious schools frequently lack accountability for educational outcomes and often fail to protect students against discrimination on the basis of race, disability status, or sexual orientation and gender identity.[108]

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103. See Elliot Ergeson, *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, 2692 (2022) ("The Supreme Court's strong Establishment Clause jurisprudence of the past has been replaced by an equal funding doctrine. This doctrine, on its own, raises significant Establishment Clause concerns, but, when coupled with the general doctrinal pattern of narrowing the Establishment Clause and broadening the Free Exercise Clause, the potential for an explicit preferred funding regime looms large."). This collision is also referred to as "structural preferentialism." *See* Schragger et al., *supra* note 10, at 2, 9–28, 50–55 ("When these two lines of doctrine are brought together, they create a legal structure in which the state is required to give religious entities preferential treatment as compared with secular counterparts.").

104. Had *Bob Jones* been decided differently (i.e., had the Court allowed the university to receive tax exempt status while simultaneously breaking federal antidiscrimination law), the case arguably would have represented a similar preferred funding regime for religion. Bob Jones University would have simultaneously received a free exercise exemption from a government policy forbidding racial discrimination, alongside government funding, in the form of a federal tax exemption.

105. *See* Derek W. Black, *When Religion and the Public-Education Mission Collide*, 132 YALE L.J. F. 559 (2022); *see also* Aaron Saiger, *School Funding Under the Neutrality Principle: Notes on a Post-Espinoza Future*, 88 FORDHAM L. REV. ONLINE 213 (2019) (anticipating a possible future in which the government is compelled to fund religious schools on an equal basis to public schools). *But see* Aaron Tang, *Who's Afraid of Carson v. Makin?*, 132 YALE L.J. F. 504 (2022) (arguing that *Carson* does not threaten public education, but rather motivates good lawmaking and education policy).

106. Black, *supra* note 105, at 575 (collecting citations).

107. In Utah, a pro-voucher lobbyist was caught on tape saying that her end goal was to "destroy public education" by taking money directly from public education and putting it into school choice programs. *See* Courtney Tanner, *Utah Voucher Lobbyist Apologizes for Saying She Wanted to 'Destroy Public Education'*, SALT LAKE TRIB. (Jan. 24, 2023), https://www.sltrib.com/news/education/2023/01/24/utah-voucher-lobbyist-apologizes/ [https://perma.cc/82LU-3HKZ].

108. *See* Black, *supra* note 105, at 586, 591–92.

Black noted that since the Great Recession, public funding of nonpublic schools via voucher programs has increased exponentially in states across the country.[109] Furthermore, nearly 70% of American nonpublic schools are religiously affiliated, and 78% of nonpublic school students are enrolled in those schools.[110] Concurrently, states have dramatically defunded public schools by nearly $600 billion nationwide.[111] All in all, Professor Black argued, states are "starving public schools and incentivizing exit to nonpublic schools" that are predominantly religious and democratically unaccountable.[112]

C. REVISITING *NOMOS AND NARRATIVE*—AN UNSATISFYING ANSWER TO ROBERT COVER

This Note proposes that the above cases represent more than just the sum of their holdings—more even than the possibility of a preferred funding regime for religion. Rather, the Supreme Court has given Cover an answer (albeit an unsatisfactory one), 40-plus years after he questioned its religious liberty jurisprudence. Cover asked, at the time, whether an insular religious community's paideic, world-creating commitments are "at the mercy of each public policy decision that is not wrong."[113] The Court's is "no." Religious communities are not at the mercy of "each public policy decision that is not wrong"; rather, as a general rule, they are in practice entitled to exemptions from those policy decisions.[114]

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109. *See id.* at 588–89.

110. *See id.* at 585 (citing *Statistics About Nonpublic Education in the United States*, U.S. DEP'T OF EDUC. (Dec. 2, 2016), https://www2.ed.gov/about/offices/list/oii/nonpublic/statistics.html [https://perma.cc/9AGV-HKBP].

111. *See id.* at 592.

112. *Id.* at 591–92.

113. Cover, *supra* note 5, at 66.

114. In proposing that the Court's implicit response has been to say that insular communities and their religious commitments are almost never at the mercy of a "not wrong" public policy decision, this Note does not suggest that *Bob Jones* is no longer good law. Rather, it suggests that *Bob Jones* has been tightly circumscribed to its facts. The case is likely cabined to government policies forbidding racial discrimination. That is to say, secular policy that is merely "not wrong" can limit religious law in the case of racial discrimination, but not elsewhere, due to the United States' overwhelming interest in countering its history of slavery and Jim Crow. *See* John D. Inazu, *The Four Freedoms and the Future of Religious Liberty*, 92 N.C. L. REV. 787, 828 (2014). Perhaps "race is different," and so government policies that fight racial discrimination have a privileged place in our constitutional jurisprudence. *See id.* at 828, 837–42. But even if *Bob Jones* remains good law because of the "race is different" principle, at the end of the day this merely reiterates that the IRS' antidiscrimination policy was "not wrong." *See* Cover, *supra* note 5, at 66–67.

At first glance, the Court's answer to Cover's inquiry may appear narrow or measured. It neither grants free exercise exemptions as of right, nor automatically compels the government to meet heightened scrutiny in defense of its denial of such exemptions.[115] In theory, the government can avoid granting religious exemptions entirely. To do so, it need only avoid demonstrating anti-religious animus in its application of a law, as in *Masterpiece Cakeshop*; avoid devaluing the claimed religious exemption by allowing comparable secular exemptions, as in *Tandon*; and avoid creating a "discretionary" "mechanism for individualized exemptions" that makes a given law not generally applicable, as in *Fulton*.[116] In other words, these cases have in common a core holding that the government need only avoid discriminating—whether in intent or in impact[117]—against religion. Similarly, to avoid funding religious institutions (including religious schools), the government need only avoid funding comparable secular institutions.[118]

In practice, however, the Court's answer to Cover's question is remarkably expansive. A sympathetic court applying *Masterpiece Cakeshop* might cherry-pick a factual record in order to create a narrative of government animus toward religion (as the *Masterpiece Cakeshop* Court itself was accused of doing).[119] And in an era of complex regulatory codes and legislation, it will be increasingly rare to find a well-written regulation that does not leave room for some kind of nonreligious exemption, whether expressly named (*Tandon*) or left to the discretion of an executive or bureaucratic official (*Fulton*).[120] The Court has therefore signaled that religious exemptions will be granted as of right—in effect, if not in theory.[121] It has likewise signaled that religious

115. As discussed throughout Part I.B, *supra*.

116. *See generally* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 584 U.S. 617 (2018); Tandon v. Newsom, 593 U.S. 61 (2021) (per curiam); Fulton v. City of Phila., 593 U.S. 522 (2021).

117. *See, e.g.*, Tebbe, *supra* note 47, at 2399 (["The equal value doctrine] does not require any showing of discriminatory purpose, object, or intent.").

118. *See supra* Part I.B.

119. *See supra* note 59.

120. *See supra* note 73.

121. *See* Schragger et al., *supra* note 10, at 14 ("In theory, then, religion and nonreligion are similarly situated under government regulations. Absent discrimination, neither is entitled to special relief from burdens. . . . In practice, however, the Court has expanded the availability and strength of exemptions, giving religious believers an important measure of freedom not enjoyed by others, even when they are exercising fundamental rights of their own.); *cf.* Rothschild, *supra* note 42, at 284 n.13 ("Perhaps ironically, granting general

funding will be granted in every situation where a secular institution receives a similar public benefit.[122] But instead of taking responsibility for these broad doctrines, the Court suggests that it is merely protecting against the overreach of anti-religious government discrimination.[123]

The reader will recall that Cover wrote *Nomos and Narrative* immediately following the Supreme Court term in which *Bob Jones University v. United States* was decided. To the extent that Cover's primary post-*Bob Jones* concern was that the state would run roughshod over the religious commitments of insular communities, he can rest assured. As discussed, recent religious liberty jurisprudence checks that impulse significantly. But Cover was similarly preoccupied with the state's ability to carry out certain fundamental goals. *Bob Jones* concerned him not because the state had checked the school's racist policies, but because the gravitational pull of an insufficiently articulated decision might draw in the state's jurispathic powers for substantially lesser justification.

As such, Cover suggested a framework for when the state could, if necessary, infringe upon the narrative world of a religious community. "The invasion of the nomos of the insular community,"

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applicability a broad meaning along these lines is not meaningfully different from overturning *Smith* since practically every law has at least one exception for a secular entity or activity. In fact, the broad interpretation goes further than overturning *Smith*. Under *Smith*, the free exercise claimant must prove that the law at issue substantially burdens her religious practice. But not so if one argues the government discriminates against religion under *Smith*'s general applicability rule. Further, under *Smith*, after triggering the First Amendment, courts move on to applying heightened scrutiny. But under a broad general applicability test, strict scrutiny would almost always fail—how can a discriminatory, underinclusive exemption scheme be narrowly tailored?—and likely would not be undertaken in the first place.") (citations omitted).

122. *See* Schragger et al., *supra* note 10, at 14 ("The new constitutional baseline is this: whenever the state provides a public benefit, it has no choice but to offer that benefit to religious organizations on equal terms. If secular organizations receive state subsidies, so too must churches.").

123. *See* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 584 U.S. 617, 635–36 (2018) ("This sentiment is inappropriate for a Commission charged with the solemn responsibility of fair and neutral enforcement of Colorado's antidiscrimination law—a law that protects against discrimination on the basis of religion as well as sexual orientation."); Fulton v. City of Phila., 593 U.S. 522, 536 (2021) ("We have never suggested that the government may discriminate against religion when acting in its managerial role."); *see also* Rothschild, *supra* note 42, at 290–91 (discussing how in various COVID-related cases wherein houses of worship sought free exercise exemptions to public health-inspired maximum occupancy orders (i.e., the type of case that *Tandon* would be): "the real constitutional question [the Justices] grappled with was whether it could be said that [the state in question] was discriminating against religion by having different standards for church gatherings and certain secular gatherings").

he wrote, "ought to be based on more than the passing will of the state. It ought to be grounded on an interpretive commitment that is as fundamental as that of the insular community."[124] Such a fundamental interpretive commitment—a paideic, world-building commitment of the state—was available to the *Bob Jones* Court. This was the "redemptive" vision of a racially pluralist United States.[125] Specifically, this fundamental interpretive commitment would have taken the form of a constitutional mandate against the "public subsidization of racism," rather than a mere acknowledgment of the permissibility of such a policy, implemented at the discretion of a lone agency.[126] Cover argued that, while the *Bob Jones* Court acknowledged the importance of America's continuing fight against racial discrimination,[127] "[t]he grand national travail against discrimination is given no normative status in the Court's opinion, save that it means the IRS was not wrong."[128]

Moving forward, the Supreme Court should guard against a preferred funding regime for religion arising from the collision between free exercise exemption rights and free exercise funding rights. Its free exercise doctrine should also elevate—at least vis-à-vis requests for exemptions from religious communities[129]—evaluations of whether or not the state's law represents a paideic commitment to match that of the religious party. The existence and legitimacy of such a statist paideic commitment would be

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124. Cover, *supra* note 5, at 67 n.195; *see also id.* at 67 ("The insular communities deserved better—they deserved a constitutional hedge against mere administration. And the minority community deserved more—it deserved a constitutional commitment to avoiding public subsidization of racism.").

125. *See* Cover, *supra* note 5, at 65–68.

126. *See id.* at 67. The IRS's revocation of tax-exempt status from Bob Jones University based on the school's racially discriminatory policies resulted from a shift in IRS policy. *See* Bob Jones Univ. v. United States, 461 U.S. 574, 577–82 (1983).

127. *See Bob Jones Univ.*, 461 at 595 ("Given the stress and anguish of the history of efforts to escape from the shackles of the 'separate but equal' doctrine . . . it cannot be said that educational institutions that, for whatever reasons, practice racial discrimination, are institutions exercising 'beneficial and stabilizing influences in community life' . . . or should be encouraged by having all taxpayers share in their support by way of special tax status.").

128. Cover, *supra* note 5, at 66.

129. This Note is concerned, as was *Nomos and Narrative*, with conflicts between the law of the state and the law of the religious community. The relationship between free exercise exemptions sought by a community and those sought by an individual or small group of individuals, and all of the questions that arise from any distinctions or differences, is a topic for a different day.

measured, perhaps, by the state's ability to identify a constitutional (i.e., societally fundamental) commitment.[130]

This Note does not propose, however, that a statist paideia should be a nonnegotiable, blanket requirement in order for the government to deny a religious exemption. Such an approach would be flawed. For instance, a religious exemption jurisprudence that hinged solely on the question of statist paideia would be ill-equipped to uphold vaccination requirements against claims of religious free exercise. Compulsory vaccination or other government public health measures seem like obvious, "not wrong" uses of the state's police power[131] that the government may legitimately uphold over religious objection. But labeling such measures as "constitutional" or otherwise "societally fundamental" commitments would move them beyond the regulatory and into the world-creating and meaning-creating—distorting those concepts from *Nomos and Narrative* beyond recognition.[132] Between its distortion of important concepts and its near-defenselessness against religious exemption claims, imposing a blanket statist paideia requirement for denying a religious exemption would ill-serve both insular communities and America's pluralist, democratic society at large.

Rather, this Note proposes that courts should treat the presence or absence of a statist paideic commitment as an important factor in analyzing certain religious liberty claims,[133] but should stop short of adopting a bright-line rule. The importance of the paideic commitment might be weighted most heavily in cases dealing with the world-creating commitment of a religious community—as in religious education cases such as *Bob Jones*, or with Hasidic yeshivas—rather than more individualistic religious exemption claims, like claims for exemption from vaccine mandates.[134]

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130. *See* Cover, *supra* note 5, at 67.

131. *See* Jacobson v. Massachusetts, 197 U.S. 11, 35 (1905).

132. Clearly, not all legislation that is "not wrong" is world-creating—the distinction between imperial and paideic law must mean something, to be at all useful.

133. While the precise mechanisms of this analysis are beyond this Note's scope, they are needed to provide practical guidance to future parties. As Cover wrote, insular religious communities deserve a measure of certainty. *See* Cover, *supra* note 5, at 66–68.

134. *Nomos and Narrative* does not purport to apply to individuals' claims for religious exemption; rather, it focuses on claims from insular communities. *See generally* Cover, *supra* note 5. Perhaps not too much should be read into this distinction, given the dramatically different doctrinal context in which Cover was writing, *cf.* Schragger et al., *supra* note 10, at 28–55 (political history of religion law jurisprudence), but neither should it be assumed that Cover would apply his critique of *Bob Jones* to more individualized claims for religious exemption.

Regardless, inquiries by courts into statist paideic commitments would encourage the state parties to articulate whether or not they conceive of their laws as paideic, possibly redemptive commitments,[135] or merely imperial, world-maintaining regulations.

Part II suggests applying such an approach to the issue of Hasidic yeshivas in New York. The tension between Hasidic yeshivas' nearly entirely religious education and New York State's "substantial equivalence law"[136] is precisely the type of conflict between the law of the insular religious community and the law of the state about which Cover wrote in *Nomos and Narrative*.[137] Hasidic communities' world-creating (paideic) commitments to immersive religious instruction are at odds with New York's world-maintaining (imperial) commitments to educational regulation. After setting the scene, Part II argues that New York should maintain that its educational legal commitments are also world-creating. Specifically, New York should affirm that its compulsory education law represents a fundamental commitment to a world in which every child receives the basic secular education needed to guarantee that child's potential to one day involve themselves in the civic, social, and economic life of society beyond the boundaries of their religious communities, should they so desire.

II. PAIDEIA IN PRACTICE—HASIDIC YESHIVAS AND NEW YORK EDUCATION LAW

Hasidic schools across New York City and the Lower Hudson Valley do not provide a meaningful education in math, English literacy, science, and other foundational secular subjects.[138] The

135. *See* Cover, *supra* note 5, at 66 ("Such a redemptive claim would pose no general threat to the insular community, no threat that rests on anything save the kind of commitment that goes with the articulation of the constitutional mandate.").

136. N.Y. Educ. Law § 3204.

137. *See* Hayes, *supra* note 18, at 146 ("In his article, Cover urged the Supreme Court to provide a more explicit account of the limits of nomic insularity and the state's duty to regulate *paideic* communities. Should the state curtail the autonomy of a committed group when its norms violate the health, welfare, and civic rights of its members or other citizens? Should it act . . . [w]hen a *charedi* school's curriculum deprives its graduates of the secular knowledge and basic literacy essential to financial independence and civic life?").

138. *See generally* Eliza Shapiro & Brian M. Rosenthal, *Failing Schools, Public Funds*, N.Y. TIMES, Sept. 11, 2022, at A1 [hereinafter *Failing Schools, Public Funds*] (describing the lack of secular education in Hasidic schools); *see also* Matty Lichtenstein, *Legitimizing Tactics: Hasidic Schools, Noncompliance, and the Politics of Deservingness*, 127 AM. J. SOCIO., no. 6, 1860 (2022) (describing Hasidic education).

majority of these schools—yeshivas[139]—decline to take part in state-wide standardized testing; in those that do participate, 99% of male students and 80% of female students read below grade level.[140] Former yeshiva students tell of learning little to no math beyond basic arithmetic and being third-generation New Yorkers without English-language proficiency.[141] One former student recounted learning to read English at the age of 28, with the help of a neighbor and Dr. Seuss' *Green Eggs and Ham*.[142]

At the same time, these schools receive hundreds of millions of dollars annually from federal, state, and local governments.[143] Historically, New York government actors—both city and state—have woefully under-enforced the state's minimum standards of education with respect to these yeshivas,[144] and have failed to

139. Unless otherwise noted, "yeshiva" in this Note should be taken to refer to a Hasidic or otherwise ultra-Orthodox school, rather than a modern Orthodox school. *See infra* note 148 (defining modern Orthodox) *and see infra* note 164 (defining category conflation).

140. *See Failing Schools, Public Funds*, *supra* note 138.

141. *See id.* ("'I don't know how to put into words how frustrating it is,' said Moishy Klein, who recently left the community after realizing it had not taught him basic grammar, let alone the skills needed to find a decent job. 'I thought, 'It's crazy that I'm literally not learning anything. It's crazy that I'm 20 years old, I don't know any higher order math, never learned any science.'"); *id.* ("'I'm the third generation born and raised in New York City,' [Chaim Fishman] said, 'and, still, when I was 15, I could barely speak English.'").

142. *See id.* ("After six months in a psychiatric hospital, [Mendy] Pape said he recovered enough to find work and an apartment. A neighbor started to teach him English in her spare time, he said, and gave him his first secular book: 'Green Eggs and Ham' by Dr. Seuss. He was 28."). These individuals face extraordinary difficulties as they grow up, especially should they choose to leave the communities of their youth and enter the broader world; of those that do, many encounter poverty, hunger, and homelessness, and suicide attempts are not infrequent. *See, e.g.*, *id.* (recounting the attempted suicide of Mendy Pape, who experienced homelessness in Montreal shortly after leaving a Hasidic community in Brooklyn); Taffy Brodesser-Akner, *Apostates Anonymous*, N.Y. TIMES SUNDAY MAG., Apr. 2, 2017, at 36 (describing the aftermath of the suicide of Faigy Mayer after she left the Hasidic community; quoting the executive director of an organization for ex-Hasidim as saying, "I can't think of many members who haven't, at one time or another in their journeys, contemplated suicide because they have felt they have no other options"); Zalman Rothschild, *Free Exercise's Outer Boundary: The Case of Hasidic Education*, 119 COLUM. L. REV. F. 200, 201–02 (2019) (summarizing the problem and collecting sources).

143. *See Failing Schools, Public Funds*, *supra* note 138 (summarizing the origins and purposes of $375 million in government funding for New York's Hasidic boys' schools in 2019).

144. *See Failing Schools, Public Funds*, *supra* note 138 (describing how "generations of children have been systematically denied a basic education" and how "over the years, city and state officials have avoided taking action"); *see also* Complaint at ¶¶ 63–64, Young Advocs. for a Fair Educ. v. Cuomo, 359 F. Supp. 3d 215 (E.D.N.Y. 2018) (quoting a Hasidic leader's understanding of the unlawful state of childhood education within his community—and lack of corresponding state enforcement: "[i]n the past, every child violated the law, and if it would have ended up in court there wouldn't have been an answer as to why the law wasn't adhered to.").

ensure that government funding is used for its intended purposes.[145]

In Hasidic yeshivas, secular education is frequently subordinated to religious learning, which is among the highest of the community's obligations.[146] And as New York State ramps up its enforcement efforts, the paideic, meaning- and world-creating religious legal commitments of Hasidic communities are pitted against the imperial, world-maintaining legal powers of the state. Part II introduces the reader to Hasidic yeshivas, locates their frequent lack of basic secular education and access to government funding within New York education law, policy, and politics, and demonstrates how current religious liberty doctrine is inadequate to address the confrontation between the yeshivas and the state.

A. "FAILING SCHOOLS, PUBLIC FUNDS"—NEW YORK'S HASIDIC YESHIVAS

The world that Hasidic Jews (*Hasidim*) have created in the United States is largely defined by deep religious piety and resistance to acculturation to the American mainstream.[147] Hasidic Judaism is among the most traditionalist of American Judaisms in its adherence to religious law (*halacha*).[148] In New

145. *See, e.g.*, Brian M. Rosenthal, *Hasidic Schools Seize on Special Ed Windfall*, N.Y. TIMES, Dec. 29, 2022, at A1 (describing how under-qualified, under-regulated private companies divert state special education money into the Hasidic community for non-special education purposes); *and* Brian M. Rosenthal & Eliza Shapiro, *City Halts Business With 20 Firms Serving Yeshivas Amid Fraud Inquiry*, N.Y. TIMES, Feb. 3, 2023, at A13 (describing new enforcement measures as "a sharp change in the city's approach to education contracting"). While the focus of this Note is on the state's ability to choose what it funds, rather than the state's ability to ensure that funding is used for its official purpose, for discussion of potential criminal fraud in yeshivas' use of public funding, see, e.g., Brian M. Rosenthal & Eliza Shapiro, *Fraud Costs Hasidic School $8 Million*, N.Y. TIMES, Oct. 24, 2022, at A19 (discussing deferred prosecution agreement by Central United Talmudical Academy in Williamsburg following federal investigation); Press Release, U.S. Attorney's Office for the Eastern District of New York, Brooklyn Yeshiva Admits to Pervasive Program and Benefit Fraud Conspiracy (Oct. 24, 2022), https://www.justice.gov/usao-edny/pr/brooklyn-yeshiva-admits-pervasive-program-and-benefit-fraud-conspiracy [https://perma.cc/MFH2-EJX4] (same). This issue, while worthy of attention, is beyond the scope of this Note.

146. For an introduction to Hasidic Judaism and the yeshiva system, see *infra*, Part II.A, at pp. 32–37; Lichtenstein, *supra* note 138, at 1860–62, 1868–70, 1875–79.

147. *See* JONATHAN SARNA, AMERICAN JUDAISM 297 (2d ed. 2004).

148. *See, e.g.*, PEARL BECK ET AL., UJA-FEDERATION OF NEW YORK, JEWISH COMMUNITY STUDY OF NEW YORK: 2011 COMPREHENSIVE REPORT 213 (rev. ed. 2013) ("[Orthodox Jewish groups] may be arrayed on a traditional–modern continuum, with the Hasidim at one end and the Modern Orthodox at the other. . . ."). Hasidic Jews are an especially traditional subset of those Jews who are frequently described as ultra-Orthodox. *See id.* at 211 n.2. In

York, Hasidic Judaism burgeoned in the years before, during, and after the Holocaust, when leading European Jewish spiritual and religious leaders (*rebbes*) came to the United States seeking refuge.[149] Many of these rebbes sought to recreate the institutional structures—indeed, the very worlds—of their destroyed communities, including the Jewish school systems.[150] As of 2011, roughly 16% of Jews in the "Eight-County New York Area" were Hasidic, accounting for a total population of 239,000.[151]

Hasidic yeshivas are gender-segregated.[152] In New York State, Hasidic boys' schools enroll around 50,000 students.[153] These schools are almost exclusively dedicated to religious studies.[154] While there is no single centralized yeshiva system,[155] typically the youngest students (roughly grades one through four) begin school around nine in the morning and end school around four or five in the afternoon, with secular studies such as math and English beginning only around two-thirty.[156] Older students (roughly grades five through eight) can be in school from seven-thirty in the

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contrast to the ultra-Orthodox in general and the Hasidim in particular, Modern Orthodox Jews—who would be to the right of center on such a spectrum—place a much greater emphasis on reconciling traditional religious, social, and cultural values with modernity. *See* SARNA, *supra* note 147, at 304–06. "No accepted and felicitous term is available to designate Orthodox Jews situated at either end of the traditional-modern continuum." BECK ET AL., *supra*, at 211 n.2. While this Note focuses on Hasidim, at some points it will include brief discussion of other streams of Orthodox Judaism. This Note will use ultra-Orthodox to refer to the more traditional streams and Modern Orthodox to refer to the more liberal streams, while acknowledging the unfortunate reduction inherent in such definitions. *See, e.g.*, Avi Shafran, *I Am a Haredi Jew, Not an Extremist*, N.Y. TIMES OP., Feb. 21, 2020, at A27 (arguing against the use of the label "ultra-Orthodox"); see also Rabbi Norman Lamm, The Arrogance of Modernism, Shavuot I (May 23, 1969), https://archives.yu.edu/gsdl/collect/lammserm/index/assoc/HASH26f6.dir/doc.pdf [https://perma.cc/6HSW-W59C] ("I am similarly upset when I hear people saying, 'He is religious—but modern,' in almost exactly the same tone as one would say, 'He is slightly insane—but sincere'—as if modernity can save the benighted religious soul from the damnation to which the unsophisticated are foredoomed. I even confess that I am uncomfortable with the title 'Modern Orthodox.' There is an arrogance about this assertion of modernity which should give offense to any intelligent and sensitive man. There is no better term that I have found, but I flinch when I articulate the words.").

149. *See* SARNA, *supra* note 147, at 293–94.

150. *See id.* at 297.

151. BECK, *supra* note 148, at 212 fig. 7-1. The Eight-County New York Area refers to the Bronx, Brooklyn, Manhattan, Queens, Staten Island, Nassau, Suffolk, and Westchester. *Id.* at 19.

152. *See, e.g.*, Lichtenstein, *supra* note 138, at 1869.

153. *See Failing Schools, Public Funds*, *supra* note 138.

154. *See* Lichtenstein, *supra* note 138, at 1875–76. For the younger students, religious studies are largely Bible-centric, whereas the older students graduate to a focus on Talmud (rabbinic law). *See id.* at 1875.

155. *See Failing Schools, Public Funds*, *supra* note 138.

156. *See* Lichtenstein, *supra* note 138, at 1875–76.

morning to six at night or later, but only begin secular studies around four in the afternoon.[157] After eighth grade or so, secular studies are foregone entirely.[158] In total, secular studies are limited to one or two hours a day, four days a week, for five or six years, corresponding roughly to elementary and middle school.[159] Religious studies are taught fully in Yiddish, and secular studies in a mix of Yiddish and English.[160] To the extent that secular education is a part of the students' curriculum, one yeshiva administrator described it as a tertiary priority at best—after religious studies and character development—and a former student characterized it as a "joke."[161] By contrast, Hasidic girls' schools split time roughly evenly between religious and secular studies,[162] due to different expectations for men and women in Hasidic life.[163] Accordingly, inadequacies in secular education are greatest in the boys' schools.[164]

While litigation concerning the tension between New York's educational requirements and ultra-Orthodox religious liberty interests can be traced back to at least 1950,[165] the decline of

157. *See id.*

158. *See id.* at 1876.

159. *See id.*

160. *See id.*

161. *See* Lichtenstein, *supra* note 138, at 1878–79 (quoting interviews with yeshiva administrators, lecturers, and former students); *see also Failing Schools, Public Funds*, *supra* note 138 ("The leaders of New York's Hasidic community have built scores of private schools to educate children in Jewish law, prayer and tradition—and to wall them off from the secular world. Offering little English and math, and virtually no science or history, they drill students relentlessly, sometimes brutally, during hours of religious lessons conducted in Yiddish.").

162. *See* Lichtenstein, *supra* note 138, at 1878.

163. *See id.*

164. That the boys' schools tend to teach less secular material than the girls' schools should not, however, be taken to indicate a lack of seriousness with regard to the relative lack of secular education in the girls' schools. *See, e.g.*, *Failing Schools, Public Funds*, *supra* note 138 (describing the well-below average test scores at Hasidic girls' schools); Brodesser-Akner, *supra* note 142, at 36 (describing the impact of a lack of secular education on all ex-Hasidim, including women). Matty Lichtenstein further describes how "category conflation" is consciously used by Hasidic yeshiva advocates to conflate noncompliant and compliant schools into a single, compliant category. Lichtenstein, *supra* note 138, at 1882–89. This includes conflating compliant girls' yeshivas with noncompliant boys' yeshivas, as well as conflating compliant Modern Orthodox schools with noncompliant Hasidic schools. *Id.*

165. *See* Application of Auster, 100 N.Y.S.2d 60 (Sup. Ct. King Co. 1950), *aff'd sub nom.*, Auster v. Weberman, 102 N.Y.S.2d 418 (App. Div. 1951), *aff'd*, 302 N.Y. 855, (1951), and *aff'd sub nom*. Auster v. Weberman, 104 N.Y.S.2d 65 (App. Div. 1951) (divorced mother's successful petition to compel her former husband to either enroll their son in a school that met the state's education requirements or surrender custody to her); People on Complaint of Shapiro v. Dorin, 99 N.Y.S.2d 830 (N.Y. Dom. Rel. Ct. 1950), *aff'd sub nom*. People v. Donner, 103 N.Y.S.2d 757 (App. Div. 1951), *aff'd*, 302 N.Y. 857 (1951) (three fathers

secular education in yeshivas has accelerated in recent decades.[166] To address this issue, in 2012 "individuals raised within Hasidic and Haredi communities" founded Young Advocates for Fair Education (YAFFED), with the goal of "improving the secular education curricula in ultra-Orthodox and Hasidic Yeshivas."[167] A few years later, Parents for Educational and Religious Liberty in Schools (PEARLS) was founded to defend the "intensive religious instruction" offered in New York yeshivas.[168]

In September 2022, the issue reached *The New York Times*' Sunday edition, whose front page was dominated by the first in a series of articles on yeshiva education in Brooklyn and the Lower Hudson Valley.[169] The reporting included hard data, such as statistics of abysmal Hasidic standardized test scores.[170] At Central United Talmudical Academy in Monsey, not one student of more than 1,000 was able to pass standardized tests in reading

convicted of failing to enroll their children in a school that provided statutorily required secular education). Both cases considered a religious liberty claim against the background of the state's police powers. *See Auster*, 100 N.Y.S. 2d at 62–65 ("Surely, [the state legislature] intentionally would enact no law which would require a child to receive instruction that would be offensive to his religious belief or the religious belief of his parents; nor would this Court condone such a practice were it attempted, for we all personally and collectively cherish the right to practice our respective religions according to the dictates of our consciences and according to our religious teachings. . . . This Court, however, must interpret and enforce the law as it finds the law to be. Hence I reach the conclusion that the boy . . . must be sent to a school where he will have the education in the subjects required by the State Education Law."); *Shapiro*, 99 N.Y.S. 2d. at 833 ("Religious convictions of parents cannot interfere with the responsibility of the State to protect the welfare of children.") (citations omitted). Both *Auster* and *Shapiro* were appealed to the U.S. Supreme Court, where each was dismissed for want of a federal question. Weberman v. Auster, 342 U.S. 884 (1951); Donner v. New York, 342 U.S. 884 (1951).

166. *See* Lichtenstein, *supra* note 138, at 1876 ("These Hasidic educational norms correspond to a rightward shift toward intensified and text-based religiosity, accompanied by the explicit prioritization of Torah study, in the post–World War II American Orthodox Jewish community. . . . A local politician recalled that while secular studies were a 'priority' in his childhood Hasidic school in the 1960s: 'In the last 25 . . . years, they started going the other way, which is you can't be frum [religious] enough. There's not enough time for Torah. And that . . . one is taking away from the other. . . . It seems at this point that there's a competition . . . about who could do the least.'").

167. *See What We Do*, YAFFED, https://yaffed.org/what-we-do/ [https://perma.cc/E6NU-BEX2].

168. *See Our Mission*, PEARLS, https://pearlsny.org/our-mission/ [https://perma.cc/5H8N-PBJB]; *see also* Search Results for EIN No. 47-5683669, IRS, https://apps.irs.gov/app/eos/details/ [https://perma.cc/V9MC-2C5H] (search using EIN number) (tax returns for PEARLS begin in 2016).

169. *See Failing Schools, Public Funds supra* note 138. For a web-based collection of The New York Times's recent coverage of the topic, see *Hasidic Yeshivas in New York*, N.Y. TIMES, https://www.nytimes.com/spotlight/hasidic-yeshivas [https://perma.cc/F2EA-D8XW].

170. *See Failing Schools, Public Funds supra* note 138.

and math.[171] At nine of the 12 Hasidic boys' schools where students sat for standardized state tests in 2019, less than one percent of students tested at grade level.[172] These were the only nine schools in all of New York State to test so poorly; the overall pass rate for the state was nearly 50%.[173] Students at Hasidic girls' schools did relatively better, but still failed the same tests at a rate of 80%.[174]

The *Times*' coverage also sourced anecdotal reporting from parents, teachers, administrators, and former students.[175] It told of middle-school-aged students who could barely speak or write in English, and who could do basic sums, but no higher-level math.[176] It told of teens and young adults who—when they chose to leave—were unable to function outside of their communities due to their lack of secular knowledge.[177] The *Times* asserted that the problem was growing worse, with many yeshivas providing markedly fewer opportunities for secular learning than they did a generation ago.[178] Some parents, educated in the same yeshivas as their children, worry about a repeating cycle of English illiteracy, including a lack of basic conversational fluency.[179]

The *Times* also highlighted the hundreds of millions of dollars of government funding that attaches to Hasidic yeshivas. According to the *Times*, Hasidic boys' schools in New York State collectively received over one billion dollars of government money over four years, including over $375 million in 2019 alone.[180] New York, unlike many states, does not offer tuition vouchers to parents sending their children to nonpublic schools.[181] Rather, the funding

171. *See id*.
172. *See id*.
173. *See id*.
174. *See id*.
175. *See Failing Schools, Public Funds supra* note 138.
176. *See id*.
177. *See id*.
178. *See id*.; *see also*, Lichtenstein, *supra* note 138, at 1876.
179. *See Failing Schools, Public Funds*, *supra* note 138.
180. *See id*.
181. *See* Table 2.1: States with Voucher Programs, by State: 2017, N.Y. STATE EDUC. DEP'T, https://nces.ed.gov/programs/statereform/tab2_1-2020.asp [https://perma.cc/7Q57-6WUR]; Kevin Frey, *NY Religious School Advocates: SCOTUS Helped Tuition Aid Push*, SPECTRUM NEWS 1 (June 27, 2022), https://spectrumlocalnews.com/nys/central-ny/politics/2022/06/28/ny-religious-school-advocates--scotus-helped-tuition-aid-push [https://perma.cc/W6XP-EHUW].

comes from a variety of city, state, and federal programs and is earmarked for specific purposes.[182]

As the reporting demonstrates, the stark lack of basic secular education, especially in conjunction with access to government funding, is increasingly in the limelight. The next section describes the statutory, regulatory, political, and legal landscape surrounding that lack. In short, many ultra-Orthodox Jewish individuals and organizations are resisting the government's recent efforts to enforce its secular education requirements.[183]

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182. In 2019, government funding from these combined sources included about $100 million each for antipoverty programs for free student meals and federal Title I funding (including costs of test administration, attendance checking and enrollment data reporting, and purchasing instructional materials), over $50 million in vouchers from New York City for after-school care for low-income families, and about $30 million for student transportation. *Failing Schools, Public Funds*, *supra* note 138. There are a variety of ways for New York nonpublic schools—including religious schools—to receive money from New York State, specifically. These include the Nonpublic School Safety Equipment (NPSE) program, which allows nonpublic schools to seek reimbursement for expenses such as defibrillators, door hardening, water testing, and fire safety, *see Safety Equipment Funding for Nonpublic Schools*, N.Y. STATE EDUC. DEP'T, https://www.p12.nysed.gov/nonpub/schoolsafety/home.html [https://perma.cc/347F-XTZJ]; Christina Coughlin, *State Office of Religious and Independent Schools (SORIS) School Safety Equipment Grant Guidance*, N.Y. STATE EDUC. DEP'T (Jan. 28, 2022), http://www.nysed.gov/common/nysed/files/programs/nonpublic-schools/npse-guidance.pdf [https://perma.cc/UFM5-VN86]; the Mandated Services Aid and Comprehensive Attendance Policy (MSA-CAP), which reimburses for costs related to pupil attendance reports, administration of standardized tests, and participation in immunization programs, *see Mandated Services Aid / Comprehensive Attendance Policy (MSA-CAP)*, N.Y. STATE EDUC. DEP'T, http://www.nysed.gov/nonpublic-schools/mandated-services-aidcomprehensive-attendance-policy-msa-cap#cap [https://perma.cc/E797-HL92]; *Guidelines: Nonpublic School Mandated Services Aid For The 2020–2021 School Year*, N.Y. STATE EDUC. DEP'T (Oct. 2021), https://www.p12.nysed.gov/nonpub/mandatedservices/forms/documents/2020-21Guidelines.pdf [https://perma.cc/7SNA-8J4P]; Pupil Attendance Recordkeeping, 8 CRR-NY § 104.1; and Academic Intervention Services (AIS), which reimburses professional development and other costs for teachers of struggling students, *see* N.Y. Educ. Law § 1950; *NYS Academic Intervention Services for Nonpublic Schools Program Guidance 2021–2022 School Year*, N.Y. STATE EDUC. DEP'T, http://www.nysed.gov/common/nysed/files/programs/nonpublic-schools/ais-year-5-guidance-final_1.pdf [https://perma.cc/C356-ZGZV]; *New York State Nonpublic School Reimbursement Request Form for Academic Intervention Services (AIS)*, N.Y. STATE EDUC. DEP'T http://www.nysed.gov/common/nysed/files/programs/nonpublic-schools/ais-year-5-reimbursement-request-form-final.pdf [https://perma.cc/8Y52-8ACW].

183. *See, e.g.*, *Failing Schools, Public Funds*, *supra* note 138. Another indicator is a small, multidisciplinary anthology titled RELIGIOUS LIBERTY AND EDUCATION: A CASE STUDY OF YESHIVAS VS. NEW YORK (Jay Bedrick et al. eds., 2020) [hereinafter YESHIVAS VS. NEW YORK]. While there is difference among the essays and the authors, the book takes an overall pro-exemption approach. In its choice of imagery, the book's cover—largely consisting of a painting by the impressionist painter and Bundist Samuel Rothbort titled "Soldiers check for Seditious talk"—draws a throughline from the pogroms to the New York State Education Department. In the painting, on the left, a yarmulka-wearing, bearded man gesticulates, mid-lecture, to a group of young boys seated at a table. Samuel Rothbort, "Soldiers Check for Seditious Talk", *in* YESHIVAS VS. NEW YORK, on cover. The boys look down at books in their laps, fiercely connecting their teacher's lesson to the text. *Id.* On

Simultaneously, many are pushing for increased funding to Jewish nonpublic schools.[184] After all, a world is at stake.

B. THE POLICY LANDSCAPE—REGULATORY EFFORTS AND YESHIVA ADVOCACY

It is unlawful for a New York school to almost wholly ignore secular education.[185] Childhood education is compulsory in New York State.[186] Parents and families have the right to send their children either to public schools provided by the state,[187] to a nonpublic school of their choice,[188] or to homeschool them;[189] but in order to satisfy the compulsory education requirement, nonpublic education must meet the requirements of New York' Education Law § 3204, the "substantial equivalency law."

N.Y. Educ. Law § 3204 (§ 3204) commands that "[i]nstruction given to a minor elsewhere than at a public school shall be at least substantially equivalent to the instruction given to minors of like age and attainments at the public schools of the city or district

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the right of the image, sharply dressed, mustachioed, and armed Russian soldiers peer around the door frame. *Id.* In other works by the artist, soldiers carry out the violence that, while only implied in this painting, is inseparable from the history and memory of Jewish persistence in late Czarist Russia. *See* Molly Crabapple, *My Great-Grandfather the Bundist*, N.Y. REV. BOOKS (Oct. 6, 2019), https://www.nybooks.com/online/2018/10/06/my-great-grandfather-the-bundist/ [https://perma.cc/5EDR-P3NP]. Both in this choice of cover and verbally in the book's introduction, the book's editors contextualize the contemporary yeshiva matter within a long struggle against wanton uses of state power to commit cultural genocide via outlawing Jewish education, from the Seleucids, to the Romans, to the Soviet Union. *See* YESHIVAS VS. NEW YORK, at xiii.

184. *See, e.g.*, *About Teach New York*, TEACH COALITION, https://teachcoalition.org/nys/ [https://perma.cc/9C6D-FH6U].

185. *See, e.g.*, Rothschild, *supra* note 142, at 211 ("Virtually all reports indicate that Hasidic schools do not provide this 'adequate' education and are in flagrant violation of New York state law."). Even some proponents of yeshiva regulation by the state acknowledge that most ultra-Orthodox yeshivas cannot continue to operate as they do while being in compliance with New York law. *See also* Letter from Rabbi David Zwiebel, Executive Vice President, Agudath Israel of America, to Dr. Betty A. Rosa, Commissioner, N.Y. STATE EDUC. DEP'T (May 31, 2022) [hereinafter *Zwiebel Letter*], https://agudah.org/wp-content/uploads/2020/09/Letter-to-SED-5.31.22.pdf [https://perma.cc/CVQ5-DYBV] (acknowledging that to be in compliance with the law as enforced by the New York State Education Department "would likely require changes in those yeshivas' daily school schedules, would intrude upon their educational and religious autonomy, and would jeopardize their ability to carry out the mission for which they were created").

186. N.Y. Educ. L. Ch. 16, tit. IV, art. 65.

187. N.Y. CONST. art. 11, § 1.

188. NY. Educ. L. § 3204(1) ("A minor required to attend upon instruction by the provisions of part one of this article may attend at a public school or elsewhere.").

189. *Id.*; *see also* 8 N.Y.C.R.R. 100.10 (regulatory requirements for home instruction).

where the minor resides."[190] Part 130 of the Regulations of the Commissioner of Education, adopted in September 2022, sets out the standards by which substantial equivalency is judged.[191] Among other considerations, the Local School Authority (LSA) is directed to determine whether instruction is given by a "competent teacher"; whether English is the language of instruction for common branch subjects; whether the curriculum includes core classes in mathematics, science, English language arts, and social studies; and whether the curriculum includes instruction in additional subjects ranging from New York State history and civics, history and health education, highway and traffic safety, and defibrillator usage, as required in public schools.[192] Schools may, however, avoid LSA review entirely and instead demonstrate substantial equivalency via one of six alternative pathways (including, for example, participation in the International Baccalaureate program or accreditation by a state-approved body).[193]

As the state has stepped up its enforcement efforts, the Hasidic community has tried to immunize its yeshivas from the substantial equivalency requirements via legislative efforts, participation in the regulatory process, litigation, and electoral politics. The community's legislative efforts are characterized by the Felder Amendment of 2018, named for State Senator Simcha Felder.[194] At the time of the amendment's passage, Senator Felder was the swing vote in a closely divided senate chamber, as well as an energetic defender of the interests of his Orthodox Jewish constituents.[195] In 2018, Senator Felder "essentially [held] the

190. NY. Educ. L. § 3204(2); *see also*, N.Y. Educ. L. § 801(1) ("Similar courses of instruction [to those in public schools] shall be prescribed and maintained in nonpublic schools in the state, and all pupils in such schools over eight years of age shall attend upon such courses. If such courses are not so established and maintained in a nonpublic school, attendance upon instruction in such school shall not be deemed substantially equivalent to instruction given to pupils of like age in the public schools of the city or district in which such pupils reside.").

191. 8 N.Y.C.R.R. § 130.

192. *Id.* at § 130.9. For example, the LSA in Brooklyn would be the New York City Department of Education.

193. *Id.* at § 130.3. The reader should perk up upon learning that anti-regulation yeshiva advocates have described these pathways as "exemption[s]" from LSA review. *See* Complaint ¶¶ 75–83, Parents for Educ. and Religious Liberty in Schs. v. Young, 79 Misc. 3d 454 (N.Y. Sup. Ct. 2023) (No. 907655-22). We will return to the significance of this characterization in Part II.C *infra*.

194. N.Y. Educ. L.aw § 3204(2)(ii)–(iii)(v).

195. *See* Rachel Silberstein, *Sen. Simcha Felder, explained: Can the Wayward Democratic State Senator from Brooklyn Be Reeled In?*, TIMES UNION (Jun. 2, 2018),

[annual state budget] hostage," ultimately allowing it to advance only upon the inclusion of legislative text that was transparently tailored to exempt ultra-Orthodox yeshivas from many of the substantial equivalency requirements.[196]

The Felder Amendment failed to achieve its intended purpose. A federal judge described the legislation as establishing "a floor rather than a ceiling" for substantial equivalency requirements for covered schools.[197] In other words, the factors mandated by the statute for qualifying nonpublic schools may be—and have been—treated as additional requirements rather than replacement requirements for determining substantial equivalency.[198] The biggest practical impact of the amendment has been its grant of authority over final determinations of substantial equivalency to the state's Commissioner of Education (the "Commissioner"), rather than an LSA.[199]

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https://www.timesunion.com/news/article/Sen-Simcha-Felder-explained-12954696.php [https://perma.cc/NYG7-LWKG].

196. Vivian Wang & Jesse McKinley, *Sway of State Senator Spares Jewish Schools Curriculum Oversight*, N.Y. TIMES, Apr. 4, 2018, at A23; *see also* Young Advocs. for Fair Educ. v. Cuomo, 359 F. Supp. 3d 215, 223 (E.D.N.Y. 2019) ("Although there is little official legislative history accompanying the Amendment, statements by Senator Felder appear to confirm that the Amendment was drafted with these yeshivas in mind."). The law added subsections (ii)–(v) to N.Y. Educ. L. § 3204(2), which declare that the Felder Amendment path applies to the subset of nonpublic schools that (1) are non-profit corporations; (2) have a bilingual program; and (3) have school days running from at least 9:00am–4:00pm for grades 1–3, 9:00am–5:30pm for grades 4–8, and 9:00am–6:00pm for grades 9–12. In the words of Wang & McKinley, *supra*, in *The New York Times*, "in effect, yeshivas."

197. *See Young Advocs.*, 359 F. Supp. 3d at 224. This description came in the context of a suit by YAFFED, seeking an injunction against the Felder Amendment on Establishment Clause grounds. *See id.* at 219. The case was ultimately dismissed on standing and ripeness grounds, *see id.* at 216, but not before several Orthodox Jewish groups joined in an amicus brief in defense of the law. *See* Brief for Parents for Educ. and Religious Liberty in Schs. et al. as Amici Curiae supporting Defendant, Young Advocs. for Fair Educ. v. Cuomo, 359 F. Supp. 3d 215 (2019).

198. *See Young Advocs.*, 359 F. Supp. at 224 ("Viewed holistically, the effect of the Felder Amendment was to expand NYSED's discretion to exempt covered schools from the educational requirements otherwise applicable to nonpublic schools under NYSED's then-existing guidelines. As indicated by the Amendment's use of open-ended language such as 'including' and 'not limited to,' the specific educational criteria set forth in the Amendment establish a floor rather than a ceiling. NYSED could deem schools to be compliant with the Education Law's substantial equivalence mandate if they meet these minimal requirements. Alternatively, NYSED could impose learning standards that go above and beyond these statutory requirements, and deem any schools that fall beneath these heightened standards noncompliant with the substantial equivalence mandate—even if the schools provide the basic level of instruction required in the Felder Amendment itself. Either is a permissible interpretation of the statute.").

199. *See* 8 N.Y.C.R.R. 130.2. But the Commissioner still relies on the LSA's fact-finding and recommendation in making such a final determination. *See, e.g.*, 8 N.Y.C.R.R. 130.8.

Thus, Felder Amendment notwithstanding, Part 130 of the Regulations of the Commissioner of the New York State Department of Education (NYSED) contains the mechanisms for determining whether a nonpublic school—yeshiva or not—offers an education that is compliant with substantial equivalency requirements.[200] These regulations trace their origins to 2015, when "parents, former students, and former teachers filed a complaint against the New York City Department of Education . . . asserting that certain religious schools provided only limited secular education that did not meet the 'substantial equivalence' standard mandated by state law."[201] A multi-year fact-finding and drafting process included a 60-day public comment period in spring 2022, which garnered over 350,000 comments.[202] Among the commenters were "tens of thousands of individuals" arguing against Part 130's application to yeshivas.[203] While NYSED did not report on the religious background of these commenters, one website claimed that a total of over 223,000 members of *Klal Yisrael* (Hebrew for "the Jewish people") had taken part in the comment-period campaign against the proposed regulations.[204] And in the weeks leading up to the deadline for public comment, ultra-Orthodox media outlets urged participation in the process.[205]

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200. *See* 8 N.Y.C.R.R. 130.

201. James N. Baldwin, *Proposed Addition of Part 130 of the Regulations of the Commissioner of Education Relating to Substantially Equivalent Instruction for Nonpublic School Students*, N.Y. STATE. EDUC. DEP'T, at 2 (Sept. 1, 2022), https://www.regents.nysed.gov/common/regents/files/922p12a7.pdf [https://perma.cc/583G-TEBG], adopted unanimously in *Summary of the September 2022 Meeting*, N.Y. STATE EDUC. DEP'T (Sept. 22, 2022), https://www.regents.nysed.gov/common/regents/files/1022bra20.pdf [https://perma.cc/NJ5T-W7NL].

202. *See* Baldwin, *supra* note 201, at 10. The public comment period was compelled by a successful lawsuit against an earlier implementation of what NYSED had characterized as "guidelines" and which were struck down as regulations implemented in violation of New York State's Administrative Procedure Act. *See* Parents for Educ. & Religious Liberty in Schs. v. Rosa, No. 901354-19 (N.Y. Sup. Ct. Apr. 17, 2019).

203. *See* Baldwin, *supra* note 201, at Comment 5 in Attachment B. Part 130 itself does not single out yeshivas for special treatment. *See* 8 N.Y.C.R.R. 130. The Department's response to this comment reiterated that "[t]he proposed regulation is applicable to all nonpublic schools, a universe far broader than a single religious tradition." Baldwin, *supra* note 201, at Response to Comment 5 in Attachment B.

204. *See* PROTECTCHINUCH, https://www.protectchinuch.com [https://perma.cc/5UU9-R76V]. While protectchinuch.com does not explicitly confirm as much, presumably the 223,000 signatures that it cites were also in opposition to the then-proposed regulations.

205. *See* Concerned Parent, Letter to the Editor, *What Can You Do to Stop Regulations that Threaten Our Schools?*, COLLIVE (May 23, 2022), https://collive.com/what-can-you-do-to-stop-regulations-that-threaten-our-schools/ [https://perma.cc/2XU2-R69T]; *Orthodox Groups Undertake Letter Campaign Supporting Yeshivas*, HAMODIA (May 9, 2022),

Agudath Israel of America (also known as "the Agudah"), an umbrella ultra-Orthodox advocacy organization, published its own letter to NYSED in response to the call for comments.[206] The letter expressed concern that Part 130, in practice, would violate religious liberties and parents' rights to choose their children's education, and would fail to account for the "educational value of Jewish studies."[207]

Upon the new regulations' enactment, several Orthodox groups and yeshivas promptly filed a state court lawsuit challenging them.[208] The plaintiffs alleged a swarm of state and federal constitutional violations, including of their rights to free exercise, freedom of speech, due process, and equal protection, as well as violations of New York administrative procedural requirements.[209] Focusing on the administrative law grounds, the trial court decided in favor of the state on almost all fronts, with one critical exception.[210] The court held—based on the text of the compulsory education law, the enabling statute for the new regulations—that the substantial equivalency requirements may only be enforced via imposition of fines or imprisonment on a parent, or via the

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https://hamodia.com/2022/05/09/orthodox-groups-undertake-letter-campaign-supporting-yeshivas/ [https://perma.cc/Z38B-QMBL].

206. *See Zwiebel Letter*, *supra* note 185. The Agudah describes itself as "the arm and voice of American Orthodox Jewry." *About*, AGUDAH ISRAEL OF AMERICA, https://agudah.org/about/ [https://perma.cc/64ZN-ECK5]. It "advocates for its constituents at federal, state, and local levels" and provides "social, educational, and youth services to its constituents." *Id.*

207. *See Zwiebel Letter*, *supra* note 185. The Agudah also suggested that the state abandon its intentions to interpret the Felder Amendment's substantial equivalency measurements as supplemental to the measurements used by the Board of Regents and instead view them as alternate measurements of substantial equivalency, such that satisfaction thereof would in and of itself satisfy compliance with § 3204. *See id.* The Agudah found authority for the state to make this interpretation in dicta, excerpted above, from Judge Glasser's decision in *Young Advocates for Fair Education v. Cuom*o, 359 F. Supp. 3d 215, 224, 226 (E.D.N.Y. 2019).

208. Petition, Parents for Educ. & Religious Liberty in Schs. v. Young, 79 Misc. 3d 454 (Albany Cty. Sup. Ct. Oct. 9, 2022), ECF No. 1. Petitioners included PEARLS, the Agudah, Torah Umesorah, and five yeshivas that have been in operation in New York since at least the early twentieth century. *See id.* at 6–7.

209. *See id.* at 29–35. The lawsuit's arguments under the New York State Administrative Procedure Act alleged that a failure to meaningfully review and respond to the comments made the process "a sham." *See id.* at 25–27. In its procedural claims, the complaint evoked *Parents for Educational & Religious Liberty in Schools. v. Rosa*, No. 0901354-19 (N.Y. Sup. Ct. Apr. 17, 2019), in which some of the same plaintiffs found success with similar claims. *See also* Rothschild, *supra* note 142, at 203–04, 213–14 (summarizing the earlier lawsuit).

210. Parents for Educ. & Religious Liberty in Schs. v. Young, 79 Misc. 3d 454, 464–72 (N.Y. Sup. Ct. 2023), *aff'd as modified*, 2024 WL 3186813 (N.Y. App. Div. June 27, 2024).

withholding of funds from a city or public school district that failed to enforce the law. The court further held that before parents are penalized, they must be given the opportunity to demonstrate that their child is receiving substantially equivalent education via supplemental means, such as at-home instruction.[211] In contrast, the 2022 regulations, as written, purportedly compelled parents to enroll their children in different, compliant schools, in part by announcing that an institution offering non-equivalent education would "no longer be deemed a school which provides compulsory education fulfilling [parents'] requirements [under the compulsory education law]."[212] In essence, the trial court ruled that the state could not enforce its substantial equivalency requirements directly on offending yeshivas (or other offending schools).[213]

But this aspect of the decision was short-lived. In June 2024, the Appellate Division, New York's intermediate appellate court, issued a limited reversal, holding that "the loss of status as a substantially equivalent school nonpublic school"—while a "serious consequence"—is not an unauthorized regulatory "penalty" or "closure" of such a school, but rather "the logical result" of a statutorily enabled determination "that a school does not meet the [statutorily] required standards."[214] Most likely, such a loss of status disqualifies such institutions—upon which parents can no longer rely to fulfill their duties under the compulsory education law—from receiving government funding meant for nonpublic schools.[215]

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211. *See id.* at 468–71.

212. 8 N.Y.C.R.R. §§ 130.6, 130.8.

213. Anti-regulation yeshiva advocates subsequently celebrated a limited victory. *See* Michael Hill, *NY's Power to Regulate Religious Schools Trimmed by Judge*, ASSOCIATED PRESS (Mar. 24, 2023), https://apnews.com/article/religious-schools-yeshivas-court-new-york-f12343636d92377c167ac2f67c111772 [https://perma.cc/V4G3-QZCN] (quoting statement from PEARLS); *see also Lawsuit Decision: While Short of Victory, Court Recognizes State Education Overreach in Substantial Equivalency Regulations*, AGUDATH ISRAEL OF AM. (Mar. 23, 2023), https://agudah.org/lawsuit-decision-while-short-of-victory-court-recognizes-state-education-overreach-in-substantial-equivalency-regulations/ [https://perma.cc/P2BV-2BFT] (describing the decisions as "provid[ing] important protections for Orthodox Jewish education in New York" but "not the complete victory many were davening [praying] for").

214. Parents for Educ. & Religious Liberty in Schs. v. Young, 2024 WL 3186813 at *4 (N.Y. App. Div. June 27, 2024).

215. *See* Reply Brief for Appellants at 18, Parents for Educ. & Religious Liberty in Schs. v. Young, No. 907655-22 (N.Y. Sup. Ct. 2023), ECF No. 21 ("To be sure, a negative substantial equivalency determination has consequences for both parents and a nonpublic school. It means . . . the school is not entitled to state aid. . . . [T]hese consequences reflect the reality that a nonpublic school which fails to provide substantially equivalent instruction is not a full-fledged 'school' within the meaning of the Compulsory Education

Finally, Hasidic communities have also flexed their electoral muscle in opposition to increased regulation. Though small—Hasidic Jews make up one percent of New York State's population, and ten percent of the state's Jewish population—Hasidic communities often vote in blocs according to the endorsements of their respective leaders, which are highly sought-after by state and local candidates.[216] Any comments from would-be or sitting mayors or governors supporting increased regulation of yeshivas have been muted at most.[217]

Law and cannot receive public funds in the same way as a nonpublic school which fulfills the requirements of the Compulsory Education Law."). Whether for parents or for the yeshivas, such consequences would only be instituted as a last resort, after multiple opportunities for the yeshivas to attain compliance, with the help of the state. N.Y.C.R.R. §§ 130.6, 130.8.

216. *See* Emma G. Fitzsimmons, *How New York's Hasidic Community Became a Political Force*, N.Y. TIMES, Oct. 31, 2022, at A16 [hereinafter *Political Force*]. For example, Hasidic votes were keenly courted by Eric Adams and Andrew Yang in the 2021 Democratic New York City mayoral primary, with both candidates pledging a policy of noninterference with yeshiva education. *See id.* Hasidic votes were also contested in the 2022 gubernatorial general election campaign. Although the community typically supports Democratic candidates, *see id.*, former Congressman and Republican gubernatorial nominee Lee Zeldin made serious, concerted efforts to sway the Hasidic vote in his favor, *see* Nicholas Fandos & Eliza Shapiro, *In Brooklyn Enclave, Zeldin Sees Path to a Win*, N.Y. TIMES, Sept. 24, 2022, at A1 [hereinafter *Zeldin Sees Path*]. At the center of Congressman Zeldin's outreach was a promise to protect yeshiva education from government interference. His efforts paid off. In heavily Hasidic election districts in Crown Heights, Flatbush, and Williamsburg, Zeldin won with percentages topping 70, 80, and even 90% of the total vote. *See* Suhail Bhat et al., *Did Your Neighborhood Turn Out to Vote?*, THE CITY (Nov. 9, 2022), https://projects.thecity.nyc/zeldin-hochul-election-voter-turnout-nyc/ [https://perma.cc/LQE8-JVVE]. *But see* Lichtenstein, *supra* note 138, at 1869–70 (finding "religious Jews' voting power . . . a partial and insufficient explanation" for non-enforcement of substantial equivalency); *id.* at 1860 (proposing instead that the Hasidic schools as "nonconforming organizations" draw upon "a multilevel tool kit of three flexible legitimizing tactics that position them as deserving of state support: compliance markers, category conflation, and discursive resonance").

217. Then-Mayor Bill de Blasio began a high-profile investigation in 2015, but it "stalled almost as soon as it began." Eliza Shapiro, *Do Students in Yeshivas Learn Secular Subjects? Inquiry May Settle Issue*, N.Y. TIMES, Dec. 4, 2018, at A22. His successor, Mayor Eric Adams, has demonstrated sparse and superficial concern over the paucity of secular education in yeshivas. Although he affirmed his administration's intention to finish the investigation that the de Blasio administration began, he has also made comments minimizing the scope and nature of the problem, ascribing any shortcomings to only "a small number of yeshivas" and averring that most contribute to a "well-rounded quality education," comments which stand in direct contrast to the fact-finding of *The New York Times*' reporting. *Political Force*, *supra* note 216; Lauren Hakimi, *Mayor Eric Adams Brushes Off Yeshiva Critics at South Williamsburg Event*, SHTETL HAREDI FREE PRESS (Oct. 23, 2023), https://www.shtetl.org/article/mayor-eric-adams-condemns-yeshiva-critics-at-south-williamsburg-event [https://perma.cc/9XEY-FF84]. More recently, Mayor Adams urged Haredi communities to take to "the streets" in protest of the state's enforcement efforts. Lauren Hakimi, *'Where's Our Presence in the Streets?' Mayor Adams Tells Yeshiva Leaders to Get Outraged*, SHTETL HAREDI FREE PRESS (Jan. 22, 2024), https://www.shtetl.org/article/wheres-our-presence-in-the-streets-mayor-adams-tells-

Alongside advocacy efforts against increased state regulation of yeshivas, Hasidic and other Orthodox Jewish groups also advocate for greater government funding for religious schools. One prominent example is Teach Coalition, whose New York chapter (Teach NYS) "fight[s] for fair government funding for . . . Jewish day schools and yeshivot" via programs for classroom technology, special needs education, and kosher meals.[218] Teach NYS' website states its hope to reach $1.3 billion "in annual local and state support of nonpublic school students" by 2030.[219] Similarly, the Agudah celebrated the passing of New York State's 2023 budget, highlighting millions of dollars of increased funding for nonpublic schools.[220]

A range of Orthodox Jewish organizations also filed or signed onto amici curiae briefs urging a decision in favor of a religious liberty right to nonpublic school funding in *Carson v. Makin*, the most recent religious education case decided by the Supreme Court.[221] When the Court ultimately ruled in favor of allowing government funds to reach Maine's religious nonpublic schools via tuition vouchers, Teach Coalition's director of government affairs described the ruling as "an amazing next step,"[222] and the Agudah celebrated the ways in which the decision "eases the way for state

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yeshiva-leaders-to-get-outraged [https://perma.cc/6U25-JHEC]. During her 2022 campaign, meanwhile, Governor Kathy Hochul said that regulating yeshivas was not her responsibility, in what *The Times* described as a "studied silence" on the issue. *Political Force*, *supra* note 216; *Zeldin Sees Path*, *supra* note 216.

218. *See About Teach New York*, TEACH COALITION, https://teachcoalition.org/nys/ [https://perma.cc/SH9S-KMRT]. Teach Coalition is affiliated with the Orthodox Union, *see id.*, an umbrella organization for American Orthodox Judaism. *See* ORTHODOX UNION, https://www.ou.org/ [https://perma.cc/EYM9-P4SA].

219. *See About Teach New York*, *supra* note 218. This would be up from $295 million in the 2023 New York State budget. *See Description of 2022–23 New York State School Aid Programs*, N.Y. STATE DIV. OF THE BUDGET, 1, 22 (2022) https://www.budget.ny.gov/pubs/archive/fy23/ex/local/school/2223schoolaid.pdf [https://perma.cc/4VNF-E3ZZ].

220. *New York State Passes Budget: Agudath Israel Applauds Wins for Yeshivas and Substantial New Gains Directly for Parents*, AGUDATH ISRAEL OF AM. (Apr. 10, 2022), https://agudah.org/new-york-state-passes-budget-agudath-israel-applauds-wins-for-yeshivas-and-substantial-new-gains-directly-for-parents/ [https://perma.cc/M3LG-GUES].

221. 596 U.S. 767 (2022). The groups included the Agudah and Torah Umesorah, *see* Brief for The National Jewish Commission on Law and Public Affairs et al. as Amici Curiae supporting Petitioners, Carson v. Makin, 596 U.S. 767 (2022) (No. 20-1088); the National Council of Young Israel, *see* Brief for the Partnership for Inner-City Education et al. as Amici Curiae supporting Petitioners, Carson v. Makin, 596 U.S. 767 (2022) (No. 20-1088); and the Union of Orthodox Jewish Congregations of America, *see* Brief for the Union of Orthodox Jewish Congregations of America as Amici Curiae supporting Petitioners, Carson v. Makin, 596 U.S. 767 (2022) (No. 20-1088).

222. Frey, *supra* note 181.

aid to flow to parents who choose to send their children to religious schools."[223]

C. YESHIVAS VERSUS THE STATE—DEMONSTRATING THE SHORTCOMINGS OF CURRENT RELIGIOUS LIBERTY LAW

As the last section demonstrated, whether directed against the application of New York's compulsory education law or for increased state funding, Hasidic advocacy is a part of a world-building project. Where this world-building project collides with the secular state, it simultaneously takes the form of prickly resistance to government regulation and self-assured demands for access to government funding. So far, much of this action has taken place outside of the courts,[224] while the few judicial decisions have hinged on administrative law or procedural elements.[225] But religion law waits in the wings.[226] When push comes to shove, which will win out? The religious commitments of the community? Or the law of the state?

As Part I argued, current religious liberty jurisprudence is ill-equipped for such a case. In reducing the real, important tensions between commitments of the religious community and secular state to a formalistic and expansive hunt for discrimination,[227] the Supreme Court has put its thumb on the scales for religious litigants.[228] It is not hard to imagine a court applying *Masterpiece Cakeshop*'s hairpin trigger of "slight suspicion" of hostility toward religion.[229] Following this rule, if opponents of substantial equivalency can find an example of a New York bureaucrat expressing disbelief or disappointment with the religious values that inform Hasidic stances toward education, a sympathetic court could strike down the enforcement action. Nor is it hard to imagine

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223. *Agudath Israel Statement Applauding Supreme Court Ruling in* Carson v. Makin, AGUDATH ISRAEL OF AM. (Jun. 21, 2022), https://agudah.org/agudath-israel-statement-applauding-supreme-court-ruling-in-carson-v-makin/ [https://perma.cc/6D3D-2YMJ].

224. *See supra* Part II.B.

225. *See, e.g.*, Parents for Educ. & Religious Liberty in Schs. v. Young, 79 Misc. 3d 454 (N.Y. Sup. Ct. 2023), *aff'd as modified*, 2024 WL 3186813 (N.Y. App. Div. June 27, 2024).

226. *See, e.g.*, Petition, ¶¶ 13, 131–38, Parents for Educ. & Religious Liberty in Schs. v. Young, No. 907655-22 (Albany Cty. Sup. Ct. Oct. 9, 2022).

227. *See supra* Part I.C.

228. *See* Schragger et al., *supra* note 10, at 9–28; *see also supra* Part I.

229. *See* Dr. A v. Hochul, 142 S. Ct. 552, 555 (2021) (Gorsuch, J., dissenting from denial of application for injunctive relief) (citing Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 584 U.S. 617, 638–39 (2018); *see also supra* Part I.B.

the equal value doctrine being used to characterize alternate pathways by which a nonpublic school can be deemed substantially equivalent (such as participation in the International Baccalaureate program or accreditation by a state-approved body)[230] as secular exemptions from LSA review.[231] Such secular exemptions would, according to *Tandon v. Newsom*, require the granting of a corresponding religious exemption.[232] Similarly, the "open-ended" language of the Felder Amendment[233] might open the door for a yeshiva to plead for religious exemption according to the individualized exemptions rule of *Fulton*.[234] Specifically, the schools could argue that this "open-ended" language, for all intents and purposes, creates a mechanism by which the Education Commissioner can grant individualized exemptions, which in turn, according to *Fulton*, means that the Commissioner must grant a religious exemption. Finally, the trilogy of *Trinity Lutheran*, *Espinoza*, and *Carson* suggests that funding on par with secular nonpublic schools might be guaranteed to yeshivas, regardless of their substantial equivalency compliance.[235] Of course, the fact that such arguments can be brought does not ensure their success. But at the very least, these potential claims illustrate how recent trends in free exercise jurisprudence could have an impact on New York's ability to guarantee basic education to all New York children. If one assumes the foundational desirability of basic secular education for all, this exercise demonstrates the inadequacy of current free exercise doctrine.

Re-enter Robert Cover. Having set the theoretical, doctrinal, and factual background, this Note proceeds by asking what a more satisfactory religious liberty jurisprudence might look like as applied to the standoff between New York yeshivas and the state.

III. COMMITTING TO SECULAR EDUCATION

Guided by deeply held paideic legal commitments, Hasidic communities are in the business of world- and meaning-creating. This world-creating is an intensive, demanding, and jealous

230. 8 N.Y.C.R.R. § 130.3.
231. *See* Petition ¶¶ 75–83, Parents for Educ. & Religious Liberty in Schs. v. Young, No. 907655-22 (Albany Cty. Sup. Ct. Oct. 9, 2022), ECF No. 1.
232. *See supra* Part I.B.
233. *See supra* note 198 and accompanying text.
234. *See* Fulton v. City of Phila., 593 U.S. 522, 533–34 (2021).
235. *See supra* Part I.B.

project. It requires that Hasidic children spend dozens of hours per week receiving instruction in Jewish studies at the expense of—and to guard against the effects of—secular mathematics, language and literature, science, and social studies. Hasidic communities deem this necessary in order to invest young students with Torah, with halacha, and with Hasidic piety. Their commitment is textbook paideia. After all, paideic law "is pedagogic. It requires both the discipline of study and the projection of understanding onto the future."[236]

For the secular state to enforce its education law upon such communities, its courts must wield their jurispathic powers. This need for jurispathos does not mean that the state should abstain from law-making wherever there is a potential conflict with religious paideic law, or that a court should bar the state from doing so. But the state and its courts should hesitate to infringe upon Hasidic religious commitments merely because New York's education policy is "not wrong." Alone, the fact that a policy is "not wrong" insufficiently protects the insular community against the coercive power of the state.[237] Rather, New York should enforce its education law—even at the expense of the sacred commitments of many Hasidic communities—because of New York's own paideic commitments.

Whether through its courts or its legislature, New York should imbue its education law with a paideic call for a sound education, including the secular basics, for all children.[238] As this section demonstrates, the path to do so is open. Indeed, in a recent case discussing yeshiva education (specifically, alleging that the Felder Amendment violated the Establishment Clause, but dismissed for unripeness and lack of standing), Judge I. Leo Glasser of the Eastern District of New York motioned toward a statist paideic commitment to New York's education requirements.[239] First, Judge Glasser drew upon *Brown v. Board of Education* and defended "the right of every child to a sound basic education, the

236. Cover, *supra* note 5, at 13.

237. *See id.* at 66–67.

238. As discussed above, Cover argues that just because a legal commitment is the state's does not mean that it is fully imperial, regulatory, and devoid of narrative and meaning. Paideic law and imperial law are ideal types. States can and do engage in the mode of paideic law and legal world-building, perhaps nowhere more than in the field of education. *See supra* note 25 and accompanying text.

239. *See* Young Advocs. for Fair Educ. v. Cuomo, 359 F. Supp. 3d 215, 226–27 (E.D.N.Y. 2019).

actualization of which 'is perhaps the most important function of state and local governments.'"[240] By articulating the protection of a right to education as "the most important function" of government, Judge Glasser explicitly elevated the statist legal commitments at hand beyond the mundanely regulatory and world-maintaining. In quoting from *Brown v. Board of Education*, he implicitly associated yeshiva education with the ultimate American statist paideia, the United States' Civil Rights-era commitment to racial pluralism and multiracial democracy.[241] Next, Judge Glasser highlighted "the importance of education for the liberty of the *individual*."[242] "Simply put," Judge Glasser wrote, "one who enters adulthood without a sound basic education is not fully free to pursue their loftiest ambitions or to chart their own future. Circumstance has charted it for them."[243] This appeal to individual liberty also motions toward a statist paideia, in which education law might expand beyond an exercise of the state's police power and into a meaning-rich suffusion of the American mythos of personal self-determination.

Nevertheless, even in dicta, Judge Glasser's analysis remains a mere nod toward paideic commitment, rather than a commitment itself. "States," Judge Glasser wrote, "have a compelling interest in prescribing minimum requirements for the curricula provided at private schools within their jurisdiction."[244] As in *Bob Jones*, the court merely affirmed that because the state's interest is compelling, its law is not violative of the Constitution—that is to say, not wrong.[245] Judge Glasser's analysis is what Cover might call a "quintessential gesture to the jurisdictional canons: the

240. *Id.* (quoting Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954)).

241. This association is not between yeshiva advocates and school segregationists, but between the importance of access to education in both issues.

242. *Young Advocs.*, 359 F. Supp. 3d at 226 (emphasis in original).

243. *Id.* (collecting sources); *see also* Plyler v. Doe, 457 U.S. 202, 222 (1982) ("The inability to read and write will handicap the individual deprived of a basic education each and every day of his [or her] life"); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 112 (1973) (Marshall, J., dissenting) ("Education directly affects the ability of a child to exercise his [or her] First Amendment rights, both as a source and as a receiver of information and ideas, whatever interests he [or she] may pursue in life"); Wisconsin v. Yoder, 406 U.S. 205, 221 (1972) (White, J., concurring) ("A State has a legitimate interest not only in seeking to develop the latent talents of its children but also in seeking to prepare them for the life style that they may later choose, or at least to provide them with an option other than the life they have led in the past.").

244. *Young Advocs.*, 359 F. Supp. 3d at 227 (collecting cases).

245. *See* Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983) ("The government interest at stake here is compelling.").

statement that an exercise of political authority was not unconstitutional" that "places nothing at risk."[246] The question remains whether the insular community is "at the mercy of each public policy decision that is not wrong."[247]

As with *Bob Jones*, Judge Glasser's dicta falls short of a paideic commitment "not because of the form of argument, but because of the failure of the Court's commitment," as Cover wrote regarding that earlier decision.[248] The value that Judge Glasser placed on the state's role in guaranteeing adequate education, as well as on education's role in securing individual liberty, could very well form the foundations of a statist paideic commitment, should the state choose to make one. Whether through the recognition of a court, the declaration of the legislature, or even a constitutional amendment, New York should make a clear paideic commitment to basic secular education for all. That commitment should rise to the level of an overarching constitutional mandate, the policy of the government as a whole, as opposed to a mere compelling interest underpinning policies implemented by the State Education Department.[249] Of course, for such a commitment to take practical effect requires a jurisprudence—from the Supreme Court down—that treats state paideic commitments as valid even when they conflict with religious commitments. But the fact that New York cannot compel such a jurisprudence should not stop it from encouraging one.

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246. *See* Cover, *supra* note 5, at 66.

247. *Id.*

248. *Id.*

249. *See generally* Matter of Weber v. N.Y. State Educ. Dep't, 76 Misc. 3d 676, 680 (N.Y. Sup. Ct. 2022) (asking the court to "[declare] that the right to a 'sound basic education' guaranteed by [N.Y. CONST. art. 11, § 1] applies to Petitioner Weber's minor son who attends a nonpublic religious school [specifically, a Hasidic yeshiva] in New York State"). Thus far, New York's grant of a constitutional right to a "sound basic education" has only been upheld in the context of adequate public schooling. *See, e.g.*, Campaign for Fiscal Equity, Inc. v. State, 100 N.Y.2d 893, 902 (2003) ("[T]he State has obligated itself constitutionally to ensure the availability of a 'sound basic education' to all its children."). Yet the fact that the right accrues to the child, and not the parent, may suggest that the right applies to a child no matter what school their parent enrolls them in. *Cf. In re* Downey, 72 Misc. 2d 772, 773–75 (N.Y. Fam. Ct. 1973). *Downey* held that that the state was responsible for the full cost of tuition to an appropriate private school for a developmentally disabled child, regardless of the parent's ability or willingness to pay. *Id.* at 774. While the court's decision rested mostly on equal protection grounds (that is, the state cannot decline to pay for the schooling of a single class of children (i.e., developmentally disabled children), the court also observed that "it is the child who is given the right to an education, not the parent and [the child's] right should not be abridged [based on the circumstances or choices of the parent]." *Id.* at 774–75. While *Downey*'s discussion concerned financial choices or circumstances, it seems possible that similar logic could be applied to the parent's religious choices or circumstances.

In the meantime, however, New York State actors and allies must work with the Supreme Court doctrine that currently exists, despite its unfavorability to state interests as balanced against religious liberty claims. In the short term, this means competing on an unbalanced playing field. New York should heed the lessons of *Masterpiece*, *Tandon*, and *Fulton* to ensure that no religiously discriminatory application or impact can be attributed to its education law and policies. Simultaneously, it should steer clear of school vouchers at all costs, to avoid mandatory funding of inadequate education by way of the new preferred funding regime for religion.

But in the long term, those who believe in a sound basic education for all should challenge these recent trends in religious liberty jurisprudence. As this Note has argued, recent Supreme Court religious liberty jurisprudence has embraced a maximalist free exercise doctrine, while also eviscerating church-state separation regarding government funding of religion. It is true that the "federal courts' conservative trajectory" and corresponding federal religion law jurisprudence may be "cemented for a generation."[250] That is all the more reason for proponents of a balanced religious liberty jurisprudence in general, and advocates for basic secular education in yeshivas in particular, to urgently continue their efforts. This likely involves shining a more public light on the implications of the Court's expansive free exercise jurisprudence than can be done from within a law school, law office, or legal brief. Political pressure should be brought to bear to challenge the ideas of de facto religious exemptions as of right, the rapidly eroding ability of states to restrict public funds from going to religious uses, and the collision of the two into a preferred religious funding regime. Public political pressure could force conservative jurists, scholars, and activists to defend these recent trends not doctrine-by-doctrine, case-by-case, but with attention to the overall impact on the structuring of a pluralist, democratic society.

250. Elizabeth Sepper & James D. Nelson, *Government's Religious Hospitals*, 109 VA. L. REV. 61, 110 (2023); *see also* Schragger et al., *supra* note 10, at 72–83 (predicting 20–30 years of the new religious liberty regime).

CONCLUSION

Children deserve an enforceable right to education. Religious communities, including New York's Hasidic communities, deserve the right to create their own normative worlds, to narrate the arcs of their own redemptions. A pluralist, democratic society demands no less on either front. But sometimes, as here, these rights come into conflict with one another. The question is how best to navigate among these competing claims.

Robert Cover articulated the problem well, but he was not the first. By some accounts,[251] an itinerant Jewish preacher was asked, two thousand-odd years ago, whether it was lawful to pay taxes to the Roman Emperor. His response: "Render unto Caesar the things that are Caesar's, and render unto God the things that are God's." The division between Caesar and God is emblematic of modern notions of the separation of church and state. But the parable bears only so much weight. Sometimes, Caesar and God lay claim to the same territory. What then?

Education is contested ground. For Hasidic communities, maximizing religious learning is the ideal.[252] Simultaneously, "education is perhaps the most important function of state and local governments."[253] In resolving such conflicts, a pluralist society should respond to Professor Cover's call. Whether at Bob Jones University or a yeshiva in Brooklyn, the state must be allowed to protect certain fundamental commitments. But the state should not necessarily be permitted to infringe so deeply upon the normative universe of a religious community merely because its own interests are "not wrong." Rather, in such circumstances, religious liberty jurisprudence should incentivize the state to affirm, convincingly, that its own commitment is world-building, rather than merely world-maintaining.

In terms of legal meaning, New York State is not only a project of imperial maintenance, although it certainly is that. It is, at least in part, a paideic project. Part of this paideia is the creation of a society with genuine religious pluralism. Tolerance is the floor. Diverse religious traditions should thrive here, even traditions that in some aspects may stand at odds with the liberal democratic project. Pluralism must stretch that far, at least. But another part

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251. *See Mark* 12:13–17; *Matthew* 22:15–22; *Luke* 20:20–26.
252. *See* Lichtenstein, *supra* note 138, at 1878.
253. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

of this paideia is the creation of a society in which children can achieve true individual self-determination. Upon reaching their majority, children must be able to chart their own path—including, should they so choose, a path separate from the deeply carved tracks in which they were raised.

New York has not elevated its guarantee of basic secular education to the level of paideia. The Commissioner of Education's regulations regarding substantive equivalency, and the compulsory education law from which they derive, lack a "normative status" in New York law. The law and policy already represent compelling state interests. But as compelling as the interests might be, they appear before the courts as an essentially discretionary policy. Indeed, how committed can the state be to substantial equivalency enforcement if it did not meaningfully attempt such enforcement prior to 2022?

As Cover wrote, "[t]he invasion of the nomos of the insular community ought to be based on more than the passing will of the state. It ought to be grounded on an interpretive commitment that is as fundamental as that of the insular community."[254] New York's Hasidic communities "deserve[ ] better—they deserve[ ] a constitutional hedge against mere administration."[255] And children in New York "deserve[ ] more—[they] deserve[ ] a constitutional commitment" to a basic secular education.[256]

Making such a commitment is not a panacea. Regardless of where the affirmation of a constitutional commitment to education originates, it could eventually find its way before a federal court on a religious liberty claim. At that point, federal jurisprudence will need to be equipped to recognize a statist paideia, rather than conduct its current hunt for discrimination, expansively and formalistically defined. Optimistically, perhaps the state can create good facts, which can in turn create good law.[257] Cover wrote that law as narrative bridges the gap between current

254. Cover, *supra* note 5, at 67 n.3, 195.

255. *Id.* at 67.

256. *Id.* New York's Constitution already contains an explicit recognition of a fundamental commitment to the availability of *public* secular education. *See* N.Y. CONST. art. 11, § 1. But this textual commitment to the providing of "common schools" for the populace has not yet been offered by the state—including its judges—as standing for a fundamental commitment to basic education for all, no matter what school a child is enrolled in.

257. *See* United States v. Joseph, 730 F.3d 336, 337 (3d Cir. 2013) ("Lawyers and judges are familiar with the well-worn adage that bad facts make bad law. A possible corollary to this proposition is that good facts make good law.").

reality and an imagined future.[258] Perhaps, then, the facts of a future reality—namely, a world-creating, normative commitment to basic secular education—will help bridge the gap between the law as it is, and the law as it should be.

258. *See* Cover, *supra* note 5, at 9.