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The Establishment of Religion in Schools

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Abstract. Recent Supreme Court opinions have upended laws that prohibited state support for and participation in devotional exercises, sectarian activities, and religious education. The Essay reviews a variety of historical antecedents that the Court formerly found highly persuasive to Establishment Clause jurisprudence. It next evaluates and critiques the Roberts Court's steady devaluation and erosion of disestablishment norms in opinions that struck down restraints on prayers at public school events and restrictions on public funding of religious schools. References to history and tradition in those cases are at best oblique and at worst misleading. Rather than formalistic recitations of the strict scrutiny test that exaggerate free exercise concerns, the Court should rely on nuanced contextual reasoning to protect the exercise of private religious convictions and maintain separation between religious beliefs and state actions.

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Introduction

The First Amendment perspicuously prevents the government from interfering with or involving itself in personal worship. The Supreme Court has long recognized that the framers of the Religion Clauses understood establishment of religion to include state "sponsorship, financial support, and active involvement . . . in religious activity."[1] Increasingly, however, the Roberts Court has found states' policies restricting religious schools from obtaining public funding to be unconstitutional. Doctrinal developments constrain the ability of states to exercise judgments about how to avoid entanglement with religious practices. The Court now requires state authorities to help offset the tuition of students who attend both private religious and private secular schools, at least in rural areas where public school alternatives are unavailable.[2] Additionally, a majority of Justices regard prayers led by a coach, while surrounded by students at the end of public-school athletic events, to be protected by free exercise of religion and free speech.[3]

To bolster their departure from precedent, the Justices have painted a veneer of traditional meaning on the weakened edifice of the Establishment Clause. In place of a rampart against coercion and indoctrination, the Court has skewed the line between public officials' secular and religious conduct. The Justices have dodged the complex policy concerns at play when Establishment Clause values conflict with religious choices, providing little "meaningful guidance" to lower court judges who must "decide cases . . . on a day-by-day basis."[4] Rather than adopting the "flexibility" needed for states to "navigate the tension between the two Religion Clauses,"[5] the Court selectively favored free exercise arguments without adequately weighing them against states' antiestablishment objectives.

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1. Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970).
2. *See* Carson *ex rel.* O.C. v. Makin, 142 S. Ct. 1987, 1993, 1997-98 (2022) (finding that a state tuition assistance program that rendered sectarian schools ineligible to receive the benefit violated the Free Exercise Clause); *see also* Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2262-63 (2020) (holding that a no-aid provision that discriminated against religious institutions violated the Free Exercise Clause); Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2024-25 (2017) (determining that the Free Exercise Clause prevents states from denying to otherwise eligible church-affiliated schools the receipt of public funds earmarked for refurbishing children's playgrounds).
3. *See* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2432-33 (2022) (holding that a school district violated the Free Exercise and Free Speech rights of a public-school coach who engaged in religious prayers after games).
4. Thomas v. Rev. Bd., 450 U.S. 707, 722 (1981) (Rehnquist, J., dissenting).
5. *Carson*, 142 S. Ct. at 2009 (Breyer, J., dissenting).

This Essay critiques the judicial trend toward rigidly emphasizing free exercise values and downplaying antiestablishment concerns. In the education context, a formalistic method of interpretation omits contextual analysis—of how state funding of religious schools impacts resources available to public schools, affects the choices of students and parents who are opposed to religious tenets, and reflects on government neutrality. Verbal formalism obfuscates the assessment of complimentary policies that separate the spheres of private worship from public education.

I argue, to the contrary, that proportionality analysis is required of courts to bridge the constitutional values of the Establishment and Free Exercise Clauses. The constitutional injunction against religious establishment is meant to advance tolerance, individual liberty, institutional integrity, and division between civic education and religious teaching. Balanced interpretation of the Religion Clauses safeguards religious convictions and practices from government interference. Such an approach to interpretation charts a narrow course between the two, avoiding the clash that would ensue were either of their "absolute terms . . . expanded to a logical extreme."[6] Their inherent tensions require contextual judicial assessments. But the Court currently tends to cite the relevance of strict scrutiny without adequately parsing its elements of compelling interest and narrow tailoring.

The first Part of this Essay explores historical antecedents to modern Establishment Clause doctrine: early American efforts to bar governmental support for religious institutions. The second Part recites Supreme Court precedents addressing ritualistic conduct in public schools and tax funded tuition to offset the tuition costs of religious education. The third Part demonstrates how recent decisions increasingly countenance greater government involvement in religious life by emphasizing free exercise claims at the expense of antiestablishment doctrine. The fourth Part reflects on the extent to which recent precedents upend doctrine and water down constitutional text.

I. Historical Antecedents of Establishment Clause Doctrine

The Court's latest decision addressing religious freedoms at schools, *Kennedy v. Bremerton School District*, asserted that interpretation of the Religion Clauses must "focus[] on original meaning and history."[7] Yet the majority scarcely developed its interpretive method in the context of K-12 education. Earlier Supreme Court holdings had—with varying degrees of success—expounded historically significant information about the founding

6. *Walz*, 397 U.S. at 668-69.

7. 142 S. Ct. at 2428.

generation's understandings.[8] The limiting statement in *Kennedy*, however, did not constrain the majority to the founders' commitment to separation between civil and religious functions.[9]

A. The Jeffersonian and Madisonian Tradition of Religious Disestablishment

Jeffersonian and Madisonian principles of religious separation and religious liberty dominated Supreme Court understandings starting from the late-nineteenth century and evolved throughout most of the twentieth. The Roberts Court, however, has been steadily moving away from the separation metaphor.[10]

Jefferson's perspective is particularly informative of early American thought. In 1779, he foresightedly advocated for a bill to provide public education.[11] His *Notes on the State of Virginia* articulated his view that schools should "teach[] all children of the state reading, writing, . . . common arithmetic," and other secular subjects.[12] Madison demonstrated support for

8. *See* Town of Greece v. Galloway, 572 U.S. 565, 576 (2014) (asserting that "the Establishment Clause must be interpreted 'by reference to historical practices and understandings'" (quoting County of Allegheny v. ACLU, 492 U.S. 573, 670 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part))); Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2085-89 (2019) (adopting a historical line of doctrine); Alexander Tsesis, *Government Speech and the Establishment Clause*, 2022 U. ILL. L. REV. 1761, 1792 (critiquing the Court in *American Legion* for adopting a historical method but then resorting to a novel understanding of the Christian cross); Steven K. Green, *The Legal Ramifications of Christian Nationalism*, 26 ROGER WILLIAMS U. L. REV. 430, 483 (2021) (arguing that historical pedigree can offer clear guidance, but not where history only obliquely corresponds with the case and controversy before a court).

9. Nuances about the framers' understandings of church-state separation can be found at *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 760-61 (1973). *See also id.* at 770 n.28 (relying on Madison's *Memorial and Remonstrance*); Everson v. Bd. of Educ., 330 U.S. 1, 63 (1947) (Rutledge, J., dissenting) ("Now as in Madison's day it is one of principle, to keep separate the separate spheres as the First Amendment drew them; to prevent the first experiment upon our liberties; and to keep the question from becoming entangled in corrosive precedents."); Torcaso v. Watkins, 367 U.S. 488, 493 (1961) ("In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'" (quoting *Everson*, 330 U.S. at 16)).

10. Justices Thomas and Gorsuch are at the forefront of the effort to diminish the constitutional value of the "separationist view," which they argue was "originally motivated by hostility toward certain disfavored religions." Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2266 (2020) (Thomas J., concurring).

11. Thomas Jefferson, A Bill for the More General Diffusion of Knowledge (1779), *in* 2 THE PAPERS OF THOMAS JEFFERSON 526, 526 (Julian P. Boyd ed., 1950).

12. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 146 (William Peden ed., 1954) (1787).

Jefferson's position through his speech against religious assessments and advocacy for the public-school bill.[13]

While Jefferson and Madison wrote about founding-era Virginia politics, their separation principle remains jurisprudentially relevant. Justice Brennan explained that Virginia's "efforts to separate church and state provided the direct antecedents of the First Amendment."[14] Andrew Koppelman contends that Madison's thoughts about the separation of church and state are "the most useful source[s] of anti-establishment thinking."[15] Other authors assert that, as a statement of original meaning, Madison's *Memorial and Remonstrance Against Religious Assessments* is an "enduring contribution" that is "probably the fullest and most thoughtful exposition of the disestablishmentarian thinking at the time of the founding."[16]

Ratification of the Religion Clauses of the First Amendment in 1791 followed on the coattails of Virginia's passage of the Act for Establishing Religious Freedom of 1786.[17] The law had originally been drafted by Jefferson in 1777 with a natural rights component, a mode of thinking also present in the Declaration of Independence.[18] Jefferson's underlying premise was that people's opinions fare best without the purview of civil government.[19] To require anyone to contribute money to disseminate views that "he disbelieves *and abhors*, is sinful and tyrannical."[20] Even forcing a person "to support this or

13. IRVING BRANT, JAMES MADISON: THE NATIONALIST, 1780-1787, at 347 (1948).

14. Walz v. Tax Comm'n, 397 U.S. 664, 682 (1970) (Brennan, J., concurring).

15. Andrew Koppelman, *Phony Originalism and the Establishment Clause*, 103 NW. U. L. REV. 727, 746 (2009) (citing JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments* (1785), *in* THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 6, 10-11 (Marvin Meyers ed., rev. ed. 1981)).

16. MICHAEL W. MCCONNELL, THOMAS C. BERG & CHRISTOPHER C. LUND, RELIGION AND THE CONSTITUTION 42-43 (5th ed. 2022).

17. Act for Establishing Religious Freedom, VA. CODE ANN. § 57-1 (2024).

18. *Compare* Thomas Jefferson, A Bill for Establishing Religious Freedom (1777), *in* 5 THE FOUNDERS' CONSTITUTION 84, 85 (Philip B. Kurland & Ralph Lerner eds. 1987) ("[W]e are free to declare, and do declare, that the rights hereby asserted are of the natural rights of mankind. . . ."), *with* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."). *See* Michael P. Zuckert, *Thomas Jefferson and Natural Morality*, *in* THOMAS JEFFERSON, THE CLASSICAL WORLD, AND EARLY AMERICA 56, 56 (Peter S. Onuf & Nicholas P. Cole eds., 2011) (explaining "[t]he centrality of the natural rights philosophy" in Jefferson's assessment of his three great lifetime accomplishments). *Cf.* Alexander Tsesis, *Furthering American Freedom: Civil Rights & the Thirteenth Amendment*, 45 B.C. L. REV. 307, 315-16 (2004) (discussing a contradictory aspect of Jefferson's use of natural rights language in the Declaration, despite his failing to secure a condemnation of the international slave trade in the document's final draft).

19. Jefferson, *supra* note 18.

20. *Id.* (emphasis added).

that teacher of his own religious persuasion" impinges on the liberty of a person to select the recipient of his religious, charitable contribution.[21]

Almost a decade later, Madison convinced the Virginia legislature to adopt the statute and its ideal of church-state separation.[22] Madison's pamphlet on the subject, the *Memorial and Remonstrance*,[23] informed the law's antiestablishment principle.[24] His tract opposed the payment of public tithes to religious institutions, even when the taxes favored no particular Christian denomination.[25]

Both the Act for Establishing Religious Freedom and the *Memorial and Remonstrance* reflected the values that led the young nation in 1791 to adopt the Religion Clauses into the Bill of Rights.[26] Justice Powell asserted that "Madison's *Memorial and Remonstrance* [is] recognized today as one of the cornerstones of the First Amendment's guarantee of government neutrality toward religion."[27]

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21. *Id.*

22. *See* Lee v. Weisman *ex rel.* Weisman, 505 U.S. 577, 615 (1992) (Souter, J., concurring). There is debate in the academic literature about how much gravitas to grant Madison's and Jefferson's separationist views on religious separation. *Compare, e.g.*, LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 51-62, 182 (1986) (adopting Madison's and Jefferson's strict-separationist perspectives), *with* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1449-55 (1990) (arguing that Jefferson's views on Christianity were radical and rejecting a strict-separationist view). For a pithy description of the scholarly debate about the merits of strict-separation perspective and the significance of Jefferson's and Madison's opposition to funding religious institutions, see Steven K. Green, *A "Spacious Conception": Separationism as an Idea*, 85 OR. L. REV. 443, 445 (2006).

23. MADISON, *supra* note 15.

24. Debra R. Neill, *The Disestablishment of Religion in Virginia: Dissenters, Individual Rights, and the Separation of Church and State*, 127 VA. MAG. HIST. & BIOGRAPHY 2, 7 (2019).

25. *See* MADISON, *supra* note 15, at 10-11.; Everson v. Bd. of Educ., 330 U.S. 1, 36-37 (1947) (Rutledge, J., dissenting) (discussing the neutral terms and the significance of the document). On the importance of the *Remonstrance* to understanding the Establishment Clause, see *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 396 (2011); and *Perry v. Commonwealth*, 44 Va. (3 Gratt.) 632, 641-42 (1846) (interpreting the Virginia Bill of Rights).

26. F. King Alexander & Klinton W. Alexander, *The Reassertion of Church Doctrine in American Higher Education: The Legal and Fiscal Implications of the* Ex Corde Ecclesiae *for Catholic Colleges and Universities in the United States*, 29 J.L. & EDUC. 149, 159 (2000) (noting that "[t]he First Amendment was ratified in 1791 with the same objectives and protections for religious freedom as those set forth in the Virginia statute on religious liberty [and Madison's *Memorial and Remonstrance*]"). *But see* Daniel L. Dreisbach, *A Lively and Fair Experiment: Religion and the American Constitutional Tradition*, 49 EMORY L.J. 223, 230 (2000) (arguing that the Supreme Court's historical claims about Jefferson's and Madison's roles as architects of anti-separation principles are based on a "dubious syllogism").

27. Comm. for Pub. Ed. & Religious Liberty v. Nyquist, 413 U.S. 756, 770 n.28 (1973).

Decades after ratification of the First Amendment, Madison returned to the subject in a letter. He acknowledged that while it "may not be easy" to "separat[e] . . . the rights of religion and the Civil authority," the disjunction between them is necessary to "avoid collisions [and] doubts on unessential points" and to prevent factions from usurping other citizens' essential interests.[28]

As President, Jefferson adhered to a balanced and pluralistic understanding of the Religion Clause. On the free exercise side of the ledger, he wrote to the Danbury Baptist Association that "religion is a matter which lies solely between man and his God."[29] On the Establishment Clause side "a wall of separation between church and State" restrains the "legislative powers of government" from encroaching upon the religious ideas "of the whole American people."[30]

The constitutional meaning of Jefferson's views on the Religion Clauses drew from an even older tradition of separation. In the mid-seventeenth century, Roger Williams, a devout minister who was the founder of Providence Plantation (now Rhode Island), contended that separation between church and state was necessary to prevent governmental intrusion into sacral matters.[31] Separation between them, he proclaimed, protected religious autonomy.[32] This view, however, did not reflect the reality in other American colonies of Williams's day. He was especially at odds with the Puritan leadership in Massachusetts, which had banished him for his separatist preaching.[33] The Bay Colony continued to exact church taxes for two centuries after his departure.[34] Yet, it was Williams's, Jefferson's, and

28. Letter from James Madison to Rev. Adams (1832), *in* 9 The WRITINGS OF JAMES MADISON, 1819-1836, at 484, 487 (Gaillard Hunt ed., 1910).

29. Letter from Thomas Jefferson to a Committee of the Danbury Baptist Association (Jan. 1, 1802), *in* 8 THE WRITINGS OF THOMAS JEFFERSON: BEING HIS AUTOBIOGRAPHY, CORRESPONDENCE, REPORTS, MESSAGES, ADDRESSES, AND OTHER WRITINGS, OFFICIAL AND PRIVATE 113, 113 (H.A. Washington ed., 1854).

30. *Id.*

31. On Williams's history and theology, see Derek H. Davis, *The Enduring Legacy of Roger Williams: Consulting America's First Separationist on Today's Pressing Church-State Controversies*, 41 J. CHURCH & STATE 201, 212 (1999); and Jimmy D. Neff, *Roger Williams: Pious Puritan and Strict Separationist*, 38 J. CHURCH & STATE 529, 532-36, 539-41 (1996).

32. E. Gregory Wallace, *When Government Speaks Religiously*, 21 FLA. STATE U. L. REV. 1183, 1231 (1994) (observing that Jefferson's Bill for Establishing Religious Freedom is similar to "Williams' view" that "the state interferes with religious freedom in two ways: first, when it compels people to adopt its religious practices; and second, when it compels people to abandon their own religious practices").

33. Andrew R. Murphy, *Tolerance, Toleration, and the Liberal Tradition*, 29 POLITY 593, 611-14 (1997).

34. Massachusetts's formal religious establishment dissolved in 1833. *See* Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 255 n.20 (1963) (Brennan, J., concurring).

Madison's views on state and church that came to be included in the ideals of First Amendment that informed Religion Clause jurisprudence.[35]

B. America's Historic Trajectory of Church-State Disenfranchisement

Jefferson and Madison's views on religious tolerance are indicative of separation sentiments that guided state disestablishment efforts throughout the young country. The historic sentiments for state-church separation should also help today to inform the Roberts Court's test for original meaning and history.[36] Past practice should be construed not as a rigid anchor but as a guide for ascertaining the aims of the Establishment Clause against governmental commands to, inhibition of, and favoritism for religion.[37]

During the late eighteenth and early nineteenth centuries, all states with established religions disclaimed them.[38] A genuine consensus existed on this point even in states that were otherwise quite diverse.[39] After 1833, when Massachusetts repealed its church taxes, which had supported Congregationalism, state-established churches ceased to exist in the United States.[40] There was a general recognition that no taxpayers should be involuntarily required to fund or to participate in any religion, regardless of whether they agreed with its tenets.[41]

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35. *Id.* at 214 (majority opinion) ("[T]he views of Madison and Jefferson, preceded by Roger Williams, came to be incorporated not only in the Federal Constitution but likewise in those of most of our States." (footnote omitted)); *see also* ANSON PHELPS STOKES & LEO PFEFFER, CHURCH AND STATE IN THE UNITED STATES 15-16 (rev. one-vol. ed. 1964) (asserting that Williams's principles of religious pluralism were "later to become the First Amendment declaration against laws respecting any establishment of religion or prohibiting the free exercise thereof").

36. *See* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427-28 (2022) (articulating the test for judicial interpretation of the Establishment Clause).

37. *See* Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970) ("The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited.").

38. *See Schempp*, 374 U.S. at 255 n.20 (Brennan, J., concurring).

39. For a list of colonies that prior to the Revolution had established religious institutions, see C.M. Hudspeth, *Separation of Church and State in America*, 33 TEX. L. REV. 1035, 1038-39 (1955). A detailed study of disestablishment in the aftermath of the Revolution throughout the United States appears in LEVY, note 22 above, at 25-62.

40. *See supra* note 34.

41. Madison respected "freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin" while opposing tax revenues from reaching religious institutions. *See, e.g.*, MADISON, *supra* note 15, at 8; *see also* Everson v. Bd. of Educ., 330 U.S. 1, 8-11 (1947) (explaining that the framers regarded the funding of religion to be harmful to believers and unbelievers). On the other hand, the Court has held that tax exemptions to churches did not indicate government sponsorship of religion. *Walz*, 397 U.S. at 675-78 ("The grant of a tax exemption is not sponsorship since the

footnote continued on next page

Personal religious independence secured liberty of conscience and erected a barrier against social conflicts.[42] The end of state-established religions demonstrated a break from America's colonial past, when religious establishment was the norm, to a national identity that disassociated the state from religious practices and financial subsidies.

II. The Establishment Clause and Public Support for Education

The First Amendment's broad aims of preserving personal beliefs and preventing government interference with devotion[43] remain relevant to the resolution of today's controversies.[44] Public school systems have evolved to serve a diverse student body. Primary and secondary schools are loci of maturation where young learners develop interpersonal and civic skills.

To remain consistent with the Madisonian and Jeffersonian ideal of government noninterference with religious freedom and the early republic pattern of disestablishment of religious institutions,[45] public funding should not advance views that clash with the convictions of many taxpayers. Public education is supported by taxpayers who adhere to a plethora of often contradictory and sometimes antagonistic religious views, so children who attend public schools should be taught "in an atmosphere free of parochial, divisive, or separatist influences of any sort."[46] The Religion Clauses erect a barrier between students' devotional training and their public education.

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government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state.").

42. *See* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2090-91 (2019) (Breyer, J., concurring) (asserting that "the basic purposes that the Religion Clauses were meant to serve" include "assuring religious liberty and tolerance for all, avoiding religiously based social conflict, and maintaining that separation of church and state that allows each to flourish in its 'separate spher[e]'" (quoting Van Orden v. Perry, 545 U.S. 677, 698 (2005) (Breyer, J., concurring))); *see also Van Orden*, 545 U.S. at 698 (Breyer, J. concurring) (asserting that the Religion Clauses "seek to avoid that divisiveness based upon religion that promotes social conflict, sapping the strength of government and religion alike").

43. Lee v. Weisman *ex rel.* Weisman, 505 U.S. 577, 589 (1992) ("The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission.").

44. *See* Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 241 (Brennan, J., concurring) ("Whatever Jefferson or Madison would have thought of Bible reading or the recital of the Lord's Prayer in what few public schools existed in their day, our use of the history of their time must limit itself to broad purposes . . . .").

45. *See supra* Part I.A.

46. *Schempp*, 374 U.S. at 242 (Brennan, J., concurring).

This Part first interrogates cases that rejected public funding flowing to religious schooling. It then turns to decisions of the Roberts Court that have adapted strict-scrutiny rhetoric that favors religious claimants who demand state support for their children's religious schooling. That formalistic framework for reviewing state antiestablishment initiatives insufficiently interrogates the play in the joints between the Clauses.[47] Rather than rigidity, their interpretation requires contextual judicial reasoning to determine whether educational policies adequately prevent state encroachment upon religious convictions.[48]

A. The Evolution of Separation Doctrine in the Supreme Court

The Supreme Court wove the nation's commitment to religious and state separation into a line of cases beginning with the landmark opinion in *Everson v. Board of Education*, which incorporated the Establishment Clause.[49] Justice Black, who wrote for the majority, ruled that the Establishment Clause meant "at least" that "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."[50] The Court, nevertheless, found that states could draw from general revenue funds to reimburse parents for public transportation costs to send children to parochial schools.[51] The majority's rule of separation, Justice Rutledge asserted in dissent to the case, was at odds with its specific holding.[52] Like the majority, Justice Rutledge nevertheless emphasized the Madisonian and Jeffersonian

47. The Supreme Court has explained that the phrase "play in the joints" refers to "what the Establishment Clause permits and the Free Exercise Clause compels." Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2019 (2017). While no single formula could suffice to characterize the "play in the joints," it clearly refers to religious toleration. Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2289 (2020) (Breyer, J. dissenting) (asserting that the Court's reliance on the "play in the joints" notion tends to require the Court to "realize the Religion Clauses' basic purpose 'to promote and assure the fullest scope of religious liberty and religious tolerance for all and to nurture the conditions which secure the best hope of attainment of that end'" (quoting *Schempp*, 374 U.S. at 305 (Goldberg, J. concurring))).

48. Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970) ("The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited.").

49. Everson v. Bd. of Educ., 330 U.S. 1, 8 (1947); *see* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2080 (2019) (recognizing the *Everson* Court's incorporation of the Establishment Clause).

50. *Everson*, 330 U.S. at 15-16.

51. *Id.* at 18.

52. *Id.* at 41, 45 (Rutledge, J., dissenting).

perspectives. He wrote that "the Amendment forbids any appropriation, large or small, from public funds to aid or support any and all religious exercises."[53]

The Justices' distinction between parental religiosity and the state's secular functions influenced decisions by the Warren and Burger Courts.[54] The Court's opinions prevented the introduction of government largesse into religious school observances. However, holdings of those judicial periods also recognized that access to general public services, be they fire and police protections or garbage collection, is not barred by the Establishment Clause's prohibitions against government involvement in religious practices.[55] Likewise, the Court found that granting the same property tax exemptions for real estate owned by religious entities as for property owned by other private, nonprofit educational, health, and charitable organizations was "a reasonable and balanced attempt to guard against" the dangers of religious intolerance.[56]

The Court distinguished between funding granted for the general welfare of state citizens and funding directed at religious indoctrination.[57] The prohibition against government involvement in religion did not target parents' abilities to choose religious education for their children.[58] The Establishment Clause was regarded not as a complete barrier but as a safeguard of religious liberty against government interference in the private realm of religion. Chief Justice Burger noted that "the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a

53. *Id.*

54. Compare the critical perspective of Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 168 (1992) (advocating a pluralistic view with respect to state and religion, criticizing the Warren and Burger Courts for embracing an ideal of a secular state, and identifying "[t]he mistake" of the then emerging Rehnquist Court as "defer[ing] to majoritarian decisionmaking") with Steven G. Gey, *Religious Coercion and the Establishment Clause*, 1994 U. ILL. L. REV. 463, 527 (arguing against McConnell that "if the Constitution does not create a secular state, then it must create something different," with "[t]he only two alternatives" being "an outright theocracy or a system similar to that envisioned by Augustine").

55. *See, e.g.*, *Everson*, 330 U.S. at 17-18.

56. Walz v. Tax Comm'n, 397 U.S. 664, 673 (1970).

57. *See, e.g.*, Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 8 (1993) (reiterating that the First Amendment does not bar religious institutions from participation in social welfare programs or enjoying public benefits like fire protection and street repair); Bowen v. Kendrick, 487 U.S. 589, 609 (1988) (stating that the Court "never held that religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs").

58. Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925).

particular relationship."[59] He warned against too rigid an understanding of such "a useful figure of speech"[60] and adopted a contextual approach.[61]

During the years in which he presided, the Court resisted state efforts to direct public funds to religious education. Most telling of Chief Justice Burger's concepts of separation was the three-part test he articulated in *Lemon v. Kurtzman*,[62] which for half a century played a significant role in containing governmental authority outside the sphere of religious conduct.[63] Chief Justice Burger found that although there was a secular purpose behind the use of state money to supplement salaries of teachers who taught secular subjects in private schools (about 95% of which were church-affiliated), the arrangement nevertheless constituted entanglement by the government in church affairs involving instruction, salary, curriculum, and disciplinary decisions.[64]

For years after the Court announced the *Lemon* test, conservative and liberal Justices agreed that entanglement violates the Establishment Clause, repeatedly connecting that reasoning to the country's founding. Justice Powell wrote in *Sloan v. Lemon* that a private school tuition reimbursement program had the primary effect of entangling government in religious education where an overwhelming majority of the private schools that stood to benefit were religious.[65] That same day, the majority in *Nyquist* acknowledged that "Church and State" had never been entirely separated when it came to neutral public services that did not require government to support religious ideologies.[66]

59. Lemon v. Kurtzman, 403 U.S. 602, 614 (1971), *overruled by* Kennedy v. Bremerton School District, 142 S. Ct. 2407, 2427 (2022).

60. Lynch v. Donnelly, 465 U.S. 668, 673 (1984).

61. *Id.* at 679 (relying on context to determine the meaning of a religious symbol in a holiday display).

62. 403 U.S. at 612-13 ("First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" (citation omitted) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970))).

63. In *Santa Fe Independent School District v. Doe*, the Court made clear that "we assess the constitutionality of an enactment by reference to the three factors first articulated in *Lemon*." 530 U.S. 290, 314 (2000). Even so, the opinion emphasized the "purpose" prong of the *Lemon* analysis. *Id.* at 314-17; *see also* Bowen v. Kendrick, 487 U.S. 589, 602-03 (1988) (same); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 395 (1993) (applying the *Lemon* test); Stone v. Graham, 449 U.S. 39, 40-41 (1980) (per curiam) (same); Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 771 (1973) (relying on *Lemon*).

64. *Lemon*, 403 U.S. at 608, 610, 615-22.

65. Sloan v. Lemon, 413 U.S. 825, 833-35 (1973). Justice Powell noted that over 90% of the students attending nonpublic schools in Pennsylvania were enrolled in religiously affiliated schools. *Id.* at 830.

66. *Nyquist*, 413 U.S. at 780-82 (distinguishing neutral state functions benefitting religious institutions by providing health and safety services from those that benefit and advance institutions' religious missions and teachings).

Justice Powell nevertheless found that state payments for the maintenance and repair of nonpublic schools, 85% of which were church-affiliated, unconstitutionally favored religious institutions.[67]

The Court continued to accept *Everson*'s adoption of Jeffersonian and Madisonian separationism.[68] As a historical matter, the Burger Court recognized that the founders were aware of "the anguish, hardship and bitter strife that could come when zealous religious groups struggled with one another to obtain the Government's stamp of approval."[69] Caution against enmeshing government funding with religion held sway. The Court found unconstitutional the payment of public moneys for nonpublic school services, textbooks, and educational equipment;[70] for private schools' field trips;[71] and for salaries of public schoolteachers who were sent to parochial schools to teach secular subjects.[72]

The Warren and Burger Courts also consistently found community-led prayers or moments of silence to be contrary to the functions of public schools. Even a nondenominational prayer constituted a violation of the Establishment Clause.[73] A series of cases further found that a daily recitation of the Lord's Prayer over a school intercom,[74] a statutory requirement to post the Ten Commandments in a classroom,[75] and a religiously motivated daily minute of silence violated Establishment Clause principles.[76] Those decisions consistently adopted strong separation principles dating back to *Everson* and, indeed, much earlier to Jefferson's Bill for Establishing Religious Freedom and

67. *See id.* at 768.

68. *See id.* at 770 n.28.

69. Engel v. Vitale, 370 U.S. 421, 429 (1962).

70. Meek v. Pittenger, 421 U.S. 349, 370 n.20 (1975), *overruled by* Mitchell v. Helms, 530 U.S. 793 (2000); *id.* at 364 (explaining that "the primary beneficiaries" of the statute's "instructional material and equipment loan provisions, like the beneficiaries of the 'secular educational services' reimbursement program considered in *Lemon v. Kurtzman*, and the parent tuition-reimbursement plan considered in *Sloan v. Lemon*, are nonpublic schools with a predominant sectarian character").

71. Wolman v. Walter, 433 U.S. 229, 253-54 (1977), *overruled by Mitchell*, 530 U.S. 793.

72. Aguilar v. Felton, 473 U.S. 402, 412-13 (1985), *overruled by* Agostini v. Felton, 521 U.S. 203, 235 (1997); Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373, 397 (1985), *overruled by Agostini*, 521 U.S. at 235.

73. *Engel*, 370 U.S. at 430.

74. Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 207, 223 (1963).

75. Stone v. Graham, 449 U.S. 39, 42 (1980) (per curiam).

76. Wallace v. Jaffree, 472 U.S. 38, 60 (1985).

Madison's *Memorial and Remonstrance*. In some cases, the Court directly linked the Establishment Clause's principle of separation to their thought.[77]

B. The Weakening of Establishment Doctrine in More Recent Decisions

The extent to which personnel changes on the Court can alter doctrine is perhaps nowhere more evident than in the Religion Clause cases.[78] The Roberts Court has weakened the power of states to prevent public resources from being channeled into religious education.[79] The Court has increasingly relied on reasoning that favors religiosity, discounts disestablishment principles, and threatens to "create new controversy," which are likely to "begin anew the very divisions" that the Establishment Clause was meant to prevent.[80] This relatively new mode of analysis wears the mantle of originalism but fails to seriously engage with historical materials.[81]

77. *See, e.g.*, *Schempp*, 374 U.S. at 214 ("[T]he views of Madison and Jefferson, preceded by Roger Williams, came to be incorporated not only in the Federal Constitution but likewise in those of most of our States." (footnote omitted)).

78. *See* Barry P. McDonald, *Democracy's Religion: Religious Liberty in the Rehnquist Court and into the Roberts Court*, 2016 U. ILL. L. REV. 2179, 2181-82, 2202, 2207, 2225 (demonstrating that the Roberts Court's loosened restrictions on state sponsorship of religion began with the Rehnquist Court); Erwin Chemerinsky, *Assessing Chief Justice William Rehnquist*, 154 U. PA. L. REV. 1331, 1334, 1355 (2006) ("The Rehnquist Court did not overrule the test for the Establishment Clause put forth in *Lemon* . . . but it did allow much more government aid to parochial schools."); Steven G. Gey, *Life After the Establishment Clause*, 110 W. VA. L. REV. 1, 2, 38 (2007) (arguing that a "new majority on the Supreme Court is about to embark on a wholesale reinterpretation of the entire constitutional approach toward the relationship between church and state").

79. *See* Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2261 (2020) ("A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious."); Aziz Z. Huq, *The Counterdemocratic Difficulty*, 117 NW. U. L. REV. 1099, 1152 (2023) (arguing that "[t]he First Amendment, as interpreted by the Roberts Courts, protects the interests of discriminatory religious groups while limiting the ability of other groups to advance their moral views by lobbying for new legislative action").

80. Town of Greece v. Galloway, 572 U.S. 565, 577 (2014); *see* Everson v. Bd. of Educ., 330 U.S. 1, 9-10 (1947).

81. *See* Ira C. Lupu & Robert W. Tuttle, *The Remains of the Establishment Clause*, 74 HASTINGS L.J. 1763, 1766 (2023) ("In a Court that frequently pretends to adhere to originalism, this aspect of the new free exercise doctrine is strikingly non-originalist."); *see also* Alexander Tsesis, *Maxim Constitutionalism: Liberal Equality for the Common Good*, 91 TEX. L. REV. 1609, 1655-65 (2013) (describing interpretive theories, including originalism).

1. Parental choice and nonendorsement approaches to public funds for religious education

Until the mid-1990s, the Court had found state funding directed to parochial education to violate the Establishment Clause.[82] First under Chief Justice Rehnquist and now under Chief Justice Roberts, the Court shifted its reasoning. Several Justices—Alito, Gorsuch, Scalia, Rehnquist, and Thomas—decried the *Lemon* test before 2022, but they had never been in the majority in abrogating the test altogether.[83]

Even before that test was officially overturned in *Kennedy*,[84] the Court had begun to shift away from Madison's and Jefferson's model of separation. *Mueller v. Allen*, a case whose opinion was drafted by then-Justice Rehnquist and decided late in Chief Justice Burger's tenure, began to push Establishment jurisprudence into a new direction. The Court adopted a "private choice" rationalization that allowed parents to enjoy state tax deductions for tuition they paid to private religious schools.[85] The Court rejected the claim that public officials would become entangled in determining whether teachers' lesson plans adapted secular textbooks to teach religious sentiments.[86] *Mueller* financially benefited parents who selected religious schools for their children.[87]

82. *See, e.g.*, Aguilar v. Felton, 473 U.S. 402, 414 (1985) (holding it to be a violation of the Establishment Clause for a municipality to use federal funds to pay public school employees to teach at a religious school), *overruled by* Agostini v. Felton, 521 U.S. 203, 235 (1997).

83. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2080 (2019) (opinion of Alito, J.) (pointing to a "pattern" of the opinions that did not rely on the *Lemon* test as sign of the "test's shortcomings"); *id.* at 2101 (Gorsuch, J., concurring) (calling *Lemon* a "misadventure"); Van Orden v. Perry, 545 U.S. 677, 692-93 (2005) (Thomas, J., concurring) (arguing that *Lemon*'s "guideposts" are too "inconsistent" to address Establishment Clause challenges); Edwards v. Aguillard, 482 U.S. 578, 640 (1987) (Scalia, J., dissenting) (stating that the *Lemon* test was bereft of "any principled rationale" (quoting Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 681 n.7 (1980))); Wallace v. Jaffree, 472 U.S. 38, 110 (1985) (Rehnquist, J., dissenting) (arguing that the "*Lemon* test has no more grounding in the history of the First Amendment than does the wall theory upon which it rests").

84. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427 (2022); *see* also Groff v. DeJoy, 143 S Ct. 2279, 2289 (2023) (recognizing that *Kennedy* "abrogated" *Lemon*).

85. Mueller v. Allen, 463 U.S. 388, 391, 399 (1983). Interestingly, in his opinion in *Mueller*, then-Justice Rehnquist continued to rely on the *Lemon* test. *Id.* at 394-403. In a later dissent he criticized the test as untethered to history. *Wallace*, 472 U.S. at 110 (Rehnquist, J., dissenting).

86. *Mueller*, 463 U.S. at 403. Key to the Court's rejection of the challenged statute was that the law forbade tax deduction for "materials used in the teaching of religious tenets, doctrines or worship, the purpose of which is to inculcate such tenets, doctrines or worship." *Id.* (quoting MINN. STAT. § 290.09(22) (1982)).

87. *Id.* at 399; Mueller v. Allen, 514 F. Supp. 998, 1000 (D. Minn. 1981).

After *Mueller*, Justice Rehnquist's opinions relied on a framework favoring parental free exercise claims over antiestablishment assertions. For instance, his majority opinion in *Zobrest v. Catalina Foothills School District*, after he had become Chief Justice, found that the Establishment Clause was no barrier against a school district's liability for refusing to provide interpreters to hearing-impaired students who attended parochial schools.[88] The Court did not treat the case as a matter of balancing two constitutional clauses on religion; instead, the decision favored the parents' choice of school, regardless of whether the education was sectarian or secular.[89]

The Rehnquist Court thereafter continued to chip away at precedents. In *Zelman v. Simmons-Harris*, for example, it upheld a voucher program, despite the fact that 96% of its recipients had enrolled children in religious private schools.[90] The Court reasoned that parents' decisions about where to send their child was a "true private choice."[91]

Under this approach, parental decisions trumped state disestablishment aims, setting the Establishment Clause's separation mandate on its head by equating governmental refusal to fund religious education with coercion.[92] Taken to its logical conclusion, the argument would render the Establishment Clause itself a coercive provision, discouraging parents via lack of funding from obtaining a religious education for their children. This perspective places private choices ahead of the constitutional decree against government support for religion. It subordinates the rule of law to personal preferences.

The Establishment Clause, instead, sets a barrier between the right of parents to obtain religious training for children and available government resources. The First Amendment strikes a balance between private practices

88. 509 U.S. 1, 12-13 (1993).

89. *Id.* John C. Jeffries and James E. Ryan are among those who mistakenly regard the case to be one that involved only "incidental support to church school." John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 288 (2001). In fact, the holding required public employees to relay content that was intended to inculcate faith and perspective about religious subjects, services, and values verbatim to students. *Zobrest*, 509 U.S. at 18-19 (Blackmun, J., dissenting). This was a long way from reimbursing parents for transportation to parochial schools, as in *Everson*.

90. 536 U.S. 639, 647, 653 (2002).

91. *Id.* at 650.

92. Philip Hamburger adopts Chief Justice Rehnquist's personal choice approach. Hamburger treats "parental speech," "parental rights," and "parental authority" as primary values, while devaluating state antiestablishment concerns. *See* Philip Hamburger, *Education Is Speech: Parental Free Speech in Education*, 101 TEX. L. REV. 415, 452, 463 (2022). He claims that while the state might have a compelling interest in children's education, it cannot coerce parents into forgoing their children's religious schooling by withholding from them access to public funding. *Id.* at 435-37. His argument mistakenly equates lack of governmental support for parental religious choices with governmental regulations that would restrict their religious autonomy.

and the public functions of government. Parents are free to send their children to religious schools but are not entitled to receive state reimbursements to support their decisions.

As "parental choice" gained traction as a litigation strategy, Justice O'Connor proffered the endorsement test, which combined the purpose and primary-effects prongs of *Lemon*. Her formula examined not only the intent of the government action but also whether an objective observer would think a government's action had endorsed religiosity.[93] Justice O'Connor's test sought to narrow *Lemon*'s prohibition against excessive government entanglement in religion, leaving more discretion to the judiciary to favor free exercise claims. While her test continued to prevent favoritism for religious preferences, it weakened *Lemon*'s prohibition against government's excessively close relationship in others' promulgations of religious beliefs.[94] For instance, the endorsement test left the possibility of governmental funding for the display of religious symbols. Justice O'Connor therefore found no endorsement of religion even when a city financially supported a crèche, which depicted the Magi's worship of the baby Jesus, simply because the city displayed it side-by-side with other holiday symbols.[95] In a dissent joined by three Justices, Justice Brennan faulted the majority for "brush[ing] aside" concerns about the incontrovertible religious meaning of the crèche.[96] According to him, representation of the epiphany was not merely a holiday decoration but a symbol of a specific religious preference.[97]

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93. Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring); Wallace v. Jaffree, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring) ("The relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools.").

94. Chief Justice Burger explained that the excessive-entanglement inquiry "must examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority." Lemon v. Kurtzman, 403 U.S. 602, 615 (1971), *overruled by* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427 (2022).

95. Justice O'Connor recognized that entanglement could lead to political divisiveness but argued that the "entanglement prong of the *Lemon* test is properly limited to institutional entanglement." *Lynch*, 465 U.S. at 689 (O'Connor, J., concurring). Thus, she believed that the city did not violate the Establishment Clause by financially supporting a holiday crèche display that stood among other holiday symbols. *Id.* at 692 ("Pawtucket's display of its crèche, I believe, does not communicate a message that the government intends to endorse the Christian beliefs represented by the crèche."). Gillian Metzger likewise points out that the endorsement test narrowed the scope of *Lemon*. Gillian E. Metzger, Note, *Unburdening the Undue Burden Standard: Orienting* Casey *in Constitutional Jurisprudence*, 94 COLUM. L. REV. 2025, 2072 n.243 (1994).

96. *Lynch*, 465 U.S. at 725 (Brennan, J., dissenting).

97. *Id.* at 725-26 ("[T]he City's action should be recognized for what it is: a coercive, though perhaps small, step toward establishing the sectarian preferences of the majority at the

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2. The modern Court's growing assent to religious school funding

More recently the Court turned still further away from earlier Establishment Clause precedents against government aid to religious institutions. The opinions of the Warren and Burger Courts had posited that restraining religious institutions' access to public funding would prevent religious conflict among Americans.[98] These cases premised that the nation's founders had ratified the Establishment Clause to break the cycle of Protestant and Catholic mutual persecutions and their periodic attacks against Jews.[99] The principle of separation was also meant to safeguard anyone from being forced to support religion "against his will."[100] With the adoption by the Roberts Court of a more formalistic scheme that permits private parties to direct public benefits toward religious institutions, the principle that public aid could not be used for the benefit of religious schools has eroded.[101]

Chief Justice Roberts's lead opinion to *Trinity Lutheran Church of Columbia, Inc. v. Comer* emphasized free exercise concerns without adequately balancing them against antiestablishment restraints on state action.[102] There the Court held unconstitutional a state's program that financed playground resurfacing but excluded a preschool that, in her dissent, Justice Sotomayor found to integrate Christian teachings with playtime.[103] Chief Justice Roberts placed great weight on the Free Exercise Clause, which he found requires stringent

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expense of the minority, accomplished by placing public facilities and funds in support of the religious symbolism and theological tidings that the crèche conveys.").

98. In a dissent, Justice Souter provided a helpful chronology of the "Court's announced limitations on government aid to religious education, and its repeated repudiation of limits previously set." Zelman v. Simmons-Harris, 536 U.S. 639, 688-95 (2002) (Souter, J., dissenting).

99. Everson v. Bd. of Educ., 330 U.S. 1, 8-9 (1947) ("With the power of government supporting them, at various times and places, Catholics had persecuted Protestants, Protestants had persecuted Catholics, Protestant sects had persecuted other Protestant sects, Catholics of one shade of belief had persecuted Catholics of another shade of belief, and all of these had from time to time persecuted Jews.").

100. *Id.* at 15.

101. *Cf. Zelman*, 536 U.S. at 688-89 (Souter, J., dissenting) (explaining that prohibitions on public support for religious institution had already begun to erode before the Roberts Court).

102. *See* 137 S. Ct. 2012, 2017, 2024 (2017); *id.* at 2039-40 (Sotomayor, J., dissenting) ("The Court offers no real reason for rejecting the balancing approach in our precedents in favor of strict scrutiny, beyond its references to discrimination.").

103. *Trinity Lutheran*, 137 S. Ct. at 2024; *id.* at 2028 (Sotomayor, J., dissenting) (asserting that "[t]he Establishment Clause does not allow Missouri to grant the Church's funding request because the Church uses the Learning Center, including its playground, in conjunction with its religious mission"). The basis of Justice Sotomayor's claim is unclear since neither she nor the parties indicate the nature or extent to which the playground was used to further the church's religious mission.

judicial review, without giving requisite balance to countervailing antiestablishment values.[104] The majority's emphasis on free exercise placed "the highest order" burden on the state to demonstrate why religious institutions should not enjoy the same benefits from public subsidies as secular private entities.[105] The historical and traditional priorities against establishment, as they were articulated in documents like Madison's *Memorial and Remonstrance*, would have provided a basis to weigh against the religious liberty concerns at stake. Unfortunately, reflection on the founders' perspectives is missing from the majority's opinion. To the contrary, the dissent alone assessed the relevance of founding-period statements.[106]

Three years later in *Espinoza v. Montana Department of Revenue*, the Court found unconstitutional a prohibition on using state-supported scholarships to attend religiously affiliated schools.[107] Justice Breyer noted in dissent that 94% of the scholarships had thus far benefitted religious schools.[108] However, writing for the majority, Chief Justice Roberts invoked the "strictest scrutiny" without carefully fleshing out the compelling government interest and least restrictive standards.[109] Even more than in *Trinity Lutheran*, his opinion in *Espinoza* disregarded the Establishment Clause, making little more than pro forma reference to it rather than contextually evaluating the state policy against public grants reaching religious schools.[110]

The Court followed up in 2022 with *Carson v. Makin*, which held that a state that subsidizes private education in those geographic districts where public schools are unavailable must grant parents commensurate tuition assistance regardless of whether they enroll children in private religious or secular schools.[111] There is no reason to believe that the Court has not already removed the ban on directed funding.[112] While the Chief Justice

104. The Court's stringent standard of review was tied to the most rigorous scrutiny. *Id.* at 2024 (majority opinion).

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

106. *Id.* at 2033-36 (Sotomayor, J., dissenting).

107. 140 S. Ct. 2246, 2262-63 (2020).

108. *Id.* at 2282 (Breyer, J., dissenting).

109. *Id.* at 2260. The Court's only mention of the compelling scrutiny statement is conclusory and, therefore, can hardly be characterized as careful reasoning. "The Montana Supreme Court asserted that the no-aid provision serves Montana's interest in separating church and State 'more fiercely' than the Federal Constitution. But 'that interest cannot qualify as compelling' in the face of the infringement of free exercise here." *Id.* (citation omitted) (first quoting Espinoza v. Mont. Dep't of Revenue, 435 P.3d 603, 614 (2018); and then quoting *Trinity Lutheran*, 137 S. Ct. at 2024).

110. *See id.* at 2254.

111. Carson *ex rel.* O.C. v. Makin, 142 S. Ct. 1987, 1997-98 (2022).

112. Some scholars find it more ambiguous whether "the ban on direct funding . . . [has] already been removed." Richard Schragger, Micah Schwartzman & Nelson Tebbe,
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again invoked strict scrutiny, as in *Espinoza*, he did not unpack compelling-interest and narrow-tailoring analyses under the facts in meaningful depth.[113]

3. Praying at a public-school event

Outside the sphere of public funding, the Court deviated even further from school prayer precedents. The long-established rule had been that on school premises public school employee involvement in leading prayer or reading scripture violated the Establishment Clause.[114] While at work, teachers were treated as agents of public schools, whom school districts could restrain from leading religious observances.

Kennedy v. Bremerton School District broke from those precedents. The Court held that a school official had a right to pray at a school-sponsored event, even when joined by students.[115] The majority mentioned history and tradition. Yet the Court scrutinized neither the founding nor the Reconstruction era to discern whether school-employee led prayers are consistent with the nation's historical and traditional reliance on Madisonian and Jeffersonian principles of disestablishment.[116] Neither did Justice Gorsuch, who wrote the opinion, arrive at his conclusion after sifting through any relevant federalist or anti-federalist pamphlets, state ratifying conventions, or other historical sources.[117] Rather the Court reached its conclusion by analogizing case law unrelated to antiestablishment principles in schools, drawing from the incongruous area of

Reestablishing Religion, 91 U. CHI. L. REV. (forthcoming 2024) (manuscript at 74), https://perma.cc/A2U4-2FDH.

113. *See Carson*, 142 S. Ct. at 1997-98.

114. Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 223 (1963) (daily Bible reading); Engel v. Vitale, 370 U.S. 421, 430 (1962) (denominationally neutral prayer).

115. For photographs of the coach kneeling in prayer while accompanied by students, see *Kennedy v. Bremerton School District*, 142 S. Ct. 2407, 2438-39 (2022) (Sotomayor, J., dissenting).

116. *But cf. id.* at 2431 (majority opinion) ("We are aware of no historically sound understanding of the Establishment Clause that begins to 'mak[e] it necessary for government to be hostile to religion' in this way." (quoting Zorach v. Clauson, 343 U.S. 306, 314 (1952))). The historical sources the Court cited did not purport to support employee-led prayer in schools. *See, e.g.*, *id.* at 2429 n.5.

117. *Id.* at 2428 ("[T]his Court has instructed that the Establishment Clause must be interpreted by 'reference to historical practices and understandings.'" (quoting Town of Greece v. Galloway, 572 U.S. 565, 576 (2014))); *id.* at 2450 (Sotomayor, J., dissenting) ("The Court reserves any meaningful explanation of its history-and-tradition test for another day, content for now to disguise it as established law and move on.").

legislative prayer[118] invoked in the presence of adults who are not "readily susceptible to religious indoctrination or peer pressure."[119]

The *Kennedy* majority explicitly rejected past Establishment Clause reasoning and methodology for evaluating a state action that directly or indirectly affects religious beliefs and practices.[120] Justice Gorsuch curtly asserted that "this Court long ago abandoned *Lemon* and its endorsement test offshoot."[121] That conclusion called "into question decades of subsequent precedents."[122]

Additionally, the *Kennedy* majority weakened the coercion test. *Lee v. Weisman* previously found a clergy-led prayer at high school graduation impermissible.[123] The majority stated that a free exercise claim "does not supersede the fundamental limitations imposed by the Establishment Clause,"[124] which are meant to meaningfully protect unwilling students who had a "reasonable perception" that they are being "forced by the State to pray in a manner [their] conscience will not allow."[125] Even "subtle and indirect" pressure "can be as real as any overt compulsion."[126]

In *Kennedy*, the Court also distinguished *Santa Fe Independent School District v. Doe*, which had found that student-led prayer broadcast over the school's public address system before each varsity football game violated the Establishment Clause.[127] *Santa Fe* involved a school district policy that authorized students to select a classmate to lead prayer.[128] The Court found that, even though attendance at athletic events was voluntary, the pressure on adolescent students

118. *Id.* at 2428 (majority opinion) (citing *Town of Greece*, 572 U.S. at 576).

119. *Id.* at 2442 (Sotomayor, J., dissenting) (quoting *Town of Greece*, 572 U.S. at 590).

120. *Id.* at 2427 (majority opinion) (departing from *Lemon*). Moreover, the *Kennedy* Court deviated from precedent that recognized the existence of violations based on indirect coercion. *See id.* at 2451 (Sotomayor, J., dissenting); Engel v. Vitale, 370 U.S. 421, 430 (1962) ("The Establishment Clause . . . does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not.").

121. *Kennedy*, 142 S. Ct. at 2427.

122. *Id.* at 2434 (Sotomayor, J., dissenting).

123. Lee v. Weisman *ex rel.* Weisman, 505 U.S. 577, 593-94 (1992).

124. *Id.* at 587.

125. *Id.* at 593.

126. *Id.*

127. *Kennedy*, 142 S. Ct. at 2431 (distinguishing Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 294 (2000)).

128. *Santa Fe*, 530 U.S. at 297 (describing the school district's policy that "authorized two student elections, the first to determine whether 'invocations' should be delivered, and the second to select the [student] spokesperson to deliver them").

to pray was significant enough to raise Establishment Clause concerns.[129] The Court recognized it would be formalistic not to acknowledge children's desire to fit in when attending sports games with their friends.[130]

The reasoning in *Lee* and *Santa Fe* took into account the social pressures so common in high schools. In *Kennedy*, on the other hand, the Court rejected evidence that students likely feel pressure when surrounded by a coach and other students bowed in prayer.[131]

As in *Espinoza* and *Carson*, the *Kennedy* Court relied on strict-scrutiny rhetoric.[132] Yet the majority failed to engage with the factual context of the "supersized" influence that the "venerated" coach had on students' lives.[133]

The shift from the muscular definition of antiestablishment to the currently understated, weakened version of the doctrine compromises the historical, constitutional principle of separation. Formalistic invocation of the strict scrutiny test in free-exercise analysis cannot substitute for the requisite balancing of values integral to the play in the joints between the Religion Clauses.

Several lower courts that have invoked the "historical practices and understandings" language from *Kennedy* have been similarly brief in their assessment of historical facts relevant for Establishment Clause challenges. These decisions have assessed questions ranging from a prohibition against carrying weapons in houses of worship,[134] to a vaccine mandate,[135] and to a claim

129. *Id.* at 312.

130. *Id.* at 311 (finding that "[t]o assert that high school students do not feel immense social pressure, or have a truly genuine desire, to be involved in the extracurricular event that is American high school football is 'formalistic in the extreme'" (quoting *Lee*, 505 U.S. at 595)).

131. *Kennedy*, 142 S. Ct. at 2440-41 (Sotomayor, J., dissenting).

132. *Id.* at 2422 (majority opinion); *see also* Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2257 (2020); Carson *ex rel.* O.C. v. Makin, 142 S. Ct. 1987, 1997 (2022).

133. Justin Driver, Case Comment, *Three Hail Marys:* Carson, Kennedy, *and the Fractured Détente over Religion and Education*, 136 HARV. L. REV. 208, 246 (2022). Justice Gorsuch largely discounted the record of the coach's behavior over the course of eight years, when he had repeatedly initiated prayers at which he had been joined by students and spectators. *See id.* at 2435-40 (Sotomayor, J., dissenting).

134. *See* Spencer v. Nigrelli, 648 F. Supp. 3d 451, 465 (W.D.N.Y. 2022) (holding that plaintiffs were likely to succeed on an Establishment Clause claim against a state law that made possession of a firearm in a place of worship a felony), *aff'd sub nom.* Antonyuk v. Chiumento, 89 F.4th 271 (2d Cir. 2023), *vacated sub nom.* Antonyuk v. James, 144 S. Ct. 2709 (2024) (mem.).

135. *See* Kane v. de Blasio, 623 F. Supp. 3d 339, 358-59 (S.D.N.Y. 2022) (holding that employees had not demonstrated that a city's COVID-19 vaccination mandate violated the Establishment Clause).

challenging a college course's unit on Islamic terrorism.[136] Other courts have remanded cases after expressing uncertainty about the scope of historical or traditional facts relevant to the resolution of free exercise claims that litigants raised in the contexts of religious services in jails and at city prayer vigils.[137]

With time one can reasonably expect that doctrines will develop to provide lower courts greater guidance about how to evaluate the relevance and weight of history. The views of framers, like Jefferson and Madison, should no doubt inform doctrinal evolution. Where relevant, judicial reasoning should also reflect on other weighty interests pertaining to religious liberties, doctrine, structure, federalism, or textual exegeses.

III. Judicial Preferences or Constitutional Mandates?

Kennedy's invocation of "historical practices and understandings" without seriously engaging the writings of founders like Jefferson and Madison[138] left uncertain how future cases might resolve the status of precedents that had relied on the *Lemon* and endorsement tests. What is already clear, however, is that the *Kennedy* majority's formulaic statement augments judicial authority and diminishes state discretion to pass reasonable legislation meant to prevent government's excessive entanglement with or endorsement of religion. Moreover, history played a de minimis role in *Carson* and *Espinoza*, demonstrating the Court's inconsistent invocation of those criteria.[139] Selective reference to original meaning that does not define the relevant historical facts, periods of time, and actors runs the risk of becoming result-oriented and harming public trust in the Court's neutrality.

History of the founding points to a wall of separation respecting the free exercise of religion.[140] Yet that is only one mode of accepted constitutional

136. *See* Sabra v. Maricopa Cnty. Cmty. Coll. Dist., 44 F.4th 867, 888-89 (9th Cir. 2022) (holding that a community college course module about "Islamic terrorism" was not an obvious violation of Establishment Clause).

137. *See* Firewalker-Fields v. Lee, 58 F.4th 104, 122-24 (4th Cir. 2023) (finding in a Section 1983 action that "many questions remain" about how to conduct an historical analysis, and remanding to the district court); Rojas v. City of Ocala, 40 F.4th 1347, 1351-52 (11th Cir. 2022) (remanding for the district court to evaluate an Establishment Clause claim arising from a city prayer vigil).

138. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2428 (2022) (quoting Town of Greece v. Galloway, 572 U.S. 565, 576 (2014)).

139. *See supra* notes 107-13 and accompanying text.

140. *See* Reynolds v. United States, 98 U.S. 145, 164 (1878) (concluding that because the "wall of separation" metaphor came from "an acknowledged leader of the advocates of the measure, it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured"); LEO PFEFFER, CHURCH, STATE, AND FREEDOM 118-20 (1953) (defending the "wall of separation" metaphor against opposing views).

analysis. Philip Bobbitt explains that modes of interpretation other than history are likewise consistent with judicial reasoning.[141] Diffusing tensions that arise out of the Religion Clauses requires examinations of how resolution of conflicting free-exercise and antiestablishment claims are likely to impact the constitutional barrier that divides civic policy and personal conviction. Overturning longstanding precedent carries systemic consequences to precedential stability, adjudicative objectivity, and state initiative to meet constitutional mandates.[142]

The Religion Clauses should be interpreted by evaluating both the interests of liberty and the limits of governmental authority. At its core, the Establishment Clause restricts governmental funding and practices that interfere with or support private beliefs or religious rituals. The prohibition against religious interference or discrimination is but one pillar of the edifice. When public funding is directed at proselytization, prayer, and other forms of observance, its disbursement imposes religious obligations on unwilling taxpayers.

The Roberts Court often projects an air of certainty that its decisions are "crystal, transparent and unchanged";[143] to the contrary, in assessing the weight of evidence in circumstances where free exercise and antiestablishment interests differ, a judge should don "the skin of . . . living thought [which] may vary greatly in color and content according to the circumstances and the time in which it is used."[144] Religious freedom is a compelling right, but no less significant to constitutional integrity and historical grounding are policies that prohibit states from burdening unwilling taxpayers and coercing reluctant students.[145]

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141. *See* PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12-13 (1991) (surveying six modes of constitutionally legitimate forms of advocacy: historical, textual, structural, doctrinal, ethical, and prudential).

142. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854-55 (1992) (announcing factors for the Court to rely on in deciding whether to overturn precedents based on "a series of prudential and pragmatic considerations," including workability, extent of reliance, legal developments, and altered circumstances).

143. *See* Towne v. Eisner, 245 U.S. 418, 425 (1918).

144. *Id.*

145. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986) ("[F]undamental values of 'habits and manners of civility' essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular." (quoting CHARLES A. BEARD & MARY R. BEARD, THE BEARDS' NEW BASIC HISTORY OF THE UNITED STATES 228 (1968))); Trump v. Hawaii, 138 S. Ct. 2392, 2447 (2018) (Sotomayor, J., dissenting) (asserting that the extent to which "a government actor exhibit[s] tolerance and neutrality in reaching a decision . . . affects individuals' fundamental religious freedom").

In the words of Stephen Vladeck, our "society [was] founded largely on the right of those of different faiths (or no faith) to live side-by-side in peace."[146] The deference of civil society to private worship, Madison memorably asserted, quells "human passions" that might otherwise inflame "mutual animosity" because of "a zeal for different opinions concerning religion."[147] The founders' conceptions of a society that is respectful to personal beliefs of a diverse people, "strongly suggest," as Marc DeGirolami writes, "that as a conceptual matter, establishment takes political priority to free exercise exemption in America."[148] The balance of constitutional priorities circumscribes government from interfering with the guarantee of private religious practices and averts disputes between groups, while it secures to individuals the decision of whether and how to worship.

By loosening restraints on public funding that is directed at sectarian education, the Roberts Court weakened the framers' intertwined, two-part mechanism intended to protect individual convictions and to restrain government from entanglement in matters of long-simmering conflicts over often-irreconcilable creeds. That does not mean that all government benefits directed at religious institutions are unconstitutional. To the contrary, ordinary government services, including healthcare, firefighting, sewer construction, police protection, and street repair are administered alike to the advantage of religious and secular parties.[149] Those public functions are unrelated to transcendent belief.

The First Amendment explicitly recognizes the value of religion in people's lives. The prohibition against government resources being channeled toward religious training is embodied in the constitutional restraint against establishment. That restriction on governmental authority advances the private right to pursue beliefs without state involvement or interference. The recent doctrinal shift, however, dismantles key aspects of the wall of separation and, in its place, casts a public safety net for parents to draw upon to pay for religious school tuition. It is reasonable to anticipate that some state citizens will object to taxes being channeled for others' religious conviction, preaching, or

146. Stephen I. Vladeck, *The Most-Favored Right: COVID, the Supreme Court, and the (New) Free Exercise Clause*, 15 N.Y.U. J.L. & LIBERTY 699, 703 (2022).

147. THE FEDERALIST NO. 10, at 55 (James Madison) (Clinton Rossiter ed., 1961).

148. Marc O. DeGirolami, *Establishment's Political Priority to Free Exercise*, 97 NOTRE DAME L. REV. 715, 732 (2022).

149. Carson *ex rel.* O.C. v. Makin, 142 S. Ct. 1987, 2006 (2022) (Breyer, J., dissenting) ("After all, cities and States normally pay for police forces, fire protection, paved streets, municipal transport, and hosts of other services that benefit churches as well as secular organizations."); Lemon v. Kurtzman, 403 U.S. 602, 614 (1971) ("Fire inspections, building and zoning regulations, and state requirements under compulsory school-attendance laws are examples of necessary and permissible contacts."), *overruled on other grounds by* Kennedy v. Bremerton School District, 142 S. Ct. 2407, 2427 (2022).

indoctrination. *Kennedy* weakens parents' ability to challenge public school prayers, even when the religious invocations are led by school officials. All this comes at the cost of increased social pressures on students, who are likely to understand religious conduct to have the imprimatur of government.[150]

IV. Bridging the Gap Between the Religion Clauses

A decision to overturn settled doctrine should be based on more than "disagreement with [previous] results"[151] or "belief" that they were "wrongly decided."[152] The Court's perfunctory dismissal of the entanglement and endorsement tests seems to be predicated on the desire to negate earlier decisions rather than on any compelling, newly discovered facts about the founding period that might have meaningfully put in doubt the nation's long history of separation between direct public funding and religious schools and between religious observance and public school activity.[153]

Most recent majority mention of the "play in the joints" between the Religion Clauses appears only in passing.[154] Charting a course between the two requires interpretive evenhandedness that should not bend to either of the "conflicting pressures."[155] The Clauses separately prevent government support for religion while guaranteeing personal religious practices. Rigidity in the Court's interpretation, as Justice Breyer explained, "bring[s] their mandates into conflict and defeat[s] their basic purpose."[156]

150. *See* Lee v. Weisman *ex rel.* Weisman, 505 U.S. 577, 593 (1992) (stating that "the dissenter of high school age, who has a reasonable perception that she is being forced by the state to pray in manner her conscience will not allow," suffers real injury, believing "that the group exercise signified her own participation or approval of it").

151. *Cf.* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 414 (2010) (Stevens, J., dissenting) (disagreeing with the Court's decision to overturn two campaign financing precedents that had limited corporate use of general treasury funds for campaign expenditures).

152. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 864 (1991).

153. *See Kennedy*, 142 S. Ct. at 2447 (Sotomayor, J., dissenting) ("The Court now says for the first time that endorsement simply does not matter, and completely repudiates the test established in *Lemon*. Both of these moves are erroneous and, despite the Court's assurances, novel." (citations omitted)). Justice Gorsuch, joined by Justice Thomas, had earlier made clear his belief that *Lemon* had been wrongly decided. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2101 (2019) (Gorsuch, J., concurring in the judgment). There is reason to believe that Justice Alito, writing for the majority in *Kennedy*, agreed with Gorsuch's rationale since both of their opinions argued that *Lemon* erred in seeking to fashion an ahistorical "grand unified theory." *Kennedy*, 142 S. Ct. at 2427 (quoting *Am. Legion*, 139 S. Ct. at 2427).

154. *See* Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2254 (2020) (quoting Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2019 (2017)).

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

156. *Espinoza*, 140 S. Ct. at 2281 (Breyer, J., dissenting).

The tendency of recent decisions has been to focus on free exercise claims without a close reading of the antiestablishment interests asserted by states and school districts. That approach to judicial review fails to engage in context-laden analyses that reflect pressures children experience at schools from their peers and teachers. Without a transparent assessment of values that protect religion, separate of state involvement, conflicts are inevitable.[157]

The balance between the Religion Clauses allows for personal expressions of religious freedoms while simultaneously preventing state sponsorship, support, or payment for religious faith. Government cannot hinder the exercise of religion, but neither can it subsidize it. The principle requiring the secular and sacred to remain separate enables every person, without regard for religion, to enjoy liberty of conscience and security of person against government interference. The Court's nearly single-minded approach, to the contrary, favors religious devotion and gives insufficient attention to legislative policies that are designed to avoid state entanglement with personal convictions. The tensions between the Clauses will likely play out in the context of religious behaviors exercised by teachers and students at sports games, in libraries, in classes, and during school trips.

The Court's shift from traditional American disestablishment principles not only weakens state prerogatives under the Establishment Clause. Some states have understood the new doctrine to enable them to integrate religious practices into public schools. Laws recently passed by Florida, Texas, Louisiana, and Oklahoma would allow chaplains into public schools, require the posting of the Ten Commandments, and require teaching of the Bible.[158]

Primary and secondary school students have incongruous and often clashing interests and beliefs. The state should not interfere with or participate in religion. The Court's pro forma language about history and strict scrutiny are no substitutes for reasoning through pertinent details (be they levels and types of support, causal relations, students' ages, parental choices, youthful susceptibilities, civic developments, or historical meanings) and constitutional values.

Conclusion

The Court increasingly emphasizes free exercise values to the near exclusion of antiestablishment norms. This analytical approach charts a new

157. *See* Walz v. Tax Comm'n, 397 U.S. 664, 668-69 (1970) (discussing how the absolute language of the Religion Clauses tends to create "clash" when either is taken to its extreme).

158. *Pious Pupils in America Perform Better*, ECONOMIST (Aug. 15, 2024), https://perma.cc/L5AC-7DG4.

direction away from the traditional wall of separation. It strikes down laws against funding private religious schools and permits the prayer of a coach joined by students at a public-school event. That gives insufficient weight to Establishment Clause values that prohibit state monetary support for religious teachings and the indoctrination of students. The rulings in *Espinoza*, *Carson*, and *Kennedy* diminish the authority of legislators and school districts to comply with the first injunction of the First Amendment. The Court has significantly dismantled portions of the antiestablishment rampart that the founding generation erected. Greater depth of reasoning would better balance competing interests of persons who adhere to sincere religious beliefs and of government policies designed to safeguard against coercion, indoctrination, and entanglement.