ON *ESPINOZA*, SCHOOLS, AND THE RELIGION CLAUSES

*Mark Strasser**

ABSTRACT

The United States Supreme Court has long had difficulty explicating what the Religion Clauses require, permit, and prohibit. While members of the Court appreciate that the Clauses cannot be interpreted in such a way that one clause requires something that the other clause prohibits, the Justices have offered very different accounts of how to avoid that conflict. The difficulties in reconciling the clauses have been especially evident in the Court's attempts to determine the kind of state aid that may be offered to parochial schools without violating constitutional guarantees.

Establishment jurisprudence and Free Exercise jurisprudence are both evolving. The Court is now willing to uphold practices under the Establishment Clause that would previously have been found to violate those guarantees and the Court is now finding that practices violate Free Exercise guarantees that previously would have been found permissible or might even have been found not to have implicated those guarantees. One of the Court's recent forays into these areas—Espinoza v. Montana Department of Revenue—*indicates just how wrongheaded the Court's Religion Clauses jurisprudence has become.*

* Trustees Professor of Law, Capital University Law School, Columbus, Ohio.

TABLE OF CONTENTS

INTRODUCTION

Reconciling the Religion Clauses is no easy task, and the Supreme Court has had only limited success when offering an account of the relationship between the Establishment and Free Exercise Clauses as a general matter. The Court has had even more difficulty when seeking to explain the reach of these Clauses in the context of evaluating state aid to private schools. Part of the Court's difficulty is likely due to the Justices having differing understandings of what the Clauses themselves require, permit, and prohibit. An additional complicating factor is that the Justices seem to disagree about the range of state actions regarding religion that are neither prohibited under Establishment guarantees nor required under Free Exercise guarantees.[1] For example, the Justices clearly disagree about what state aid to religion is permitted under the Establishment

1. *See infra* Parts I, II.

Clause but not required under the Free Exercise Clause.[2] One of the recent cases implicating the balance between the two Clauses—*Espinoza v. Montana Department of Revenue*[3]—makes clear that the Religion Clauses jurisprudence has gone horribly wrong.

Part I of this Article offers a brief overview of the Court's Establishment Clause jurisprudence in the context of aid to private schools, including how some of the factors formerly considered extremely important have become irrelevant or somehow illegitimate. Part II focuses on some of the changes in Free Exercise jurisprudence with a special focus on the possible implications of *Espinoza*. The Court's recent foray into these areas embraces an approach that had long been rejected as a matter of constitutional law and good public policy. One can only hope that the Court will again change course before dissension within the country and other foreseeable negative effects[4] of the current approach become even more problematic.

I. THE TWISTS AND TURNS OF ESTABLISHMENT JURISPRUDENCE

The Court has long sought to offer a coherent Establishment Clause jurisprudence and has offered numerous tests to determine whether a particular practice passes constitutional muster.[5] Different Justices and commentators have noted that

2. *See* Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2288 (2020) (Breyer, J., dissenting) ("Although the majority refers in passing to the 'play in the joints' between that which the Establishment Clause forbids and that which the Free Exercise Clause requires, its holding leaves that doctrine a shadow of its former self.").

3. *Id*. at 2251 (majority opinion).

4. *Cf.* Zelman v. Simmons-Harris, 536 U.S. 639, 723 (2002) (Breyer, J., dissenting) ("The principle underlying these cases—avoiding religiously based social conflict—remains of great concern.").

5. *See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (*Lemon* test); Lee v. Weisman, 505 U.S. 577, 592–94 (1992) (coercion test); County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 592 (1989) (endorsement test). The Court has sometimes talked about a principle of neutrality. *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 839 (1995) ("A central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion."); McCreary County v. ACLU of Ky., 545 U.S. 844, 860 (2005) ("When the government acts with the ostensible

no coherent approach has yet been offered.[6] Further, the Court has offered vastly different accounts of what the Establishment Clause permits, which range from a mere willingness to afford religious institutions access to public benefits analogous to the provision of health and safety services such as police and fire protection[7] to the provision of funds that will promote the teaching of religious doctrine.[8] This Part discusses the Court's contradictory positions about which interests and goals are served by the Establishment Clause.

A. Everson *Sets the Stage*

Everson v. Board of Education of Ewing Township[9] is a landmark decision in Religion Clause jurisprudence.[10] The Court sought to preserve the Constitution's separation between church and state while not adopting a rule that would have absurd

and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality . . . .").

6. *See* Utah Highway Patrol Ass'n v. Am. Atheists, Inc., 565 U.S. 994, 994 (2011) (Thomas, J., dissenting) ("Today the Court rejects an opportunity to provide clarity to an Establishment Clause jurisprudence in shambles."); *McCreary County*, 545 U.S. at 891 (Scalia, J., dissenting) ("[T]he Court acknowledges that the 'Establishment Clause doctrine' it purports to be applying 'lacks the comfort of categorical absolutes.' What the Court means by this lovely euphemism is that sometimes the Court chooses to decide cases on the principle that government cannot favor religion, and sometimes it does not."); Mark Strasser, *Establishment Clause Health on a Restricted, Artificial Lemon Diet*, 29 B.U. PUB. INT. L.J. 169, 169 (2019) ("[T]he Court has offered no coherent account of which practices violate Establishment Clause guarantees . . . ."); Peter Margulies, *Bans, Borders, and Sovereignty: Judicial Review of Immigration Law in the Trump Administration*, 2018 MICH. ST. L. REV. 1, 67 (2018) ("[T]he Supreme Court has oscillated between tests under the Establishment Clause, producing little in the way of coherent guidance.").

7. *See* Everson v. Bd. of Educ., 330 U.S. 1, 17–18 (1947); *see also infra* Section I.A.

8. *See* Bd. of Educ. v. Allen, 392 U.S. 236, 257 (1968) (Douglas, J., dissenting) (arguing that in funding parochial schools' purchases of textbooks, the state was impermissibly promoting the teaching of religious doctrine); *see also infra* Section I.B (discussing *Allen*).

9. 330 U.S. at 1.

10. Daniel L. Dreisbach, *A Lively and Fair Experiment: Religion and the American Constitutional Tradition*, 49 EMORY L.J. 223, 224 (2000) ("The word 'landmark' is used promiscuously in discussions of constitutional case law; however, it accurately describes *Everson*.").

implications.[11] Unsurprisingly, *Everson's* holding and meaning continue to be hotly debated.[12]

At issue was a New Jersey statute that allowed school districts to make rules regarding school transportation, as well as one school board's resolution made pursuant to that statute.[13] The law in question provided that a school district's board of education "may make rules and contracts for the transportation" of children to and from schools, specifying that this included "the transportation of school children to and from school other than a public school, except [a for-profit school]."[14] One township board of education authorized reimbursements to parents for the costs of school transportation, including the transportation of some students to Catholic parochial schools.[15] The plaintiff challenged the reimbursement to parents of parochial school students, asserting that he was being "forced . . . to pay taxes to help support and maintain [religious] schools" in violation of the Establishment Clause.[16]

The *Everson* Court began its analysis by describing two approaches that the Constitution prohibited: First, "New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church."[17] Second, "other language of the amendment

11. *See Everson*, 330 U.S. at 5; *cf.* Max Guirguis, *A Coat of Many Colors: The Religious Neutrality Doctrine from* Everson *to* Hein, 43 STETSON L. REV. 67, 74 (2013) (discussing "the tightrope that the Court had to walk on after *Everson* to harmonize the conflicting views of its accommodationist and separationist wings").

12. John E. Joiner, *A Page of History or a Volume of Logic?: Reassessing the Supreme Court's Establishment Clause Jurisprudence*, 73 DENV. U. L. REV. 507, 511 (1996) ("None of these constructions [of the Establishment Clause], however, has been so hotly debated or yielded such dramatic results as the one proffered by the Supreme Court in 1947 in *Everson v. Board of Education*.").

13. *Everson*, 330 U.S. at 3–4.

14. *Id.* at 3 n.1.

15. *Id.* at 3 ("[A] township board of education, acting pursuant to . . . statute, authorized reimbursement to parents of money expended by them for the bus transportation of their children on regular busses operated by the public transportation system . . . to Catholic parochial schools.").

16. *Id.* at 5.

17. *Id.* at 16.

commands that New Jersey cannot hamper its citizens in the free exercise of their own religion."[18] The Court explained that New Jersey "cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation."[19]

Offering an account that avoided both of these prohibitions was no easy task,[20] and the Court tried to explain why the travel expense reimbursement program, while permissible, is at the outer reaches of what the Constitution permits states to do.[21] The Court began its analysis by articulating what the Establishment Clause prohibits: "No 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."[22] Thus, the question at hand was whether reimbursing parents for transportation costs to parochial schools constituted support of a religious institution.[23]

Transportation expense reimbursement might seem to impermissibly promote religious education because the reimbursement would use public funds in a way that might induce some students to receive a religious education rather than a public education.[24] However, if the possibility that children would attend religious school because of the transportation expense reimbursement was alone enough to disqualify the program, then the State would be very limited in

18. *Id.*

19. *Id.*

20. *Id.* at 14 (noting the "difficulty in drawing the line between tax legislation which provides funds for the welfare of the general public and that which is designed to support institutions which teach religion").

21. *See id.* at 16–18.

22. *Id.* at 16.

23. *See id.*

24. *Id.* at 17 (acknowledging the "possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the State").

the kinds of services it could provide religious schools without violating constitutional guarantees.[25] For example, because "parents might be reluctant to permit their children to attend schools which the state had cut off from such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks,"[26] expenditure of state funds for such basic services would provide an inducement (or remove a disincentive) for children to attend religious schools and thus would seem prohibited by Establishment Clause guarantees.[27] Yet, even if the use of tax dollars to provide basic services to religious schools might make those schools more attractive and thus might result in more students attending those schools, the First Amendment does not preclude the state from offering such services.[28] Indeed, refusing to provide police and fire protection for religious schools might be thought to suggest hostility rather than neutrality towards religion.[29]

While the First Amendment does not plausibly preclude the state from providing police and fire services to religious schools,[30] the strength of the analogy between the provision of police and fire services on the one hand and bus transportation on the other is undercut by the Court's own analysis.[31] The Court suggested that the State would not have violated constitutional guarantees by only funding the transportation

25. *Cf. id.* at 17–18 (suggesting that an analogous claim might be made about the provision of a variety of public services).

26. *Id.*

27. *See id.*

28. *Id.* at 18 (noting that to cut off religious schools from such basic services, thereby making it much harder for those schools to operate, "is obviously not the purpose of the First Amendment").

29. *See id.* ("[The First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary.").

30. *See id.* at 61 (Rutledge, J., dissenting) ("Certainly the fire department must not stand idly by while the church burns.").

31. *Cf. id.* at 60 ("Nor is the case comparable to one of furnishing fire or police protection . . . .").

costs of public-school students.[32] But the Court would not have made the same point about police and fire protection—it would hardly be acceptable for fire personnel to extinguish a fire at the public school but simply watch as the fire destroyed the religious school (because public employees would be prohibited from putting out such a fire during work hours).[33] If it would be permissible not to pay the transportation expenses of parochial school students but impermissible not to pay for the fire department to extinguish the fire at the parochial school, then the analogy is inapt.[34] Perhaps the nature of the benefits themselves helps explain why fire protection, but not bus transportation, must be provided.[35] In any event, the persuasiveness of the analogy is severely diminished if the state could refuse to provide bus transportation to parochial schools but could not permissibly deny police and fire protection to parochial schools.[36]

Regardless of how one might distinguish between state provision of bus transportation on the one hand and state provision of police and fire services on the other, the *Everson* Court classified bus transportation as a "benefit[] of public welfare legislation,"[37] which was "so separate and so indisputably marked off from the religious function" that it could not be denied to parochial schools.[38] Because this benefit

32. *Id.* at 16 (majority opinion) ("[W]e do not mean to intimate that a state could not provide transportation only to children attending public schools . . . .").

33. *See id.* at 60–61 (Rutledge, J., dissenting).

34. *See id.*

35. *See id.* (suggesting that police and fire services are related to safety whereas the provision of bus transportation is more closely related to the provision of religious education); *cf.* Andrew A. Thompson, Trinity Lutheran Church of Columbia, Inc. v. Comer *and the "Play in the Joints" Between Establishment and Free Exercise of Religion*, 96 TEX. L. REV. 1079, 1085 (2018) (describing the importance of police and fire protection).

36. *See* Mark Strasser, *Free Exercise and* Comer*: Robust Entrenchment or Simply More of a Muddle?*, 52 U. RICH. L. REV. 887, 904 (2018) [hereinafter Strasser, *Free Exercise and* Comer] (discussing another way "in which the analogy between travel reimbursement and the provision of police and fire services was inapt").

37. *Everson*, 330 U.S. at 16–18.

38. *Id.* at 18.

allegedly involved the health and safety of children,[39] the state was not barred by Establishment guarantees from providing the reimbursement.[40]

B. *A Change in Emphasis*

In *Board of Education v. Allen*,[41] the Court modified the *Everson* Establishment Clause analysis suggesting that public monies could only be used to promote parochial schools insofar as those monies were being used to promote health and safety.[42] At issue in *Allen* was the constitutionality of a New York law requiring public authorities to lend secular textbooks to private schools, including religious schools.[43] The law was challenged as a violation of Religion Clause guarantees.[44] In analyzing whether the New York plan passed constitutional muster, the Court offered its own analysis of *Everson*, explaining that the *Everson* Court held that "the Establishment Clause does not

39. *See id.* at 17 ("Moreover, state-paid policemen, detailed to protect children going to and from church schools from the very real hazards of traffic, would serve much the same purpose and accomplish much the same result as state provisions intended to guarantee free transportation of a kind which the state deems to be best for the school children's welfare."); see also Strasser, *Free Exercise and* Comer, *supra* note 36, at 903–04 (providing further detail on the Court's characterization of the reimbursement as a safety measure).

40. *Everson*, 330 U.S. at 18 (majority opinion); *cf. id.* at 16 ("[W]e must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief."). *But see id.* at 46 (Rutledge, J., dissenting) (stating that "it cannot be said that the cost of transportation is no part of the cost of education or of the religious instruction given," and arguing that by defraying the costs of transporting children to schools where they will receive religious instruction, the state is aiding and encouraging religious institutions).

41. 392 U.S. 236 (1968).

42. *See supra* notes 39–40 and accompanying text (explaining the *Everson* Court's stance that the Establishment Clause does not prohibit the state from promoting health and safety in parochial schools); *Allen*, 392 U.S. at 241–42 (characterizing *Everson*'s Establishment Clause analysis as being about extending the benefits of state law to all citizens without regard to religious affiliation, rather than about health and safety).

43. *Allen*, 392 U.S. at 238 ("A law of the State of New York requires local public school authorities to lend textbooks free of charge to all students in grades seven through [twelve]; students attending private schools are included.").

44. *Id.* ("This case presents the question whether this statute is a 'law respecting an establishment of religion, or prohibiting the free exercise thereof,' and so in conflict with the First and Fourteenth Amendments to the Constitution . . . .").

prevent a State from extending the benefits of state laws to all citizens without regard for their religious affiliation."[45]

The *Allen* Court admitted that "books are different from buses,"[46] and that "books, but not buses, are critical to the teaching process, and in a sectarian school that process is employed to teach religion."[47] But the Court was nonetheless confident that the books themselves would be secular rather than sectarian, precisely because the same books would be used in the public schools.[48] Further, the Court noted that religious schools "do an acceptable job of providing secular education to their students."[49] Finally, the Court was unwilling to conclude that "the processes of secular and religious training are so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion."[50] Because the New York program would be promoting secular but not religious education, the Court found the program compatible with constitutional guarantees.[51]

In his *Allen* dissent, Justice Black noted that the *Everson* opinion, which he had authored,[52] emphasized the difference between health and safety on the one hand and instruction on the other.[53] Basically, both *Everson* and *Allen* recognized that the

45. *Id.* at 242.

46. *Id.* at 244.

47. *Id.* at 245.

48. *Id.* ("[W]e cannot assume that school authorities, who constantly face the same problem in selecting textbooks for use in the public schools, are unable to distinguish between secular and religious books or that they will not honestly discharge their duties under the law.").

49. *Id.* at 248.

50. *Id.*

51. *Id.*

52. *See* Everson v. Bd. of Educ., 330 U.S. 1, 3 (1947).

53. *Allen*, 392 U.S. at 252–53 (Black, J., dissenting). Justice Black explained that the law in *Everson* authorizing reimbursement for transportation of parochial school children

> was treated in the same way as a general law paying the streetcar fare of all school children, or a law providing midday lunches for all children or all school children, or a law to provide police protection for children going to and from school, or general laws to provide police and fire protection for buildings, including, of course, churches and church school buildings as well as others.

Id. at 252.

state should not be supporting religious education.[54] *Everson* drew the line by upholding aid that was intended to promote health and safety rather than education,[55] whereas *Allen* drew the line by upholding aid intended to promote secular rather than religious education.[56]

C. *On Paying School Personnel*

The emphasis on assuring that public funds are not used to promote sectarian education was also reflected in the Court's jurisprudence regarding the permissibility of using public funds to augment private school teacher salaries. In *Lemon v. Kurtzman*, Rhode Island and Pennsylvania programs in which public funds were used to augment parochial schoolteacher salaries were challenged under the Religion Clauses.[57] Both laws were ultimately struck down by the Court as violations of the Establishment Clause.[58] The *Lemon* Court announced the test by which it would decide whether the financial aid was constitutionally permissible, noting three different requirements: "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.'"[59]

54. *See Everson*, 330 U.S. at 16 ("New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church."); *Allen*, 392 U.S. at 248 ("We are unable to hold . . . that this statute results in unconstitutional involvement of the State with religious instruction.").

55. *See Everson*, 330 U.S. at 17–18.

56. *Allen*, 392 U.S. at 248.

57. *See* 403 U.S. 602, 606 (1971). The Rhode Island statute at issue authorized the state to supplement the salaries of nonpublic elementary school teachers by directly paying them an amount equal to 15% of their salary. *Id.* at 607. Only teachers who taught secular subjects were eligible for the salary supplements. *Id.* at 607–08. The Pennsylvania statute provided state financial aid directly to church-related elementary and secondary schools "by way of reimbursement for the cost of teachers' salaries, textbooks, and instructional materials in specified secular subjects." *Id.* at 606–07.

58. *Id.* at 609, 611.

59. *Id.* at 612–13 (citation omitted) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).

The *Lemon* Court accepted that the statutes had a secular legislative purpose, reasoning that the legislative intent behind both laws was "to enhance the quality of the secular education in all schools covered by the compulsory attendance laws."[60] However, the Court was less confident that the second prong was also met, acknowledging that "church-related elementary and secondary schools have a significant religious mission and that a substantial portion of their activities is religiously oriented."[61]

The legislatures of both Rhode Island and Pennsylvania understood that religious schools taught both religious and secular doctrine and attempted to augment teacher salaries only insofar as the teachers were engaging in secular instruction.[62] The issue before the Court was whether the states had done enough to assure that state funds were not being used to fund religious teaching, an issue that the Court ultimately found was not necessary to decide.[63]

Next, instead of deciding whether the second prong had been met, the Court turned its attention to the third prong, which precluded excessive entanglement between church and state.[64] To determine whether excessive entanglement existed as a result of the statutes, the Court considered "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."[65] Because the mechanism adopted to prevent the state from funding religious indoctrination itself involved excessive entanglement between the state and the funded religious schools, the Court

60. *Id.*

61. *Id.*

62. *Id.* (noting that the legislatures "sought to create statutory restrictions designed to guarantee the separation between secular and religious educational functions and to ensure that State financial aid supports only the former").

63. *Id.* at 613–14 ("We need not decide whether these legislative precautions restrict the principal or primary effect of the programs to the point where they do not offend the Religion Clauses . . . .").

64. *Id.* at 613.

65. *Id.* at 615.

struck down the funding programs.[66] Commenting on the Rhode Island statute, the *Lemon* Court explained that it could not "ignore the danger that a teacher under religious control and discipline poses to the separation of the religious from the purely secular aspects of pre-college education."[67] For both statutes, the Court concluded that constitutional guarantees were violated by the safeguards employed to ensure that the state-funded teachers did not engage in religious teaching.[68]

In striking down the statutes, the *Lemon* Court was neither implying nor assuming that "teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the statute and the First Amendment."[69] Nonetheless, a "comprehensive, discriminating, and continuing state surveillance [would] inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected,"[70] which was one of the reasons both state programs failed under the entanglement prong.[71]

66. *Id.* at 614 ("[W]e conclude that the cumulative impact of the entire relationship arising under the statutes in each State involves excessive entanglement between government and religion.").

67. *Id.* at 617.

68. *Id.* at 619–21.

69. *Id.* at 618.

70. *Id.* at 619.

71. The Court also identified "the divisive political potential" of the programs as a separate base of entanglement. *See id.* at 622–24. The Court explained that in communities where a lot of children attend church-related schools, "it can be assumed that state assistance will entail considerable political activity." *Id.* at 622. People on both sides, those in favor of state aid and those opposing it, will "promote political action to achieve their goals," which in turn will require candidates to take stances on the issue and ultimately force voters to choose. *Id.* While ordinary "political debate and division" are "normal and healthy" expressions of democracy, the Court noted that "political division along religious lines was one of the principal evils against which the First Amendment was intended to protect." *Id.* Given the "expanding array of vexing issues, local and national, domestic and international, to debate and divide on," the Court elaborated that "[t]o have States or communities divide on the issues presented by state aid to parochial schools would tend to confuse and obscure other issues of great urgency." *Id.* at 622–23. The fact that the appropriations benefit "relatively few religious groups" as opposed to all religious groups, as well as the likelihood that there will come increasing pressure for expanding aid, both further aggravated the potential for "[p]olitical fragmentation and divisiveness on religious lines." *Id.* at 623.

The *Lemon* entanglement prong provided the basis for striking down a number of programs involving aid to secular schools: in *Aguilar v. Felton*, the Court used that prong to invalidate a program whereby public school teachers were paid to teach in parochial schools,[72] and in *Meek v. Pittenger* the Court used that prong to strike down public funding of the provision of a variety of teaching and related services in parochial schools.[73] So, too, in *Wolman v. Walter* the Court struck down the public provision of certain instructional aids and equipment to parochial schools because of the possibility that those aids and equipment would be used to promote sectarian teaching.[74]

Yet, the Court's Establishment Clause jurisprudence changed markedly. In *Agostini v. Felton*, the Court examined whether the program struck down in *Aguilar* was still unconstitutional in light of the Court's intervening decisions.[75] The *Agostini* Court again considered whether federal funds could be used to pay teachers in a parochial school setting,[76] although this time the Court modified its approach.[77] The Court continued to use the first two prongs of the *Lemon* test to determine whether Establishment Clause guarantees had been violated.[78] However, the Court rejected that entanglement should be a separate prong, stating that it instead belonged within the

72. Aguilar v. Felton, 473 U.S. 402, 409–10 (1985) (striking down the use of public funds to pay public school teachers to teach in parochial schools), *overruled by* Agostini v. Felton, 521 U.S. 203 (1997).

73. Meek v. Pittenger, 421 U.S. 349, 365–66, 370 (1975), *overruled by* Mitchell v. Helms, 530 U.S. 793 (2000).

74. Wolman v. Walter, 433 U.S. 229, 248–51 (1977), *overruled by Mitchell*, 530 U.S. at 793; *see also* Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373, 397 (1985) (striking down public-school programming offered at parochial schools because of the possibility that the programming would promote sectarian education), *overruled by Agostini*, 521 U.S. at 203.

75. *Agostini*, 521 U.S. at 209 ("We agree with petitioners that *Aguilar* is not consistent with our subsequent Establishment Clause decisions . . . .").

76. *Id.* at 208–09.

77. *Id.* at 223 ("Our cases subsequent to *Aguilar* have, however, modified in two significant respects the approach we use to assess indoctrination.").

78. *Id.* at 222–23 ("[W]e continue to ask whether the government acted with the purpose of advancing or inhibiting religion . . . Likewise, we continue to explore whether the aid has the 'effect' of advancing or inhibiting religion.").

effects prong, at least for schools[79] The Court also noted that its approach to assessing the effects prong had been modified.[80] First, the presumption was no longer that the "placement of public employees on parochial school grounds" inevitably had an impermissible effect.[81] Second, the *Agostini* Court expressly rejected "the rule . . . that all government aid that directly aids the educational function of religious schools is invalid."[82]

In some respects, the *Agostini* Court was not breaking new ground when announcing that not all direct public aid to parochial schools was impermissible.[83] The Court had long permitted assisting the educational function of religious schools; for example, the *Allen* Court had permitted loaning secular textbooks to parochial schools.[84] The important question left open in *Agostini* and addressed in later cases involved the *kinds* of state assistance to parochial education that were compatible with Establishment Clause guarantees.[85]

D. *A Different Kind of Reimbursement Program*

Just as the jurisprudence changed markedly with respect to the kinds of public aid that could be given to parochial schools, it likewise changed markedly with respect to the kinds of public aid that could be given to private parties seeking sectarian

79. *Id.* at 232–33. The Court noted that the factors used in prior cases for "assess[ing] whether an entanglement is 'excessive'" were similar to those used for assessing primary effect. *Id.* at 232. The Court therefore found it was most appropriate to treat entanglement not as its own factor, but instead "as an aspect of the inquiry into a statute's effect." *Id.* at 233; *Mitchell*, 530 U.S. at 807–08 ("[I]n *Agostini* we modified *Lemon* for purposes of evaluating aid to schools and examined only the first and second factors . . . . We acknowledged that our cases discussing excessive entanglement had applied many of the same considerations as had our cases discussing primary effect, and we therefore recast *Lemon's* entanglement inquiry as simply one criterion relevant to determining a statute's effect." (citing *Agostini*, 521 U.S. at 232–33) (internal citations omitted)).

80. *Id.* at 223 ("What has changed since we decided *Ball* and *Aguilar* is our understanding of the criteria used to assess whether aid to religion has an impermissible effect.").

81. *Id.*

82. *Id.* at 225.

83. *See supra* Section I.B (discussing Bd. of Educ. v. Allen, 392 U.S. 236 (1968)).

84. *See supra* Section I.B (discussing *Allen*, 392 U.S. 236 (1968)).

85. *See, e.g.*, *infra* notes 150–57 and accompanying text (discussing Mitchell v. Helms, 530 U.S. 793, 835 (2000)).

education for their children. The earlier view was announced two years after *Lemon* in *Committee for Public Education & Religious Liberty v. Nyquist*[86] and *Sloan v. Lemon*.[87] At issue respectively were a New York program and a Pennsylvania program that partially reimbursed tuition costs to parents whose children attended private schools.[88] In both cases, the Court struck down the program.[89]

The *Nyquist* Court discussed some of its past Establishment Clause decisions, noting that "not every law that confers an 'indirect,' 'remote,' or 'incidental' benefit upon religious institutions is, for that reason alone, constitutionally invalid."[90] Nonetheless, the New York law included a provision that would have authorized school payments by the state that might have been used for sectarian purposes,[91] which the *Nyquist* Court recognized was precluded by constitutional guarantees.[92]

The *Nyquist* Court examined a different part of the statute authorizing partial tuition reimbursement for parents.[93] As an initial part of its analysis, the Court noted that direct payments

86. 413 U.S. 756 (1973).

87. 413 U.S. 825 (1973). *Lemon v. Kurtzman* was issued in 1971. 403 U.S. 602 (1971).

88. *See Nyquist*, 413 U.S. at 764–65 ("Section 2 establishes a limited plan providing tuition reimbursements to parents of children attending elementary or secondary non-public schools . . . . The remainder of the 'Elementary and Secondary Education Opportunity Program,' contained in §§ 3, 4, and 5 of the challenged law, is designed to provide a form of tax relief to those who fail to qualify for tuition reimbursement."); *Sloan*, 413 U.S. at 828 ("Pennsylvania's 'Parent Reimbursement Act for Nonpublic Education' provides for reimbursement to parents who pay tuition for their children to attend the State's nonpublic elementary and secondary schools.").

89. *Nyquist*, 413 U.S. at 798 ("Our examination of New York's aid provisions, in light of all relevant considerations, compels the judgment that each, as written, has a 'primary effect that advances religion' and offends the constitutional prohibition against laws 'respecting an establishment of religion.'"); *Sloan*, 413 U.S. at 835 ("Pennsylvania's post-*Lemon v. Kurtzman* attempt to avoid the Establishment Clause's prohibition against government entanglements with religion has failed to satisfy the parallel bar against laws having a primary effect that advances religion . . . .").

90. *Nyquist*, 413 U.S. at 771 (citations omitted).

91. *Id.* at 779–80.

92. *Id.* at 798.

93. *Id.* at 780 ("The state program is designed to allow direct, unrestricted grants of $50 to $100 per child (but no more than 50% of tuition actually paid) as reimbursement to parents in low-income brackets who send their children to nonpublic schools . . . .").

to the religious schools would not have passed constitutional muster.[94] Here, however, the payments were made to the parents rather than the schools,[95] which was relevant for constitutional purposes.[96] But *Everson* and *Allen* counseled that more was required in order for payments to the parents to be constitutionally permissible in this kind of case, namely, that the money would be reimbursing payments used for secular rather than sectarian purposes.[97] Here, "the effect of the aid [was] unmistakably to provide desired financial support for nonpublic, sectarian institutions."[98]

The *Nyquist* Court recognized that the reimbursement would go to the parents with no strings attached—the parents could use the money as they wished and thus would not be a mere "conduit" for the funds to go to the religious schools.[99] But that difference did not resolve the relevant problem. Because "the grants [were] offered as an incentive to parents to send their children to sectarian schools . . ., the Establishment Clause [was] violated."[100]

The state's failure to provide reimbursement might be an alleged interference with the parent's right to send her child to a parochial school, a right that had long been recognized by the Court.[101] Yet, such a claim was rejected, at least in part, because

94. *Id.* ("There can be no question that these grants could not, consistently with the Establishment Clause, be given directly to sectarian schools . . . .").

95. *Id.* at 781 ("The State and intervenor-appellees rely on *Everson* and *Allen* for their claim that grants to parents, unlike grants to institutions, respect the 'wall of separation' required by the Constitution.").

96. *Id.* ("[T]he fact that aid is disbursed to parents rather than to the schools is only one among many factors to be considered.").

97. *See id.* at 781–82; *see also* Sloan v. Lemon, 413 U.S. 825, 832 (1973) ("Such benefits were carefully restricted to the purely secular side of church-affiliated institutions and provided no special aid for those who had chosen to support religious schools. Yet such aid approached the 'verge' of the constitutionally impermissible." (quoting Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947))).

98. *Nyquist*, 413 U.S. at 783.

99. *See id.* at 786.

100. *Id.*

101. *See id.* at 788 ("It is true, of course, that this Court has long recognized and maintained the right to choose nonpublic over public education." (citing Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925))).

the state was not permitted to violate Establishment guarantees,[102] and the Court "decline[d] to approach or overstep the 'precipice' against which the Establishment Clause protects."[103] Further, even if the Establishment Clause did not prohibit such a reimbursement program, more would have to be shown to demonstrate that the failure to pay or reimburse parochial school tuition constituted a free exercise violation.[104] The *Everson* Court had made clear that the State was not obligated to pay for bus transportation for private school students,[105] and so certainly would not be obligated to offset religious school tuition.

In *Sloan*, two of the appellant parents sent their child to a private, secular school.[106] They argued that they should not be denied partial tuition reimbursement merely because the parents sending their children to religious schools could not receive the aid on Establishment Clause grounds.[107] The Act contained a severability clause,[108] permitting the unconstitutional provision to be stripped from the Act without invalidating the entire Act.[109] But the district court rejected that the provision authorizing tuition reimbursement for secular schools was severable.[110] The court explained that because "so substantial a majority of the law's designated beneficiaries were

102. *Id.* ("In its attempt to enhance the opportunities of the poor to choose between public and nonpublic education, the State has taken a step which can only be regarded as one 'advancing' religion.").

103. *Id.*

104. *Id.*

105. *See* Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947).

106. *Sloan*, 413 U.S. at 833.

107. *Id.* at 833–34. The district court had taken a different approach. *Id.* ("The District Court's final order enjoined the State Treasurer from disbursing funds to any parents, irrespective of whether their children attended sectarian or nonsectarian schools.").

108. *Id.*

109. *Id.* at 833 n.10. The Act's severability clause provided as follows: "If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid, in one or more of its applications, the part remains valid in effect in all valid applications that are severable from the invalid applications." *Id.*; *see* Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 2335, 2351 (2020) ("[T]he Court invalidates and severs unconstitutional provisions from the remainder of the law rather than razing whole statutes . . . .").

110. *Sloan*, 413 U.S. at 833–34.

affiliated with religious organizations, it could not be assumed that the state legislature would have passed the law to aid only those attending the relatively few nonsectarian schools."[111]

Suppose that the provision were severable. Then, the partial reimbursement of the tuition costs of the secular school might be awarded.[112] However, some of the other appellants argued that equal protection guarantees would be violated if the parents of a child attending a secular private school would receive partial reimbursement while the parents of a child attending a religious private school would not.[113] The Court characterized this equal protection argument as "thoroughly spurious,"[114] explaining that "valid aid to nonpublic, nonsectarian schools would provide no lever for aid to their sectarian counterparts."[115]

To put it briefly, in *Nyquist*, the Court recognized that giving public monies to parents as a way of promoting parochial school attendance violated Establishment guarantees.[116] In *Sloan*, the Court recognized that the state could accord benefits to secular but not sectarian private schools without violating constitutional guarantees.[117] However, these understandings of constitutional guarantees would ultimately be modified by the Court.[118]

111. *Id.* at 834.

112. *See id.* ("Appellants ask this Court to declare the provisions severable and thereby to allow tuition reimbursement for parents of children attending schools that are not church related.").

113. *Id.* ("If the parents of children who attend nonsectarian schools receive assistance, their argument continues, parents of children who attend sectarian schools are entitled to the same aid as a matter of equal protection.").

114. *Id.*

115. *Id.*; *see also* David H. McClamrock, *The First Amendment and Public Funding of Religiously Controlled or Affiliated Higher Education*, 17 J.C. & U.L. 381, 418–19 (1991) ("[I]n *Brusca v. Missouri ex rel. State Board of Education*, the Court summarily affirmed a federal district court's holding that neither the free-exercise clause nor the equal-protection clause of the federal constitution required a state to subsidize religious elementary and secondary schools on the same terms as nonreligious schools.").

116. *See supra* notes 99–100 and accompanying text.

117. *See Sloan*, 413 U.S. at 832–34 (differentiating "indirect" and "incidental" benefits for strictly secular uses in sectarian schools from subsidized tuition for religious institutions).

118. *See* discussion *infra* Sections I.E, II.C (discussing *Mueller*, *Zelman*, *Mitchell*, and *Espinoza*).

E. *An About-Face*

The Court's interpretation of Establishment Clause guarantees was sharply modified in *Mueller v. Allen*.[119] At issue was a Minnesota statute granting a tax deduction to parents for the costs of sending their children to elementary and secondary schools—the deduction was "limited to actual expenses incurred for the 'tuition, textbooks and transportation' of dependents attending elementary or secondary schools."[120]

The law was challenged as a violation of Establishment Clause guarantees by virtue of its "providing financial assistance to sectarian institutions."[121] The Court distinguished this case from *Nyquist*,[122] emphasizing that "the deduction is available for educational expenses incurred by *all* parents, including those whose children attend public schools and those whose children attend nonsectarian private schools or sectarian private schools."[123] But the widespread availability of the deduction did not entail that the deduction was of equal value regardless of the kind of school attended.[124] As Justice Marshall noted in dissent, the parents of children attending public schools might get a deduction for the purchase of "pencils, notebooks, and bus rides for their school-age children."[125] In contrast, the parents of children attending private schools might be partially reimbursed for tuition, which in effect would mean that the taxpayers were subsidizing parochial school tuition.[126]

119. 463 U.S. 388 (1983); *see infra* notes 127–36.

120. *Id.* at 391 (referencing MINN. STAT. § 290.09 (repealed 1987)).

121. *Id.* at 392.

122. *Id.* at 394 ("[W]e conclude that § [290.09(22)] bears less resemblance to the arrangement struck down in *Nyquist* than it does to assistance programs upheld in our prior decisions and those discussed with approval in *Nyquist*.").

123. *Id.* at 397.

124. *See id.* at 409 (Marshall, J., dissenting) (explaining that these deductions were not of equal value for all parents).

125. *Id.*

126. *Id.* at 407 ("By ensuring that parents will be reimbursed for tuition payments they make, the Minnesota statute requires that taxpayers in general pay for the cost of parochial education . . . .").

The *Mueller* Court recognized that "financial assistance provided to parents ultimately has an economic effect comparable to that of aid given directly to the schools attended by their children,"[127] but emphasized that "under Minnesota's arrangement[,] public funds become available only as a result of numerous private choices of individual parents of school-age children."[128] Yet, the same point was true of the programs struck down in *Nyquist* and *Sloan*, and those programs were nonetheless unconstitutional.[129] The fatal difficulty in those programs, also shared by the Minnesota program, was that the state funds were not limited to the support of secular activities.[130] Even more surprisingly, the *Mueller* Court claimed that its decision was compatible with *Nyquist*.[131]

Mueller had emphasized the numerous private choices made by parents.[132] Yet, the Court was focused neither on which choices were being made nor on the degree to which such choices were truly voluntary.

In *Mueller*, the vast majority of children attending private school were attending sectarian schools.[133] The same was true in *Sloan*,[134] where the sheer proportion of children attending parochial schools at least suggested that a purpose behind the

127. *Id.* at 399 (majority opinion).

128. *Id.*

129. Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 798 (1973); Sloan v. Lemon, 413 U.S. 825, 835 (1973); *see supra* Section I.D (discussing *Nyquist* and *Sloan*).

130. *Mueller*, 463 U.S. at 414 (Marshall, J., dissenting) ("A tax deduction has a primary effect that advances religion if it is provided to offset expenditures which are not restricted to the secular activities of parochial schools.").

131. *See id.* at 390 (majority opinion) ("[T]his question was reserved in *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973)."); *id.* at 404 (Marshall, J., dissenting) ("The majority today does not question the continuing vitality of this Court's decision in *Nyquist*.").

132. *See id.* at 399 (majority opinion).

133. *Id.* at 405 (Marshall, J., dissenting) ("90,000 students were enrolled in nonpublic schools charging tuition; over 95% of those students attended sectarian schools.").

134. *Sloan*, 413 U.S. at 830. At the time, over 90% of Pennsylvania's nonpublic school students were attending religiously affiliated schools. *Id.*

deduction was to enable children to attend such schools.[135] Such a purpose alone implicates Establishment concerns.[136]

That parents were choosing to send their children to religious schools does not mean that the parents preferred that their children receive a religious education or even that the parents were of the faith tradition associated with the school. For example, *Zelman v. Simmons-Harris*[137] involved the constitutionality of a voucher program used in Cleveland, Ohio, to help parents send their children to religious schools.[138] Many of the parents felt constrained to send their children to a religious school not in accord with their faith tradition[139] rather than to public schools that were "among the worst performing public schools in the Nation."[140] Rather than finding such a constrained parental choice problematic for purposes of the Establishment Clause, the Court found the program to be one of "true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals."[141] The Court seemed to have adopted Justice O'Connor's suggestion in her concurrence that the criterion for determining whether parents have a true choice should not be too demanding.[142]

135. In *Sloan*, the Court accepted the district court's refusal to make support of secular private schools severable from support of religious schools, implying that an important purpose behind the law was to support the latter schools and that the law might well not have been passed but for its making tuition at religious schools deductible. *See id.* at 832–34; *supra* notes 111–15 and accompanying text.

136. *See* McCreary County v. ACLU of Ky., 545 U.S. 844, 860 (2005) ("Manifesting a purpose to favor one faith over another, or adherence to religion generally, clashes with the 'understanding, reached . . . after decades of religious war, that liberty and social stability demand a religious tolerance that respects the religious views of all citizens . . . .'" (quoting Zelman v. Simmons–Harris, 536 U.S. 639, 718 (2002) (Breyer, J., dissenting))).

137. 536 U.S. 639 (2002).

138. *Id.* at 644–45.

139. *See id.* at 704–07 (Souter, J., dissenting) ("Evidence shows, however, that almost two out of three families using vouchers to send their children to religious schools did not embrace the religion of those schools.").

140. *See id.* at 644 (majority opinion).

141. *Id.* at 653.

142. *See id.* at 652; *id.* at 670 (O'Connor, J., concurring) ("For nonreligious schools to qualify as genuine options for parents, they need not be superior to religious schools in every respect. They need only be adequate substitutes for religious schools in the eyes of parents.").

The *Zelman* Court's willingness to approve a voucher plan was unsurprising, notwithstanding the lack of safeguards considered important in *Everson*, *Allen*, *Nyquist*, and *Sloan* that monies not go to support religious education.[143] After all, the *Mueller* Court had simply ignored that the Minnesota tax deductions would be indirectly supporting religious education.[144] Further, in *Mitchell v. Helms*, an Establishment Clause challenge to direct federal aid to parochial schools had been rejected, at least in part, because of a lack of showing that a significant amount of aid had been improperly used.[145]

At issue in *Mitchell* was the constitutionality of using federal funds to purchase educational materials and equipment that would be lent to public and private schools, including parochial schools.[146] When evaluating whether such aid was constitutionally permissible, the *Mitchell* plurality reasoned that "[i]f the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government."[147] Yet, the Court had never previously suggested that public aid supporting religious education was permissible as long as it had not been at the behest of the government.[148] Rather, the Court's previous focus had been on which prophylactic steps were necessary to prevent public support of religious indoctrination *even where the State had made clear that using public funds to support such teaching*

143. *See* discussion *supra* Sections I.A–D.

144. For a discussion of *Mueller*, see *supra* notes 119–36 and accompanying text.

145. Mitchell v. Helms, 530 U.S. 793, 835 (2000) ("We are unwilling to elevate scattered *de minimis* statutory violations, discovered and remedied by the relevant authorities themselves prior to any litigation, to such a level as to convert an otherwise unobjectionable parishwide program into a law that has the effect of advancing religion."); *see also id.* at 864 (O'Connor, J., concurring in the judgment) ("The evidence proffered by respondents, and relied on by the plurality and Justice Souter, concerning actual diversion of Chapter 2 aid in Jefferson Parish is *de minimis*.").

146. *Id.* at 801 (majority opinion).

147. *Id.* at 809.

148. For example, in *Lemon*, the Court struck down aid to religious institutions, notwithstanding that the state had precluded the aid's use to promote religious education. *See* Lemon v. Kurtzman, 403 U.S. 602, 613–14 (1971).

was prohibited.[149] Entanglement would neither have been a separate prong under *Lemon*[150] nor included in the effects prong[151] if the sole worry were whether the Government itself was urging religious indoctrination.

The *Mitchell* plurality offered a new test—"[w]here the aid would be suitable for use in a public school, it is also suitable for use in any private school."[152] To see why this formulation leads to surprising results, one need only consider a kind of aid that is paradigmatically neutral[153]—financial support. Because dollars themselves do not have impermissible content, one would expect that money could appropriately be given to pubic and sectarian schools alike, even if those dollars were then used by the sectarian schools to make paradigmatically religious purchases such as Bibles.[154]

The transformation in Establishment Clause jurisprudence over the past several decades has been rather marked. At one point, the Court tried to carefully hone its analysis so that the Constitution precluded state support of religious education but did not bar the State's affording general welfare benefits to religious schools.[155] The Court then modified the rationale, upholding state support of secular education in religious schools as long as the State was not thereby supporting religious education.[156] But the Court's current interpretation

149. *Cf. id.* at 613 (discussing "statutory restrictions designed to guarantee the separation between secular and religious educational functions and to ensure that State financial aid supports only the former").

150. *See generally supra* notes 57–71 and accompanying text.

151. *See supra* notes 79–82 and accompanying text.

152. *Mitchell*, 530 U.S. at 822.

153. *Cf. id.* at 809 ("In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, we have consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion.").

154. *See* Steven G. Gey, *Vestiges of the Establishment Clause*, 5 FIRST AMEND. L. REV. 1, 40 (2006) ("[T]he government cannot give a religious school Bibles, but it may give the religious school money that the school can use to buy Bibles.").

155. *See* Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947).

156. Bd. of Educ. v. Allen, 392 U.S. 236, 248 (1968) (explaining that the State could support the teaching of secular education in parochial schools).

of Establishment Clause guarantees no longer focuses on preventing state support of religious education, instead offering a more forgiving approach toward states that wish to support such education.[157]

There is another trend that may not bode well for peace among the religious and between the religious and non-religious. The Court does not rigorously enforce the Establishment Clause's requirement of state neutrality among religions,[158] which might well promote the kind of religious conflict that the Establishment Clause was supposed to reduce.[159]

One issue involves the Establishment Clause limitations on states wishing to promote religion generally or certain religions in particular.[160] But what of states (or state constitutions) that prohibit support of religious education? The Court's focus has shifted to the conditions under which state support of religious education is *required* under Free Exercise guarantees.[161]

II. THE SHIFTING FREE EXERCISE JURISPRUDENCE

The Court's exposition of Free Exercise guarantees has been rather uneven. Often, the question has been whether particular state policies or practices were viewed as coercing individuals to act in ways contrary to faith,[162] although the criterion for determining whether something was coercive for Free Exercise

157. *See supra* text accompanying notes 137–54 (discussing *Zelman* and *Mitchell*).

158. *See, e.g.*, Town of Greece v. Galloway, 572 U.S. 565, 569 (2014) (rejecting an Establishment Clause challenge to a town's practice of opening meetings with Christian prayers); Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2074 (2019) (rejecting an Establishment Clause challenge to Maryland maintaining the Bladensburg Peace Cross).

159. *See generally Everson*, 330 U.S. at 11–15 (discussing the evils the Religion Clauses were designed to suppress).

160. Justice Scalia offered his understanding of Establishment Clause limitations in his *McCreary County* dissent: "With respect to public acknowledgment of religious belief, it is entirely clear from our Nation's historical practices that the Establishment Clause permits . . . disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists." *See* McCreary County v. ACLU of Ky., 545 U.S. 844, 885, 893 (2005) (Scalia, J., dissenting).

161. *See supra* Part II.

162. Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2283 (2020).

purposes has proven elusive.[163] However, the Court's understanding of what counts as coercive has changed markedly, so that practices once thought either permissible (because not coercive for free exercise purposes) or perhaps not even triggering free exercise guarantees (obviating the need to determine whether the practice was coercive)[164] might now be thought violating those guarantees.[165] The Court's recent Free Exercise decision in *Espinoza* has only made the jurisprudence more confusing, although the tenor of the jurisprudence is unmistakable.[166]

A. *Coercion*

The Court has frequently suggested that an important element in Free Exercise jurisprudence is whether the State is coercing an individual to act in a way contrary to his or her conscience.[167] For example, *Zorach v. Clauson* involved a

163. *Compare* Braunfeld v. Brown, 366 U.S. 599, 600, 607–09 (1961) (upholding a Pennsylvania criminal statute prohibiting Sunday retail sales of certain commodities under the Free Exercise Clause because "the State regulate[d] conduct by enacting a general law within its power, the purpose and effect of which [was] to advance the State's secular goals, [making] the statute . . . valid despite its indirect burden on religious observance" because the alternative of granting exceptions to certain religions would create an administrative burden), *with* Sherbert v. Verner 374 U.S. 398, 399–400, 407–09 (1963) (striking down South Carolina refusal to award unemployment compensation to individual who was unemployed because she refused to work the Sabbath); see *infra* notes 180–200 and accompanying text for a discussion of these cases.

164. *See* Locke v. Davey, 540 U.S. 712, 729 (2004) (Scalia, J., dissenting) (suggesting that the state would not violate free exercise guarantees if only offering scholarships for matriculation at public universities). Justice Scalia did not make clear whether such a program would not even trigger free exercise scrutiny or whether such a program would trigger but survive free exercise scrutiny. *See id.*

165. *See Espinoza*, 140 S. Ct. at 2256 (suggesting Montana's disqualification of a religious school from funding was "indirect coercion"); *see also infra* notes 287–329 and accompanying text (discussing *Espinoza*).

166. *See Espinoza*, 140 S. Ct. at 2256.

167. Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 223 (1963) ("[A] violation of the Free Exercise Clause is predicated on coercion . . . ."); *see also* Comm. for. Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 786 (1973) (citing *Schempp*, 374 U.S. at 222–23) ("[W]hile proof of coercion might provide a basis for a claim under the Free Exercise Clause, it was not a necessary element of any claim under the Establishment Clause.").

Religion Clauses challenge[168] to New York's release time program, where children were released from school during school hours so that they could receive religious training elsewhere.[169] The Court quickly dispensed with the Free Exercise challenge, suggesting that "[i]t takes obtuse reasoning to inject any issue of the 'free exercise' of religion into the present case," because there was no evidence of coercion.[170] "No one is forced to go to the religious classroom and no religious exercise or instruction is brought to the classrooms of the public schools."[171] Thus, the Court suggested, where there is no pressure to act in a particular way, Free Exercise guarantees will not be implicated.[172]

Suppose, however, that the State imposes pressure to act in a way contrary to faith. In that event, Free Exercise guarantees *may* be triggered, although the Court has not provided a good test to determine whether the State has engaged in impermissible coercion.[173] Consider *Braunfeld v. Brown*, which involved a Pennsylvania law preventing the sale of most goods on Sundays.[174] The difficulty was that the plaintiffs closed their

168. Zorach v. Clauson, 343 U.S. 306, 310 (1952) ("[O]ur problem reduces itself to whether New York by this system has either prohibited the 'free exercise' of religion or has made a law 'respecting an establishment of religion' within the meaning of the First Amendment.").

169. *Id.* at 308 ("New York City has a program which permits its public schools to release students during the school day so that they may leave the school buildings and school grounds and go to religious centers for religious instruction or devotional exercises.").

170. *Id.* at 311.

171. *Id.*

172. *See id.* at 311–12; *see also Schempp*, 374 U.S. at 223 ("The distinction between the two clauses is apparent—a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended."); Engel v. Vitale, 370 U.S. 421, 430 (1962) ("The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion . . . ."); Bd. of Educ. v. Allen, 392 U.S. 236, 248–49 (1968) (quoting *Schempp*, 374 U.S. at 223) ("[I]t is necessary . . . for one to show the coercive effect of the enactment as it operates against him in the practice of his religion . . . .").

173. *See Schempp*, 374 U.S. at 318 (Stewart, J., dissenting) (discussing different factors to be included when determining whether the state is coercing students to take part in religious exercises); *cf.* Zelman v. Simmons-Harris, 536 U.S. 639, 686, 704 (2000) (Souter, J., dissenting) (noting that many families felt that they had to choose schools not associated with their faith tradition in order for their children to get a suitable education).

174. 366 U.S. 599, 600 (1961) ("This case concerns the constitutional validity of the application to appellants of the Pennsylvania criminal statute, enacted in 1959, which proscribes the Sunday retail sale of certain enumerated commodities.").

businesses from sundown on Friday to sundown on Saturday for religious reasons,[175] which put them at a disadvantage if in addition they had to close their businesses on Sunday as well.[176] The Court explained that while Sunday Closing laws might initially have been adopted for religious reasons, states now had those laws for secular reasons such as establishing "a day of community tranquility, respite and recreation, a day when the atmosphere is one of calm and relaxation rather than one of commercialism, as it is during the other six days of the week."[177]

Even if the state were enforcing the law for secular reasons, the plaintiffs would nonetheless suffer economic harm.[178] But the Court was not persuaded that Free Exercise guarantees were violated, reasoning that "the statute . . . does not make criminal the holding of any religious belief or opinion, nor does it force anyone to embrace any religious belief or to say or believe anything in conflict with his religious tenets."[179]

The freedom to act in accord with one's religious beliefs is not unlimited.[180] The *Braunfeld* Court was worried about the ramifications of its holding that an exemption was required, because "strik[ing] down . . . legislation which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature."[181] Many state laws have indirect effects upon religious practice, and a state would be handcuffed if it was precluded from legislating in a way that might adversely impact some religious

175. *Id.* at 601 ("Each of the appellants is a member of the Orthodox Jewish faith, which requires the closing of their places of business and a total abstention from all manner of work from nightfall each Friday until nightfall each Saturday.").

176. *Id.* at 601–02 ("Appellants contend that . . . due to the statute's compulsion to close on Sunday, appellants will suffer substantial economic loss . . . .").

177. *Id.* at 602.

178. *Id.* at 603 ("Concededly, appellants and all other persons who wish to work on Sunday will be burdened economically by the State's day of rest mandate . . . .").

179. *Id.*

180. *Id.* (citing Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940)).

181. *See id.* at 606.

practices,[182] especially in light of the multiplicity of religions represented in the country.[183]

The Court explained that it was the purpose or effect of a law that would determine whether it violated the Free Exercise Clause.[184] If the state's purpose "is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect."[185] But where the purpose is to promote the "State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden."[186]

The plaintiffs did not ask to have the Sunday Closing law struck down as a general matter, but instead proposed that "the State should cut an exception from the Sunday labor proscription for those people who, because of religious conviction, observe a day of rest other than Sunday."[187] The Court admitted that the plaintiffs' proposal was a workable solution, noting not only that "[a] number of States provide such an exemption," but also that such an approach "may well be the wiser solution to the problem."[188] However, experience of other states notwithstanding,[189] the Court refused to find the Pennsylvania law "invalid, either on its face or as applied."[190]

182. *See id.* ("[I]t cannot be expected, much less required, that legislators enact no law regulating conduct that may in some way result in an economic disadvantage to some religious sects and not to others because of the special practices of various religions.").

183. *See id.* ("[W]e are a cosmopolitan nation made up of people of almost every conceivable religious preference.").

184. *Id.* at 607.

185. *Id.*

186. *Id.* (citing Cantwell v. Connecticut, 310 U.S. 296, 304–05 (1940)).

187. *Id.* at 608.

188. *Id.*

189. *See id.* at 614–15 (Brennan, J., concurring and dissenting) ("[A] majority—21—of the 34 States which have general Sunday regulations have exemptions of this kind. We are not told that those States are significantly noisier, or that their police are significantly more burdened, than Pennsylvania's.").

190. *Id.* at 609.

A mere two years later, the Court decided *Sherbert v. Verner*,[191] a case that was somewhat hard to square with *Braunfeld*.[192] At issue was a denial of unemployment compensation to Adell Sherbert, who refused to work on Saturdays because of her religious beliefs.[193] The South Carolina Supreme Court had agreed with the Employment Security Commission that Sherbert's refusal to work on Saturdays did not constitute good cause and hence that she was ineligible for the benefits.[194]

The *Sherbert* Court understood that "the disqualification for benefits . . . may be only an indirect result of welfare legislation within the State's general competence to enact; it is true that no criminal sanctions directly compel appellant to work a six-day week."[195] Nonetheless, the Court pointed out that the "ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."[196] But the choice offered in *Braunfeld* was to follow the precepts of the religion and forfeit the benefits of being open six days a week or, instead, close on Sunday and on the recognized Sabbath but suffer economic harm by doing so.[197] The *Sherbert* Court distinguished *Braunfeld* by explaining that "the statute was . . . saved by a countervailing factor which finds no equivalent in the instant case—a strong state interest in providing one uniform day of rest for all workers."[198] But that allegedly strong state interest was described by Justice

191. 374 U.S. 398 (1963).

192. *See* James M. Oleske, Jr., *Free Exercise (Dis)honesty*, 2019 WIS. L. REV. 689, 691 (2019) (suggesting that the cases are irreconcilable).

193. *Sherbert*, 374 U.S. at 399 ("[S]he was unable to obtain other employment because from conscientious scruples she would not take Saturday work.").

194. *See id.* at 401.

195. *Id.* at 403.

196. *Id.* at 404.

197. *See* Braunfeld v. Brown, 366 U.S. 599, 601–02 (1961).

198. *Sherbert*, 374 U.S. at 408.

Brennan in his *Braunfeld* concurrence and dissent as a "mere convenience."[199] Further, the *Sherbert* Court's likening the burden placed on Sherbert to a fine was quite similar to Justice Brennan's suggestion that the state in effect was imposing a tax on Braunfeld.[200] Finally, the difficulty in reconciling the two cases did not escape the attention of members of the Court.[201]

The Court decided a variety of Free Exercise cases, sometimes siding with those seeking an exemption,[202] but at other times denying the exemption.[203] The jurisprudence was in substantial disarray[204] and the Court set out to clarify[205] or perhaps modify[206] the relevant test in *Employment Division, Department of Human Resources of Oregon v. Smith*.[207]

199. *Braunfeld*, 366 U.S. at 614 (Brennan, J., concurring and dissenting); *see also Sherbert*, 374 U.S. at 421 (Harlan, J., dissenting) ("The secular purpose of the statute before us today is even clearer than that involved in *Braunfeld* . . . . Finally, the indirect financial burden of the present law is far less than that involved in *Braunfeld*.").

200. *Braunfeld*, 366 U.S. at 613 (Brennan, J., concurring and dissenting) ("[T]his state-imposed burden on Orthodox Judaism, has exactly the same economic effect as a tax levied upon the sale of religious literature.").

201. *See Sherbert*, 374 U.S. at 417 (Stewart, J., concurring) ("I cannot agree that [today's] decision can stand consistently with *Braunfeld v. Brown*"); *id.* at 411–12, (Douglas, J., concurring) (noting his dissenting view in the Sunday Closing cases); *id.* at 421 (Harlan, J., dissenting) ("[D]espite the Court's protestations to the contrary, the decision necessarily overrules *Braunfeld v. Brown*, 366 U.S. 599, which held that it did not offend the 'Free Exercise' Clause of the Constitution for a State to forbid a Sabbatarian to do business on Sunday.").

202. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972) (Free Exercise guarantees require that Amish children not be forced to attend high school); Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707 (1981) (Free Exercise guarantees require that individual be given unemployment compensation when he could not work at munitions factory because of sincere religious beliefs).

203. *See* United States v. Lee, 455 U.S. 252 (1982) (refusing to exempt those with sincere objections to participate in Social Security); Bowen v. Roy, 476 U.S. 693 (1986) (refusing to exempt child from using social security number in order to get food stamps, notwithstanding that doing so was contrary to sincere religious belief).

204. *See* Bret Boyce, *Equality and the Free Exercise of Religion*, 57 CLEV. ST. L. REV. 493, 495 (2009) (describing the "substantial doctrinal disarray" prior to *Smith*).

205. Donald L. Beschle, *No More Tiers? Proportionality as an Alternative to Multiple Levels of Scrutiny in Individual Rights Cases*, 38 PACE L. REV. 384, 425 (2018) (suggesting that *Smith* was "intended to clarify free exercise analysis").

206. *See* Mark Strasser, *Narrow Tailoring, Compelling Interests, and Free Exercise: On ACA, RFRA and Predictability*, 53 U. LOUISVILLE L. REV. 467, 485–86 (2016) ("[T]he *Smith* Court not only upheld the denial of unemployment compensation, but also seemed to modify the conditions under which burdens on free exercise would trigger strict scrutiny.").

207. 494 U.S. 872 (1990).

The *Smith* Court significantly limited the robustness of free exercise rights by modifying the level of scrutiny that would be employed in many free exercise cases.[208] The Court announced a new test, explaining that "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).'"[209] Many commentators suggested that *Smith* watered down Free Exercise guarantees,[210] although there is a whole category of cases unaffected by the *Smith* modification, namely those involving animus.[211]

B. *Animus*

The *Smith* rule does not apply when the State is clearly targeting a particular religion for unfavorable treatment out of animus.[212] For example, at issue in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* were three ordinances regulating animal sacrifice.[213] The Court found that "the ordinances were

208. *See* Scott W. Gaylord, *For-Profit Corporations, Free Exercise, and the HHS Mandate*, 91 WASH. U.L. REV. 589, 605 (2014) ("After *Smith*, a claim that a neutral, generally applicable law allegedly infringes the Free Exercise Clause is subject only to rational basis review."); Scott W. Gaylord, *RFRA Rights Revisited: Substantial Burdens, Judicial Competence, and the Religious Nonprofit Cases*, 81 MO. L. REV. 655, 673 (2016) ("[I]n the wake of *Smith*, the Free Exercise Clause does not provide robust protection for religious exercise.").

209. *Smith*, 494 U.S. at 879 (citing United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

210. *See* Andy G. Olree, *The Continuing Threshold Test for Free Exercise Claims*, 17 WM. & MARY BILL RTS. J. 103, 106 (2008) ("*Smith* regrettably weakened free exercise rights."); Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743, 756 n.51 (1992) ("*Smith*, by both its context and its principles, substantially weakens the protection of the Free Exercise Clause . . . ."); John D. Inazu, *Peyote and Ghouls in the Night: Justice Scalia's Religion Clause Minimalism*, 15 FIRST AMEND. L. REV. 239, 257 (2017) (discussing "*Smith*—a case that creates unsatisfying doctrinal tensions [and] substantially weakens religious liberty protections"); Gregory P. Magarian, *The Jurisprudence of Colliding First Amendment Interests: From the Dead End of Neutrality to the Open Road of Participation-Enhancing Review*, 83 NOTRE DAME L. REV. 185, 227 (2007) ("*Smith* dramatically weakens the force of . . . the Free Exercise Clause . . . ."); Elliot M. Mincberg, *The Supreme Court and the First Amendment: The 1990-1991 Term*, 9 N.Y.L. SCH. J. HUM. RTS. 1, 38 (1991) (suggesting that *Smith* "substantially weaken[ed] the Free Exercise Clause").

211. *See infra* notes 229–34 and accompanying text (discussing the animus exception).

212. *See* Oleske, *supra* note 192, at 694; Emp. Div. v. Smith, 494 U.S. 872, 878 (1990).

213. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 527–28 (1993).

enacted 'because of,' not merely 'in spite of,' their suppression of Santeria religious practice."[214] Because of the town council's animus toward those beliefs and practices,[215] the Court struck down the ordinances as violations of Free Exercise guarantees.[216]

Suppose that a state did not have a neutral and generally applicable classification incidentally affecting religion but instead expressly classified on the basis of religion, although not because of animus. The analysis suggested in *Smith* would not apply because the law was not neutral and generally applicable.[217] However, the *Hialeah* analysis also would not apply because of the lack of animus. [218]

Locke v. Davey explored whether such a law would violate free exercise guarantees or instead fall into the area between the Establishment and Free Exercise Clauses.[219] At issue was a Washington scholarship awarded to high school students for college expenses if those students met certain "academic, income, and enrollment requirements."[220] However, the state imposed a limitation on the use of the monies; namely, they could not be used to help the student "pursue a degree in theology at that institution."[221]

Joshua Davey qualified for the scholarship but wanted to major in devotional theology.[222] He refused to certify that he would not pursue a degree prohibited under the terms of the scholarship and thus was not awarded any of those funds.[223] He challenged the limitation, arguing that it violated Religion

214. *Id.* at 540 (citing Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979)).

215. *Id.* at 542 ("The pattern we have recited discloses animosity to Santeria adherents and their religious practices . . . .").

216. *Id.* at 547.

217. *See generally Smith*, 494 U.S. at 878.

218. *See generally Hialeah*, 508 U.S. at 542.

219. *See* 540 U.S. 712, 719 (2004) (discussing "state actions permitted by the Establishment Clause but not required by the Free Exercise Clause").

220. *Id.* at 716.

221. *Id.*

222. *Id.* at 717.

223. *Id.*

Clause guarantees.[224] While the district court sided with the state, the Ninth Circuit reversed, concluding that "the State had singled out religion for unfavorable treatment."[225]

The *Locke* Court began by explaining that under Establishment Clause precedent, "the link between government funds and religious training is broken by the independent and private choice of recipients."[226] Thus, in the Court's eyes, there was nothing wrong with the State's providing a scholarship for a student to pursue ministerial studies.[227] At issue was whether the State was precluded from refusing to fund such studies.[228]

The Court rejected the contention that Washington was exhibiting animus towards religion,[229] distinguishing *Hialeah* because, there, "the law sought to suppress ritualistic animal sacrifices of the Santeria religion."[230] In contrast, the Washington law "impose[d] neither criminal nor civil sanctions on any type of religious service or rite."[231] Nor did the law "require students to choose between their religious beliefs and receiving a government benefit."[232] Rather, the "State ha[d]

224. *See id.* at 718.

225. *Id.* (citing Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993)).

226. *Id.* at 719.

227. *Id.* Specifically, the Court said, "[T]here is no doubt that the State could, consistent with the Federal Constitution, permit Promise Scholars to pursue a degree in devotional theology." *Id.* The Court cited *Witters v. Washington Dep't of Servs. for the Blind* for support, which held that the First Amendment did not bar "the State of Washington from extending assistance under a state vocational rehabilitation assistance program to a blind person studying at a Christian college and seeking to become a pastor, missionary, or youth director." 474 U.S. at 482. But the *Witters* Court had suggested that this funding might be upheld as a kind of de minimus exception. *See* Mark Strasser, *Repudiating* Everson*: On Buses, Books, and Teaching Articles of Faith*, 78 MISS. L.J. 567, 609 n.244 (2009).

228. *Locke*, 540 U.S. at 719 ("The question before us, however, is whether Washington, pursuant to its own constitution, . . . can deny them such funding without violating the Free Exercise Clause.").

229. *Id.* at 725 ("In short, we find neither in the history or text of Article I, § 11 of the Washington Constitution, nor in the operation of the Promise Scholarship Program, anything that suggests animus towards religion.").

230. *Id.* at 720 (citing Church of the Lukimi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 535 (1993)).

231. *Id.*

232. *Id.* at 720–21.

merely chosen not to fund a distinct category of instruction."[233] The Court was perhaps thinking that Davey was no worse off than he would have been if the State had decided not to offer the funding at all.[234]

Justice Scalia rejected the argument that Davey was no worse off than he would have been had the state not offered any scholarships at all, suggesting instead that, in effect, Davey was being subjected to a tax for seeking to follow his religious calling—he could pursue his major but not get the scholarship or he could study something else and get the scholarship.[235] Such an argument appeals to the *Sherbert* analysis, where the Court held that unemployment benefits could not be denied merely because Adell Sherbert refused to work on Saturdays.[236] However, there are at least two difficulties with invoking *Sherbert* in this context. First, the analogous argument suggesting that the State was imposing a tax on religious practice was rejected by the *Braunfeld* Court.[237] Second, the *Smith* Court had limited the force of *Sherbert* to unemployment compensation cases.[238]

The *Locke* Court suggested that there were "few areas in which a State's antiestablishment interests come more into play,"[239] than in avoiding the "social conflict, potentially created

233. *Id.* at 721.

234. *See id.* at 725; *cf.* Maher v. Roe, 432 U.S. 464, 474 (1977) ("An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth; she continues as before to be dependent on private sources for the service she desires.").

235. *See Locke*, 540 U.S. at 726–27 (Scalia, J., dissenting) ("[W]hen the State withholds that benefit from some individuals solely on the basis of religion, it violates the Free Exercise Clause no less than if it had imposed a special tax.").

236. *See* Sherbert v. Verner, 374 U.S. 398, 410 (1963) ("Our holding today is only that South Carolina may not constitutionally apply the eligibility provisions so as to constrain a worker to abandon his religious convictions respecting the day of rest.").

237. *See* Braunfeld v. Brown, 366 U.S. 599, 606 (1961); *supra* notes 180–90 and accompanying text (discussing *Braunfeld*).

238. *See* Emp. Div. v. Smith, 494 U.S. 872, 883 (1990) ("We have never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation.").

239. *Locke*, 540 U.S. at 722.

when government becomes involved in religious education."[240] However, Justice Scalia argued in dissent that the State had various, less objectionable ways that it could have achieved the same end; for example, the State "could make the scholarships redeemable only at public universities (where it sets the curriculum), or only for select courses of study."[241]

Arguably, by excluding theology majors,[242] the State was adopting Justice Scalia's approach and saying that there were only certain majors that could be funded.[243] Of course, the State was *only* excluding theology majors, and the question at hand was whether the State was being neutral in the appropriate sense when doing so.[244] The *Locke* majority and Justice Scalia in dissent differed in that Justice Scalia likely would have required that some secular majors also not be funded in order for the limitation to pass constitutional muster, just as including secular elements in a display might defeat an Establishment challenge to a display including religious elements.[245]

Justice Scalia in addition offered a version of the de minimus argument, suggesting that the extent to which an individual taxpayer would be supporting ministerial studies would be "de minimus"[246] and hence not reasonably thought constitutionally

240. Zelman v. Simmons-Harris, 536 U.S. 639, 718 (2000) (Breyer, J., dissenting).

241. *Id.* at 729 (Scalia, J., dissenting).

242. *See* Shannon Black, *Locke v. Davey and the Death of Neutrality as a Concept Guiding Religion Clause Jurisprudence*, 19 ST. JOHN'S J. LEGAL COMMENT. 337, 365 (2005) (noting the "exclusion of devotional theology majors from receiving scholarship funds").

243. *See Locke*, 540 U.S. at 729 (Scalia, J., dissenting).

244. *See* Ira C. Lupu & Robert W. Tuttle, *Federalism and Faith*, 56 EMORY L.J. 19, 72–73 (2006) ("A generic distinction between religion and nonreligion is as likely to have arisen from legitimate as from illegitimate grounds.").

245. *See* Eric B. Ashcroft, American Atheists, Inc. v. Davenport*: Endorsing a Presumption of Unconstitutionality Against Potentially Religious Symbols*, 2012 B.Y.U. L. REV. 371, 373–74 (2012) ("This rule, termed here the 'reindeer rule,' allows the government to avoid an establishment of religion by including 'purely secular symbols' in a religious display.").

246. *See Locke*, 540 U.S. at 729 (Scalia, J., dissenting) (discussing "the tiny fraction of Promise Scholars who would pursue theology degrees, the amount of any citizen's tax bill at stake is *de minimus*").

problematic.[247] If that were the test, however, the State could fund religious teaching in a variety of ways as long as the burden on the individual taxpayer was not significant.[248]

The *Locke* Court accepted that Establishment Clause guarantees were not violated by the state's awarding a scholarship to pursue ministerial studies,[249] but was unwilling to go so far as to say that the Constitution required such funding as a matter of free exercise merely because the State was willing to fund non-religious education.[250] The Court instead reasoned that Washington's decision fell into the area between the Establishment and Free Exercise Clauses.[251]

At this point, free exercise jurisprudence was rather forgiving with respect to which laws passed muster, assuming that the laws were neutral and generally applicable. When the state manifested animus towards religion, the law would likely be struck down, and an issue dividing members of the Court involved which laws or practices were motivated by animus.[252]

C. *A New Free Exercise Approach*

The Court changed course in *Trinity Lutheran Church of Columbia, Incorporated v. Comer*.[253] At issue was whether a religious preschool and daycare center could participate in a

247. Mitchell v. Helms, 530 U.S. 793, 861 (2000) (O'Connor, J., concurring) ("The limited evidence amassed by respondents during 4 years of discovery (which began approximately 15 years ago) is at best *de minimis* and therefore insufficient to affect the constitutional inquiry.").

248. *But cf*. Allan W. Vestal, *Cents and Sensibilities*, 20 U. PA. J. CONST. L. 245, 291 (2017) (noting that what may be de minimus to some might be of great importance to others).

249. *Locke*, 540 U.S. at 719 ("[T]here is no doubt that the State could, consistent with the Federal Constitution, permit Promise Scholars to pursue a degree in devotional theology.").

250. *See id*. ("[T]here are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause.").

251. *Id.* at 725 ("If any room exists between the two Religion Clauses, it must be here. We need not venture further into this difficult area in order to uphold the Promise Scholarship Program as currently operated by the State of Washington.").

252. *Compare id.* at 725 ("In short, we find neither in the history or text of Article I, § 11 of the Washington Constitution, nor in the operation of the Promise Scholarship Program, anything that suggests animus toward religion."), *with id*. at 733 (Scalia, J., dissenting) ("This case is about discrimination against a religious minority.").

253. 137 S. Ct. 2012 (2017).

state-run resurfacing program for the preschool's playground without offending state constitutional limits.[254] The mission of the Center, which was open to children of many faiths,[255] was to offer a safe and clean school facility with an educational program that would permit each child to "grow spiritually, physically, socially, and cognitively."[256] The resurfacing would replace the unforgiving, coarse gravel[257] with a safer, resilient surface[258] that would be ADA compliant.[259] The *Comer* Court held that Missouri's refusal to afford Trinity Lutheran the resurfacing benefit violated constitutional guarantees.[260]

The *Comer* Court cited *Everson* for the proposition that a State "cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation."[261] Yet, *Everson* did not provide support for the *Comer* Court's position—regardless of whether this religious center received the monies, no natural person would have been denied access to a public benefit because of his or her faith.[262] No facility with a resurfaced playground would have been permitted to discriminate based on the faith of the individuals using the playground.[263] Further, the

254. *See id.* at 2017.

255. *Id*. at 2017 ("The Center admits students of any religion, and enrollment stands at about 90 children ranging from age two to five.").

256. *Id.* at 2018.

257. *Id.* at 2017.

258. *Id*. at 2018.

259. *Id.* The ADA is the Americans with Disabilities Act.

260. *See id*. at 2025 ("But the exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution all the same, and cannot stand.").

261. *Id*. at 2020 (quoting Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947)).

262. *See Everson*, 330 U.S. at 16; Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1402 (2018) (discussing the difference between corporations and natural persons).

263. *Cf. Comer,* 137 S. Ct. at 2019–20 (citing *Everson*, 330 U.S. at 16) (noting that the Court upheld a New Jersey law enabling a local school district to reimburse public transportation costs).

religious center was not itself a citizen who had been discriminated against on the basis of faith, and it was the center, rather than the would-be users, that had been denied the benefit.[264]

Arguably, *Everson* would have been applicable if a different question had been presented. Suppose that the center had received the grant and a citizen had challenged that grant as a violation of Establishment guarantees. *Everson* suggests that the state was *permitted* to promote health and safety at religious institutions,[265] although a separate question would have been whether the playground was being used to promote religious doctrine.[266]

The *Comer* Court reasoned that the Missouri law "expressly discriminate[d] against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character."[267] But the anti-establishment interests discussed in *Locke* are focused on religious character,[268] and the *Locke* Court nowhere suggested that such anti-establishment interests were illegitimate to consider, so *Locke* suggests that Missouri was behaving constitutionally.[269]

The reading of free exercise offered in *Comer* involves a robust reworking of the Religion Clauses. *Everson* suggested that the State is permitted but not required to afford public benefits to religious institutions,[270] whereas *Comer* suggests that the Free

264. *Id.* at 2014 ("The Department had a strict and express policy of denying grants to any applicant owned or controlled by a church, sect, or other religious entity.").

265. *See Everson*, 330 U.S. at 6; *supra* Section I.A (discussing *Everson*).

266. *Cf. Comer,* 137 S. Ct. at 2028 ("Properly understood then, this is a case about whether Missouri can decline to fund improvements to the facilities the Church uses to practice and spread its religious views.").

267. *Id*. at 2015.

268. Locke v. Davey, 540 U.S. 712, 722 (2004).

269. *Cf. Locke*, 540 U.S. at 725 ("In short, we find neither in the history or text of Article I, § 11 of the Washington Constitution, nor in the operation of the Promise Scholarship Program, anything that suggests animus toward religion.").

270. Strasser, *Free Exercise and* Comer, *supra* note 36, at 918–19 ("[O]ne of the lessons of *Everson* is that a state is permitted, but not required, to accord some health and safety benefits to religious institutions.").

Exercise Clause *requires* that religious entities receive the same benefits that non-religious entities receive.[271]

After acknowledging that *Locke* had discussed anti-establishment interests with approval,[272] the *Comer* Court implied that such interests are illegitimate.[273] Thus, the *Comer* Court distinguished laws that were "neutral and generally applicable without regard to religion . . . from those [laws] that single out the religious for disfavored treatment."[274] But anti-establishment interests support denying benefits to religious entities but do not support denying benefits to non-religious entities, so the Court is presumably suggesting that anti-establishment interests (if beyond what the Federal Establishment Clause prohibits) are not legitimate.[275]

While the *Locke* Court had implied that Washington was simply making a decision about what to fund,[276] the *Comer* Court implied that Missouri was "singl[ing] out the religious for disfavored treatment."[277] This was the very rationale that the Ninth Circuit had adopted in *Locke*,[278] which the Supreme Court had rejected.[279]

The result in *Comer*, which provides surfacing benefits for a playground, might seem difficult to criticize because preventing young children from suffering injury is highly

271. *Cf. Comer*, 137 S. Ct. at 2024 ("Trinity Lutheran *is* put to the choice between being a church and receiving a government benefit.") (emphasis added).

272. *See id.* at 2023.

273. *Cf. Comer*, 137 S. Ct. at 2024 ("The State in this case expressly requires Trinity Lutheran to renounce its religious character in order to participate in an otherwise generally available public benefit program, for which it is fully qualified. Our cases make clear that such a condition imposes a penalty on the free exercise of religion that must be subjected to the 'most rigorous' scrutiny.") (citing Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993)).

274. *Id.* at 2020.

275. *See supra* notes 272–81 and accompanying text (contrasting the *Locke* and *Comer* approaches).

276. Locke v. Davey, 540 U.S. 712, 721 (2004).

277. *Comer*, 137 S. Ct. at 2020.

278. *See supra* note 225 and accompanying text.

279. *See Locke*, 540 U.S. at 715 ("We hold that such an exclusion from an otherwise inclusive aid program does not violate the Free Exercise Clause of the First Amendment.").

laudable.[280] Yet, refusing to award the benefit to Trinity Lutheran would merely have meant that a different playground would have received the resurfacing benefit,[281] so the *Comer* Court's reaching a different result would also have meant that children would be protected.

Ironically, the *Comer* Court did not strike down[282] the Missouri constitutional provision that prevented the state from spending public funds on religious institutions.[283] However, if the state constitutional provision did not offend federal constitutional guarantees and the Federal Constitution precluded Missouri from providing rubberized surfaces to private secular entities without also providing them to religious entities with similar needs, then the state's course of action was clear.[284] Because Free Exercise guarantees did not preclude Missouri from affording that benefit to public entities without also affording it to private entities,[285] and because the state constitutional amendment precluding support of religious entities was still enforceable, the state was barred from affording rubberized services to private entities, whether secular or sectarian.[286]

280. *See Comer*, 137 S. Ct. at 2027 (Breyer, J., concurring) ("Here, the State would cut Trinity Lutheran off from participation in a general program designed to secure or to improve the health and safety of children.").

281. There were forty-four applicants and fourteen received awards. *Id.* at 2018 (majority opinion). It is simply unclear whether more children benefited this way than would have benefited had the Church not received the funds. The criteria considered included "several criteria, such as the poverty level of the population in the surrounding area and the applicant's plan to promote recycling." *Id.* at 2017.

282. Strasser, *Free Exercise and* Comer, *supra* note 36, at 917 ("The Court . . . did not strike down Missouri's State Blaine Amendment requiring that differentiation.").

283. *Comer*, 137 S. Ct. at 2017 (discussing Article I, Section 7 of the Missouri Constitution).

284. *See infra* text accompanying notes 289–90.

285. *See* Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947) ("[W]e do not mean to intimate that a state could not provide transportation only to children attending public schools."); Locke v. Davey, 540 U.S. 712, 729 (2004) (Scalia, J., dissenting) ("[T]he State already has all the play in the joints it needs . . . [and i]t could make the scholarships redeemable only at public universities.").

286. Strasser, *Free Exercise and* Comer, *supra* note 36, at 920. Basically, if the state constitutional limitation on giving state aid to religious institutions is interpreted broadly, and if *Comer* is interpreted to preclude picking out religious institutions for less favorable treatment with respect to almost all public benefits rather than to only a limited number of public benefits,

In the next Free Exercise case—*Espinoza v. Montana Dep't of Revenue*[287]—the Court only further muddied the jurisprudence. At issue was a law providing tuition assistance to parents sending their children to private schools.[288] However, Montana has a state constitutional provision barring aid to religious schools,[289] and when authorizing the funds, the Montana Legislature directed that they be allocated in accordance with the state constitution's no-aid provision.[290] The Montana Supreme Court struck down the statute authorizing the aid because there was no way to prevent the funds from going to religious schools.[291] When considering the appeal, the United States Supreme Court framed the constitutional issue as "whether the Free Exercise Clause of the United States Constitution barred that application of the no-aid provision."[292]

The *Espinoza* Court began its analysis by suggesting that the Free Exercise Clause "'protects religious observers against unequal treatment' and against 'laws that impose special disabilities on the basis of religious status.'"[293] The Court reasoned that "Montana's no-aid provision bars religious schools from public benefits solely because of the religious character of the schools."[294] Of course, there was no suggestion that Montana was precluding cities from providing police and

then states with such constitutional provisions may be severely limited with respect to the kinds of benefits that they can accord to private, secular institutions.

287. 140 S. Ct. 2246 (2020).

288. *Id.* at 2251 ("The Montana Legislature established a program to provide tuition assistance to parents who send their children to private schools.").

289. *Id.* ("The Court relied on the 'no-aid' provision of the State Constitution, which prohibits any aid to a school controlled by a 'church, sect, or denomination.'").

290. *Id.* at 2252 ("The Montana Legislature also directed that the program be administered in accordance with . . . the Montana Constitution, which contains a 'no-aid' provision barring government aid to sectarian schools.").

291. *Id.* at 2253 ("The Montana Supreme Court went on to hold that the violation of the no-aid provision required invalidating the entire scholarship program. The Court explained that the program provided "no mechanism" for preventing aid from flowing to religious schools.").

292. *Id.* at 2251.

293. *Id.* at 2254 (quoting Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2021 (2017)).

294. *Id.* at 2255.

fire services to religious schools or other benefits of that sort.[295] Instead, the question was whether the state would provide funding to religious schools.[296]

The State had defended the no-aid provision by suggesting that "the no-aid provision has the goal or effect of ensuring that government aid does not end up being used for 'sectarian education' or 'religious education.'"[297] But, the Court reasoned, "[s]tatus-based discrimination remains status based even if one of its goals or effects is preventing religious organizations from putting aid to religious uses."[298] Here, it was not clear whether the Court was implying that it would have upheld a limitation on funds being used for religious teaching or whether, instead, such a limitation would also have been viewed as status-based[299] or, perhaps, motivated by animus.[300]

The Court understood the long historical pedigree of having no-aid provisions in state constitutions, given that "a tradition *against* state support for religious schools arose in the second half of the nineteenth century, as more than thirty States—including Montana—adopted no-aid provisions."[301] However, that tradition could not save the provision, because *some* of the state bars to aid may have been due to animus,[302] even if Montana's was not.[303] It is, at the very least, ironic that the

295. *See supra* notes 9–40 and accompanying text (discussing *Everson* upholding the state's providing public benefits rather than aid to religious education).

296. *Espinoza*, 140 S. Ct. at 2252 (noting that the "rule prohibited families from using scholarships at religious schools").

297. *Id.* at 2256.

298. *Id.*

299. *But see id*. at 2257 ("Some Members of the Court, moreover, have questioned whether there is a meaningful distinction between discrimination based on use or conduct and that based on status.").

300. *Cf.* Mitchell v. Helms, 530 U.S. 793, 829 (2000) ("In short, nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs, and other doctrines of this Court bar it. This doctrine, born of bigotry, should be buried now.").

301. *Espinoza*, 140 S. Ct. at 2258.

302. *See id.* at 2259.

303. *Id.* ("The Department argues that several States have rejected referendums to overturn or limit their no-aid provisions, and that Montana even re-adopted its own in the 1970s, for reasons unrelated to anti-Catholic bigotry.").

Sunday Closing laws at issue in *Braunfeld* had admittedly been passed to promote religion but were found constitutionally permissible because they were being maintained for secular reasons even if their origin was religious,[304] whereas Montana's law was suspect even if it had never been adopted for a prohibited purpose.[305]

The *Espinoza* Court placed "on the other side of the ledger"[306] (i.e., along with other factors militating against the program's constitutionality) the fact that Montana's no-aid provision was more robust than other states' no-aid provisions.[307] But the ledger at issue was whether the provision had been adopted because of bigotry,[308] which suggests that a state more committed to avoiding religious dissension (by passing a more robust law) is more likely to be presumed by the Court to be motivated by bigotry, evidence to the contrary notwithstanding.[309]

The *Espinoza* Court reasoned, "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."[310] The *Sloan* Court had considered and rejected the argument that state support of secular but not religious private schools violated constitutional guarantees.[311] Believing such an argument "thoroughly spurious,"[312] the *Sloan* Court explained that "valid aid to nonpublic, nonsectarian schools would provide no lever for aid to their sectarian counterparts."[313]

304. *See supra* note 177 and accompanying text.

305. *See supra* note 293–95 and accompanying text.

306. *Espinoza*, 140 S. Ct. at 2259.

307. *See id.* ("According to petitioners, 20 of 37 States with no-aid provisions allow religious options in publicly funded scholarship programs, and almost all allow religious options in tax credit programs.").

308. *See id.* (discussing whether the measure had been adopted "for reasons unrelated to anti-Catholic bigotry").

309. *See supra* notes 301–05 and accompanying text (discussing whether Montana's amendment had in fact been motivated by anti-Catholic animus).

310. *Espinoza*, 140 S. Ct. at 2261.

311. Sloan v. Lemon, 413 U.S. 825, 834 (1973).

312. *Id.*

313. *Id.*

The issue presented in *Espinoza* went at least one step beyond what the *Sloan* Court had considered.[314] The Montana Supreme Court had struck down the entire program, which meant that parents sending their children to secular private schools fared no better than parents sending their children to religious private schools.[315] The state simply did not have a scholarship program, which is exactly what Justice Scalia admitted was permissible in his *Locke* dissent.[316] Nonetheless, the *Espinoza* Court reasoned that the Montana Supreme Court should have held that the Montana state constitutional provision was unenforceable because of Free Exercise guarantees.[317] Indeed, the Court apparently thought that *Comer* had already made this clear,[318] even though the Missouri law was applied to prevent school grounds from obtaining a safer rubberized surface,[319] and the Montana law was attempting to prevent state dollars supporting religious teaching.[320]

The *Espinoza* Court remanded the case "for further proceedings not inconsistent with this opinion."[321] However, the *Espinoza* Court did not seem to appreciate that the opinion is compatible with a few different approaches.

The Montana Legislature authorized the funds, but only if they were distributed in accordance with the dictates of the Montana constitutional amendment, which precluded support

314. *See generally Espinoza*, 140 S. Ct. at 2251.

315. *Id.* at 2261–62 ("According to the Department, now that there is no program, religious schools and adherents cannot complain that they are excluded from any generally available benefit."); *see also id*. at 2279 (Ginsburg, J., dissenting) ("Under that decree, secular and sectarian schools alike are ineligible for benefits, so the decision cannot be said to entail differential treatment based on petitioners' religion.").

316. Locke v. Davey, 540 U.S. 712, 729 (2004) (Scalia, J., dissenting) ("The State could also simply abandon the scholarship program altogether.").

317. *Espinoza*, 140 S. Ct. at 2262 ("Given the conflict between the Free Exercise Clause and the application of the no-aid provision here, the Montana Supreme Court should have 'disregard[ed]' the no-aid provision and decided this case 'conformably to the [C]onstitution' of the United States.") (citing Marbury v. Madison, 5 U.S. 137, 178 (1803)).

318. *See id.* at 2256 ("Undeterred by [*Comer*], the Montana Supreme Court applied the no-aid provision to hold that religious schools could not benefit from the scholarship program.").

319. *See* Trinity Lutheran Church of Columbia v. Comer, 137 S. Ct. 2012, 2018 (2017).

320. *See Espinoza*, 140 S. Ct. at 2256.

321. *Id.* at 2263.

of religious schools.[322] The *Espinoza* Court held that such a provision was unenforceable.[323] But now the question will be whether the Legislature would have authorized the scholarship funds when one of the conditions imposed (no aid to religious institutions) could not be effectuated. The Montana Supreme Court might find that the scholarship authorization must be struck down (which is what the Montana Supreme Court already did),[324] not because the authorization was barred by the Montana Constitution but because the Legislature would not have passed the statute in the first place had it known that it could not prevent sectarian institutions from benefiting from the scholarship funds. The *Espinoza* Court reaffirmed that States need not provide scholarships to private schools,[325] so Montana might decide not to fund any private schools after all. Further, if the hypothesized understanding of legislative intent were inaccurate, the Legislature could simply pass a new statute without the no-aid limitation.

Nonetheless, *Espinoza* is significant in several ways. It further constrains legislatures and implies that anti-establishment interests are not legitimate.[326] It ignores the difference between providing public benefits and inculcating religious doctrine,[327] and implies that there is very little "play in the joints"[328] between the Establishment and Free Exercise Clauses.[329] It almost guarantees to promote more dissension along religious lines.

322. *See id.* at 2251 ("[T]he 'no-aid' provision of the State Constitution, . . . prohibits any aid to a school controlled by a 'church, sect, or denomination.'").

323. *Id.* at 2262.

324. *Id.* at 2253 ("The Montana Supreme Court went on to hold that the violation of the no-aid provision required invalidating the entire scholarship program.").

325. *Id.* at 2261 ("A State need not subsidize private education.").

326. *See supra* notes 306–13 and accompanying text (discussing the Court's apparent view that anti-establishment views must be motivated by bigotry).

327. *See supra* notes 297–304 and accompanying text.

328. *Locke*, 540 U.S. at 719.

329. For example, the *Espinoza* Court even seemed to reject a view put forward by Justice Scalia, namely, that Free Exercise guarantees would not be offended by the state's reserving certain benefits for public schools. *See supra* notes 301–04 and accompanying text.

CONCLUSION

Historically, the Court has worried about public funds being used to promote religious teaching. The *Everson* Court reasoned that it was permissible for the state to offer a subsidy of bus transportation, which was "so separate and so indisputably marked off from the religious function."[330] The *Allen* Court had upheld loaning secular textbooks to religious schools against an Establishment Clause challenge because the Court rejected that such texts would in fact be "instrumental in the teaching of religion."[331]

Does the Establishment Clause prevent the State from providing funds for religious teaching? The Court seems to think not, as long as the State is spending monies to promote non-religious teaching too. For example, the *Mitchell* plurality argued that "[i]f the religious, irreligious, and [areligious] are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government,"[332] and thus such "neutral" allocations of funds would not be an establishment violation.[333] But in *Everson*, *Allen*, *Nyquist*, and *Sloan*, members of the Court did not believe that state funding of religious teaching was permissible as long as the state also funded secular teaching.[334]

The Court has adopted a more and more permissive understanding of the Establishment Clause. Yet, some members of the Court believe that the more and more forgiving establishment limitations on the States are nonetheless too

330. Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947).

331. Bd. of Educ. v. Allen, 392 U.S. 236, 248 (1968).

332. Mitchell v. Helms, 530 U.S. 793, 809 (2000).

333. *Id.* at 835 ("Accordingly, we hold that Chapter 2 is not a law respecting an establishment of religion.").

334. *See Everson*, 330 U.S. at 16 (no public funds to support religious teaching); *Allen*, 392 U.S. at 245–47 (state cannot be involved in religious instruction); Comm. For Pub. Educ. & Religious Lib. v. Nyquist, 413 U.S. 756, 774 (1973) (state cannot promote religious instruction); Sloan v. Lemon, 413 U.S. 825, 830–31 (1973) (state cannot use public funds to promote religious teaching).

onerous, apparently believing that the States are not at all constrained by federal Establishment Clause limitations.[335]

The Court's current approach to the Religion Clauses is the opposite of what one would expect in a country with so many faith traditions. In a country as balkanized as the United States is today, the Court's adoption of an approach that is likely to lead to more conflict and dissension is simply amazing.[336] One can only hope that the Court will once again reverse course before even more damage is done to a national fabric already becoming increasingly frayed.[337]

335. *Espinoza*, 140 S. Ct. at 2264 (Thomas, J., concurring) ("Properly understood, the Establishment Clause does not prohibit States from favoring religion."). Justice Gorsuch signed onto Justice Thomas's concurrence. *See id.* at 2263.

336. *Id.* at 2281 (Breyer, J., dissenting) ("The majority's approach and its conclusion in this case, I fear, risk the kind of entanglement and conflict that the Religion Clauses are intended to prevent.").

337. *Cf.* Zelman v. Simmons–Harris, 536 U.S. 639, 717 (2002) (Breyer, J., dissenting) (discussing "the Establishment Clause concern for protecting the Nation's social fabric from religious conflict").