THE SHRINKING ESTABLISHMENT PROTECTIONS IN PUBLIC SCHOOLS

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INTRODUCTION

For several decades following the inception of the modern Establishment Clause,[1] the United States Supreme Court made clear that the Establishment Clause precludes sectarian education in public schools. With that limitation clearly in mind, the Court issued several opinions explaining the Clause's ramifications. Recently, some members of the Court have cast doubt on whether they continue to adhere to the decades-old, basic understanding of what the Establishment Clause prohibits.[2] In addition, several recent opinions have made the current Court's understanding of the Clause's limitations a matter of pure speculation.

The United States is extremely religiously diverse.[3] Nonetheless, states in the past year announced plans to reintroduce the Ten Commandments[4] and the Bible[5] into the public-school classroom, thereby accentuating the need

[1] *See* Cnty. of Allegheny v. Am. C.L. Union Greater Pittsburgh Chapter, 492 U.S. 573, 656 (1989), *abrogated by* Town of Greece, N.Y. v. Galloway, 572 U.S. 565 (2014) (Kennedy, J., concurring in part and dissenting in part) (describing Everson v. Board of Education of Ewing, 330 U.S. 1 (1947) as "the first case in our modern Establishment Clause jurisprudence"); Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819, 839 (1995) ("The first case in our modern Establishment Clause jurisprudence was *Everson v. Board of Ed. of Ewing,* 330 U.S. 1 (1947)."); Jordan Halper, *When Life Takes Your Lemons: Resolving the Legislative Prayer Debate in School Board Settings in Light of Kennedy v. Bremerton School District*, 89 BROOK. L. REV. 933, 941 (2024) ("Modern Establishment Clause jurisprudence is said to begin in 1947 with *Everson v. Board of Education*."); Mark Strasser, *Primary and Secondary Religious Schools and the Disestablishment of Everson*, 32 S. CAL. INTERDISC. L.J. 355, 355 (2023) (*"Everson v. Board of Education* is the seminal case of modern Establishment Clause jurisprudence."); Angela R. Pruitt, *Maybe Today, Satan: A Christian Supreme Court, Unbalanced Religious Clauses, and the Rise of the Satanic Temple*, 26 J. GENDER RACE & JUST. 271, 280 (2023) ("*Everson v. Board of Education* . . . marks the beginning of modern Establishment Clause jurisprudence.").

[2] *Cf.* Espinoza v. Montana Dep't of Revenue, 591 U.S. 464, 489–90 (2020) (Thomas, J., concurring) ("Under the modern, but erroneous, view of the Establishment Clause, the government must treat all religions equally and treat religion equally to nonreligion.") Justice Gorsuch joined Justice Thomas's concurrence. *See id.* at 489.

[3] *See* Dallan F. Flake, *Interactive Religious Accommodations*, 71 ALA. L. REV. 67, 71 (2019) ("[T]he United States is becoming more religiously diverse than ever."); Andrew Koppelman, *Gay Rights, Religious Liberty, and the Misleading Racism Analogy*, 2020 BYU L. REV. 1, 8 (2020) ("[T]he United States . . . [is] probably the most religiously diverse nation in the history of the world."); Jared C. Huber, *Who Is A Minister? Originalist Deference Expands the Ministerial Exception*, 99 NOTRE DAME L. REV. 1223, 1252 (2024) ("The United States is a very religiously diverse country."); Mark Strasser, *Covid-19, Free Exercise, and Most Favored Nation Status*, 27 Lewis & Clark L. Rev. 1, 37 (2023) ("The United States is extremely religiously diverse.").

[4] ASSOCIATED PRESS, *Louisiana Will Require the 10 Commandments Displayed in Every Public School Classroom* (June 19, 2024), https://www.npr.org/2024/06/19/nx-s1-5012597/louisiana-10-commandments-law-public-school-classrooms [https://perma.cc/9MTU-RK7V] ("Louisiana has become the first state to require that the Ten Commandments be displayed in every public school classroom, the latest move from a GOP-dominated Legislature pushing a conservative agenda under a new governor.").

[5] Tyler Kingkade, *Oklahoma Superintendent Ryan Walters Orders Schools to Teach the Bible*, NBC NEWS (June 27, 2024) https://www.nbcnews.com/news/us-news/oklahoma-ryan-walters-bible-taught-in-school-rcna159307 [https://perma.cc/T2M8-SKTE] ("Effective immediately, Oklahoma schools are required to incorporate the Bible as part of the curricula in grades five through 12, according to a memo Superintendent of Public Instruction Ryan Walters sent to all school districts. Schools are instructed to

for a clear and reasonable account of Establishment guarantees. Regrettably, the Court's confused and confusing approach to the jurisprudence makes whether the Court will uphold either attempt an open question. The fact that this is an open question is an indication of both the Court's willingness to reject decades of established constitutional law and its unwillingness or inability to provide lower courts with clear direction or even a framework for deciding when Establishment guarantees have been violated.[6]

Part II of this article discusses the modern Establishment Clause jurisprudence with a specific focus on its limitations on sectarian teaching in public schools. Part III focuses on the Court's recent blurring of the jurisprudence so that courts must simply guess about what, if anything, the Establishment Clause prohibits.[7] The Article concludes that the Court's recent Establishment analyses make no sense as a matter of constitutional law or good public policy and are planting the seeds for the kind of disruption and strife that the Framers foresaw and tried so hard to avoid.

I. THE EVOLVING ESTABLISHMENT CLAUSE JURISPRUDENCE

The Court has long sought to construe the Establishment Clause in a way that could keep Church and State separate but not impose limitations that seemed to defy common sense. While the Court seemed consistent with respect to certain paradigm cases that violated Establishment guarantees, it drew different lines and offered different tests[8] over time with respect to which education practices could withstand scrutiny. Over the decades, the Court has consistently rejected that prayer and sectarian teaching in the public schools are permitted.

A. DRAWING LINES IN EVERSON

Everson v. Board of Education of Ewing[9] is the seminal case in Modern Establishment Clause jurisprudence.[10] The Court tried to spell out Establishment Clause guarantees, explaining that while the Constitution

refer to the Bible and the Ten Commandments for their 'substantial influence on our nation's founders and the foundational principles of our Constitution.'").

[6] Caitlyn Sarudy, *Scotus Sours on Lemon: Kennedy and Prayer in Public School*, 23 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 303, 304 (2023) ("[T]he Court's limited use of a historical practice test in Establishment Clause jurisprudence provides little guidance to lower courts and school districts alike.").

[7] *See*, *e.g.*, Samantha Thompson Lipp, *The Rise of Public School Prayer with the Demise of Lemon v. Kurtzman*, 74 MERCER L. REV. 1221, 1221 (2023) ("This Comment predicts how, in *Lemon's* absence, the Supreme Court will likely reassess precedent in the context of public school prayer and become more accommodating of religion.").

[8] For a while, the Court employed the Lemon Test to decide which school practices were in accord with Establishment Clause guarantees. *See* Lemon v. Kurtzman, 403 U.S. 602 (1971); *see also* Lipp, *supra* note 7, at 1241 ("During *Lemon's* reign, the Supreme Court used the *Lemon* test to strike down the intertwining of religious exercises or symbols in the public school context."); Wilson Huhn, *Analysis of Carson v. Makin*, 61 DUQ. L. REV. 50, 60 (2023) (discussing the use of the Lemon Test in school funding decisions). However, the Court will not now use the Lemon Test to determine which school practices are permissible. *See* Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 534 (2022) ("[T]his Court long ago abandoned *Lemon* and its endorsement test offshoot.") (citing Am. Legion v. Am. Humanist Ass'n, 588 U.S. 29, 47–51 (2019).

[9] Everson v. Board of Education, 330 U.S. 1 (1947).

[10] *See supra* note 1 and accompanying text.

requires "a wall of separation between Church and State,"[11] the Constitution does not prohibit the State from paying the bus transportation costs of "pupils attending public and other schools."[12] The Court's rationale was not a model of clarity,[13] and some on the Court believed that the majority was simply contradicting itself.[14]

The *Everson* Court discussed legislation authorizing bus fare reimbursement so that children could "ride in public busses to and from schools rather than run the risk of traffic and other hazards incident to walking or 'hitchhiking.'"[15] The Court analogized this service to other health and safety measures provided by the State,[16] mentioning "such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks."[17] But prohibiting the State from according these public benefits "is obviously not the purpose of the First Amendment."[18] 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. State power is no more to be used so as to handicap religions, than it is to favor them."[19] This neutrality precludes the State from "exclud[ing] 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."[20]

While individuals cannot be precluded from receiving public benefits because of their religious or nonreligious beliefs, "[n]either a state nor the Federal Government can . . . pass laws which aid one religion, aid all religions, or prefer one religion over another."[21] Further, "[n]o tax in any amount . . . can be levied to support any religious activities or institutions . . . to *teach* or practice religion."[22] Yet, there is an apparent tension between the neutrality requirement and the prohibition on providing

[11] *Everson*, 330 U.S. at 16 (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878)).

[12] *Id*. at 17. Actually, the provision was less universal than the Court had implied. *See id.* at 20 (Jackson, J., dissenting) ("What the Township does, and what the taxpayer complains of, is at stated intervals to reimburse parents for the fares paid, provided the children attend either public schools or Catholic Church schools."). For a discussion of this point, see Mark Strasser, *Repudiating Everson: On Buses, Books, and Teaching Articles of Faith*, 78 MISS. L.J. 567, 573 (2009).

[13] Amy Atchison & Laura Cadra, *Keeping Up with New Legal Titles*, 100 L. LIBR. J. 169, 175 (2008) (*"Everson* and its progeny brought more confusion than clarity to the role of religion in public schools.").

[14] *Cf. Everson*, 330 U.S. at 19 (Jackson, J., dissenting) ("The case which irresistibly comes to mind as the most fitting precedent is that of Julia who, according to Byron's reports, 'whispering "I will ne'er consent,"—consented.'"); *see also* Robert A. Holland, *A Theory of Establishment Clause Adjudication: Individualism, Social Contract, and the Significance of Coercion in Identifying Threats to Religious Liberty*, 80 CAL. L. REV. 1595, 1603 (1992) (discussing "the logical inconsistency between the language and the holding").

[15] *Everson*, 330 U.S. at 7.

[16] Mark Strasser, *On Espinoza, Schools, and the Religion Clauses*, 14 DREXEL L. REV. 543, 550–51 (2022) ("[T]he *Everson* Court classified bus transportation as a 'benefit[] of public welfare legislation,' which was 'so separate and so indisputably marked off from the religious function' that it could not be denied to parochial schools. Because this benefit allegedly involved the health and safety of children, the state was not barred by Establishment guarantees from providing the reimbursement.").

[17] *Everson*, 330 U.S. at 17–18.

[18] *Id.* at 18.

[19] *Id.*

[20] *Id.* at 16.

[21] *Id.* at 15.

[22] *Id.* at 16 (emphasis added).

aid,[23] and the *Everson* Court left to subsequent courts the task of working out the ramifications of the Clause's prohibitions.[24]

B. RELEASE-TIME PROGRAMS

Everson established that the State could fund transportation costs to parochial schools without violating constitutional guarantees. But a separate question was whether other kinds of cooperative efforts between public schools and religious authorities were permissible, for example, which kinds of release-time programs, if any, passed constitutional muster.

At issue in *Illinois ex rel. McCollum v. Board of Education of School District Number 71* was an Illinois law that permitted privately employed religious teachers to come into public schools during regular hours for thirty minutes per week to "substitute their religious teaching for the secular education provided under the compulsory education law."[25] The *McCollum* Court explained some of the features of the program:

> Classes were conducted in the regular classrooms of the school building. Students who did not choose to take the religious instruction were not released from public school duties; they were required to leave their classrooms and go to some other place in the school building for pursuit of their secular studies. . . . [S]tudents who were released from secular study for the religious instructions were required to be present at the religious classes. Reports of their presence or absence were to be made to their secular teachers.[26]

The Court noted in addition that the teachers were "subject to the approval and supervision of the superintendent of schools."[27]

When striking down the program, the Court explained that this program used "tax[-]supported property for religious instruction"[28] and involved "the close cooperation between the school authorities and the religious council in promoting religious education."[29] The "State's compulsory education system"[30] had been "integrated with the program of religious instruction."[31] Because this program used a "tax[-]supported public school system to aid

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[23] Jonathan C. Lipson, *When Churches Fail: The Diocesan Debtor Dilemmas*, 79 S. CAL. L. REV. 363, 429 (2006) ("The problem can be traced to an apparent tension in Everson v. Board of Education. Although that case announced the 'no-aid' principle, . . . it also announced that religion could not be a basis for discrimination in distributing government benefits.").

[24] The *Everson* Court did not examine the implications of its own analogy to police and fire services. *See*, *e.g.*, Mark Strasser, *Free Exercise and Comer: Robust Entrenchment or Simply More of a Muddle?*, 52 U. RICH. L. REV. 887, 904 (2018). The *Everson* Court also did not discuss the implications of its comparison of school travel reimbursement to the provision of fire and police services. If, indeed, the provision of travel reimbursement was permitted, but not required, then one would assume that the provision of police and fire services to religious institutions was permitted, but not required. But Ewing Township would not have been permitted to deny police and fire services to religious institutions, which suggests one of the ways in which the analogy between travel reimbursement and the provision of police and fire services was inapt.

[25] Ill. *ex rel.* McCollum v. Bd. of Ed. of Sch. Dist. No. 71, Champaign Cnty., Ill., 333 U.S. 203, 205 (1948).

[26] *Id*. at 209.

[27] *Id*. at 208.

[28] *Id*. at 209.

[29] *Id*.

[30] *Id*.

[31] *Id*.

religious groups to spread their faith,"[32] the program violated constitutional guarantees.[33] When so holding, the Court expressly rejected that the refusal to allow the State to promote sectarian teaching constituted "governmental hostility to religion or religious teachings."[34] Instead, the Court explained that "both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."[35]

McCollum made clear that a program incorporating *all* the Champaign features would not pass constitutional muster. But a separate question involved which or how many features, if changed, would save a program from constitutional invalidation. In a subsequent case, the Court implicitly suggested which of the features highlighted by the *McCollum* Court were salient for Establishment purposes.

At issue in *Zorach v. Clauson* was a New York City program whereby students were released from school to go elsewhere for "religious instruction or devotional exercises."[36] This "program involve[d] neither religious instruction in public school classrooms nor the expenditure of public funds,"[37] because New York City public schools instead released students so that they could leave school and "go to religious centers for religious instruction or devotional exercises."[38] In this case as well, religious and school authorities cooperated with each other to make sure that the program was working as designed,[39] and public school instruction stopped while students left the school grounds for religious purposes.[40]

The *Zorach* Court was not persuaded that the program was unconstitutional because public school teachers were utilized to make the program work. The Court reasoned that a rule precluding public employees from playing *any* role in facilitating religious exercise might have profound effects. Consider, for example,

> A Catholic student applies to his teacher for permission to leave the school during hours on a Holy Day of Obligation to attend a mass. A Jewish student asks his teacher for permission to be excused for Yom Kippur. A Protestant wants the afternoon off for a family baptismal ceremony.[41]

The Court explained the public employee involvement in each case.

> [T]he teacher requires parental consent in writing. In each case the teacher, in order to make sure the student is not a truant, goes further and requires a report from the priest, the rabbi, or the minister. The

[32] *Id*. at 210.
[33] *Id*.
[34] *Id*. at 211.
[35] *Id*. at 212.
[36] Zorach v. Clauson, 343 U.S. 306, 308 (1952).
[37] *Id*. at 308–09.
[38] *Id*. at 308.
[39] *Id*. ("The churches make weekly reports to the schools, sending a list of children who have been released from public school but who have not reported for religious instruction."); *id*. at 309 ("[P]ublic school teachers police it, keeping tab on students who are released.").
[40] *Id.* at 309 ("[T]he classroom activities come to a halt while the students who are released for religious instruction are on leave.").
[41] *Id*. at 313.

> teacher in other words cooperates in a religious program to the extent of making it possible for her students to participate in it.[42]

The Court thus made clear that a rule precluding any involvement whatsoever of a public employee in facilitating religious exercise would be too severe a limitation.

Yet, the *Zorach* analysis seemed to involve "a classic straw-man argument"[43]—the New York program did not simply involve a public employee doing a little recordkeeping. Consider the allegedly analogous examples offered by the Court involving students who miss a day of school for a religious event. While some recordkeeping might be required by some public employee in that kind of case, for example, making sure that there had been a signed note from a parent,[44] instruction would not have been stopped for the rest of the students.[45] Thus, the New York program was distinguishable from a school policy enabling students to observe religious holidays—in the latter case, those not attending the religious function would have received secular instruction as usual. The *Zorach* Court was wrong to imply that striking down the New York program would somehow imply that any action by any state employee to facilitate religious learning or exercise was prohibited so that schools would be precluded from respecting the free exercise interests of individual students.[46] *Everson* had already rejected the strict separationist line that the *Zorach* Court was targeting, so the Court's analysis did little to explain why the *Zorach* program was permissible but the *McCollum* program was not.[47]

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[42] *Id*.

[43] City of Richmond v. J.A. Croson Co., 488 U.S. 469, 543 (1989) (Marshall, J., dissenting).

[44] The *Zorach* Court implied that the teacher would have to contact a clergyperson to make sure that the student had attended the religious event. *See Zorach*, 343 U.S. at 313 ("In each case the teacher, in order to make sure the student is not a truant, goes further and requires a report from the priest, the rabbi, or the minister."). But this seems implausible if only because the clergyperson might not even know if the student had attended an event where the whole congregation was present. *See* Mark Strasser, *God-Talk in the Public Schools*, 29 VA. J. SOC. POL'Y & L. 267, 291 (2022) ("It is unlikely that the school would in fact require the clergyperson to sign off on having seen the student at religious services if only because it might be rather difficult to remember who had attended in a large congregation. It seems more likely that the school would only require the parent's permission.").

[45] *Cf.* Strasser, *supra* note 44, at 293 ("[I]t is hard to understand how callous indifference would be demonstrated by a public school's refusal to modify its own program just so that religious schools would be sufficiently attractive to students to be well-attended."). For the suggestion that the release-time program was adopted out of a fear that too few students would attend were the training after school, see *Zorach*, 343 U.S. at 318 (Black, J., dissenting) ("Here the sole question is whether New York can use its compulsory education laws to help religious sects get attendants presumably too unenthusiastic to go unless moved to do so by the pressure of this state machinery.").

[46] The Court gave short shrift to the argument that free exercise guarantees prohibited New York from having the program at issue. *See Zorach*, 343 U.S. at 311 ("It takes obtuse reasoning to inject any issue of the 'free exercise' of religion into the present case. 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. A student need not take religious instruction. He is left to his own desires as to the manner or time of his religious devotions, if any.").

[47] In his *McCollum* concurrence, Justice Frankfurter tried to lay out some of the competing considerations when assessing release time programs. *See* Ill. *ex rel.* McCollum v. Bd. of Ed. of Sch. Dist. No. 71, Champaign Cnty., 333 U.S. 203, 255 (1948). (Frankfurter, J., concurring) ("Some 'released time' classes are under separate denominational auspices, others are conducted jointly by several denominations, often embracing all the religious affiliations of a community. Some classes in religion teach a limited sectarianism; others emphasize democracy, unity and spiritual values not anchored in a particular creed. Insofar as these are manifestations merely of the free exercise of religion, they are quite outside the scope of judicial concern, except insofar as the Court may be called upon to protect the right of religious freedom.").

Everson had made clear that not all state aid was prohibited, and *McCollum* had made clear that certain kinds of release-time programs do not pass constitutional muster.[48] But the only salient difference between the New York and Champaign programs seemed to be the location of the religious instruction,[49] which at least suggested that the location of the religious exercise was very important.[50] Unlike the Champaign schools, the New York public schools did not "undertake religious instruction nor blend secular and sectarian education,"[51] which may be an important difference that Establishment guarantees capture.[52]

C. SCHOOL PRAYER

Two cases decided about a decade after *Zorach* underscored the Establishment Clause's prohibition on religious activity in public schools. In *Engel v. Vitale*, the Court examined a New York law that "cause[d] the following prayer to be said aloud by each class in the presence of a teacher at the beginning of each school day: 'Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.'"[53]

Striking down the law, the *Engel* Court explained that "by using its public school system to encourage recitation of the Regents' prayer, the State of New York has adopted a practice wholly inconsistent with the Establishment Clause."[54] First, the Court characterized the practice at issue: "New York's program of daily classroom invocation of God's blessings as prescribed in the Regents' prayer is a religious activity."[55] The *Engel* Court

[48] *See id*. at 231 (Frankfurter, J., concurring) ("Different forms which 'released time' has taken during more than thirty years of growth include programs which, like that before us, could not withstand the test of the Constitution; others may be found unexceptionable.").

[49] *Zorach*, 343 U.S. at 316 (Black, J., dissenting) ("I see no significant difference between the invalid Illinois system and that of New York here sustained. Except for the use of the school buildings in Illinois, there is no difference between the systems which I consider even worthy of mention.").

[50] Note, *Freedom of Religion and Science Instruction in Public Schools*, 87 YALE L.J. 515, 534 n.96 (1978) ("The program in *McCollum* was invalidated under the establishment clause, while that in *Zorach* was upheld over both establishment and free exercise objections. The Supreme Court in *Zorach* carefully distinguished the prior case; the released-time programs differed solely by the location of the instruction."); Robert C. Stelle, *Religious Freedom in the Twenty-First Century: Life Without Lemon*, 23 S. ILL. U. L.J. 657, 661 (1999) ("[I]n McCollum v, Board of Education of School District No. 71, Champaign County, Illinois, the Court ruled that turning over classrooms in public school facilities to church-affiliated teachers for the teaching of religion violated the Establishment Clause. In contrast, however, where children were released from class to receive identical religious instruction at a location away from the school grounds, the Establishment Clause was not violated.").

[51] *Zorach*, 343 U.S. at 314.

[52] *See* Steven D. Smith, *Constitutional Divide: The Transformative Significance of the School Prayer Decisions*, 38 PEPP. L. REV. 945, 990 (2011) (noting that the *Zorach* "Court reiterated the prohibition forbidding government to 'blend secular and sectarian education.'"); *see also* Sch. Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203, 262–63 (1963) (Brennan, J., concurring) ("The deeper difference was that the McCollum program placed the religious instructor in the public school classroom in precisely the position of authority held by the regular teachers of secular subjects, while the *Zorach* program did not. The McCollum program, in lending to the support of sectarian instruction all the authority of the governmentally operated public school system, brought government and religion into that proximity which the Establishment Clause forbids."). Some simply argue that Zorach cannot be reconciled with the other cases. *See* Holland, *supra* note 14, at 1620 ("Unless *Zorach* is viewed as an aberration in the Supreme Court's treatment of religion in the public schools, there appears to be no common thread that unifies the Court's decisions in this area.").

[53] Engel v. Vitale, 370 U.S. 421, 422 (1962).

[54] *Id*. at 424.

[55] *Id*.

explained that Establishment guarantees at the very least "mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government."[56]

Yet, the *Engel* Court was not merely suggesting that the First Amendment precludes the State from composing prayers.[57] "[G]overnment in this country . . . is without power to prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity."[58] Further, a religious program will not be saved from constitutional invalidation by virtue of its being nondenominational,[59] nor will it be saved by virtue of its being voluntary:[60] "Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause."[61]

While making clear that a public school making a religious program voluntary would not somehow immunize such a program from invalidation under Establishment guarantees, the *Engel* Court also pointed out that the possibility of being excused from participation in the religious activity did not thereby make the activity voluntary and noncoercive—the Court rejected that "laws officially prescribing a particular form of religious worship do not involve coercion of such individuals."[62] The Court explained that "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious

[56] *Id*. at 425; *see also* Lee v. Weisman, 505 U.S. 577, 588 (1992) ("It is a cornerstone principle of our Establishment Clause jurisprudence that 'it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government.'") (citing *Engel,* 370 U.S. at 425).

[57] Some commentators do not seem to appreciate that the issue was raised rather than answered. *Compare* Tessa M. Bayly, *Prayer, Prac., Precedent, and Am. Sch. Bd. Meetings*, 51 U. TOL. L. REV. 173, 173 (2019) ("Rather than forbidding prayer in school, in *Engel* the Court found it unconstitutional for state officials to compose official state prayers and require their recitation by public school students."), *with* Mark Strasser, *Passive Observers, Passive Displays, and the Establishment Clause*, 14 LEWIS & CLARK L. REV. 1123, 1128 (2010) ("At least one issue raised in *Engel* was the degree to which the practice was unconstitutional because a state actor had composed the prayer.").

Cf. Linda D.W. Lam, *Silence of the Lambs: Are States Attempting to Establish Religion in Pub. Schools?*, 56 VAND. L. REV. 911, 922 (2003) ("In *Engel v. Vitale*, the Court struck down a state law requiring a daily prayer to be conducted in public schools, firmly disposing of the possibility of state-mandated prayer activities in public schools."); Nancy E. Drane, *The Supreme Court's Missed Opportunity: The Constitutionality of Student-Led Graduation Prayer in Light of the Crumbling Wall Between Church and State*, 31 LOY. U. CHI. L.J. 497, 511 (2000) ("The Court held that a public school could neither compose daily invocations for students nor promote a school-sponsored religious activity.").

[58] *Engel*, 370 U.S. at 430.

[59] *Id*; *see also* Jeffrey Horner, *Let's Take the "Bah Humbug" Out of Christmas: A Guide to Permissible Activities at Public Schools During the Christmas Season*, 207 ED. L. REP. 831, 832 (2006) ("[I]n *Engel v. Vitale*, the U.S. Supreme Court held that simply because prayer may be nondenominational cannot free it from the limitations of the Establishment Clause.").

[60] Christina Engstrom Martin, *Student-Initiated Religious Expression After Mergens and Weisman*, 61 U. CHI. L. REV. 1565, 1569 n. 31 (1994) ("As early as *Engel*, the Court explicitly held that the mere fact that the praying itself is voluntary does not keep a practice from violating the Establishment Clause.").

[61] *Engel*, 370 U.S. at 430; *see also* Dina F. El-Sayed, *What Is the Court Trying to Establish: An Analysis of Lee v. Weisman*, 21 HASTINGS CONST. L.Q. 441, 451 (1994) ("Although the prayer in *Engel* was nondenominational and the students were not compelled to participate, the *Engel* Court nonetheless found the Establishment Clause was violated.").

[62] *Engel*, 370 U.S. at 431.

minorities to conform to the prevailing officially approved religion is plain."[63]

The Court disagreed with those who claimed that the Constitution's preclusion of school prayer somehow "indicate[d] a hostility toward religion or toward prayer"[64] with a short answer: "Nothing, of course, could be more wrong."[65] The "First Amendment, which tried to put an end to governmental control of religion and of prayer, was not written to destroy either."[66] Rather, the Constitution was written "to quiet well[-]justified fears . . . arising out of an awareness that governments of the past had shackled men's tongues to make them speak only the religious thoughts that government wanted them to speak and to pray only to the God that government wanted them to pray to."[67] The Court concluded that the government should neither write nor sanction prayers and instead should "leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance."[68] By explaining that the Constitution precluded the State both from *writing* and from *sanctioning* prayers, the *Engel* Court indicated that the State practices were not immunized from invalidation merely because the State had not *composed* the prayers offered in school. As the Court made clear in a subsequent case, the State is not somehow permitted to require prayers in school as long as the State does not write them.

At issue in *School District of Abington Township, Pennsylvania v. Schempp* were Maryland[69] and Pennsylvania[70] laws authorizing Bible-reading in school.[71] Both laws specified that the readings were to be made without comment,[72] which meant that it could not be said that the State had any hand in authoring what was said.[73]

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[63] *Id*; *see also* Charles Gregory Warren, *No Need to Stand on Ceremony: The Corruptive Influence of Ceremonial Deism and the Need for A Separationist Reconfiguration of the Supreme Court's Establishment Clause Jurisprudence*, 54 MERCER L. REV. 1669, 1676 (2003) ("Additionally, the Court emphasized its concern with the 'subtle coercion' imposed upon a captive audience of impressionable students witnessing such an explicit governmental endorsement of religion . . . .").

[64] *Engel*, 370 U.S. at 433–34.

[65] *Id*. at 434.

[66] *Id*. at 435.

[67] *Id*.

[68] *Id*.

[69] Sch. Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203, 211 (1963) ("The rule provided for the holding of opening exercises in the schools of the city, consisting primarily of the 'reading, without comment, of a chapter in the Holy Bible and/or the use of the Lord's Prayer.'").

[70] *Id*. at 205 ("The . . . law . . . requires that 'At least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day. Any child shall be excused from such Bible reading, or attending such Bible reading, upon the written request of his parent or guardian.'").

[71] *Id*. ("These companion cases present the issues in the context of state action requiring that schools begin each day with readings from the Bible.").

[72] *Id*. ("The [Pennsylvania] law . . . requires that 'At least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day."); *Id*. at 211 ("[T]he . . . Baltimore City . . . rule provided for the holding of opening exercises in the schools of the city, consisting primarily of the 'reading, without comment, of a chapter in the Holy Bible and/or the use of the Lord's Prayer.'").

[73] However, choosing which passages to include or not include might itself send a message, even if the State did not author the particular message communicated. *Cf*. Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of California, 475 U.S. 1, 11 (1986) ("[A]ll speech inherently involves choices of what to say and what to leave unsaid."). A different issue involves competing religious approaches to reading the Bible—whether the Bible should be allowed to speak for itself or whether, instead, the reading should be accompanied by guidance from the clergy. *See* Corinna Barrett Lain, *God, Civic Virtue, and the American*

The Schempps challenged the Pennsylvania law because the children, Unitarians,[74] were being exposed to religious doctrines which were contrary to their beliefs.[75] While Edward Schempp knew that he could have had the children excused from the exercises, he decided not to do that for fear that removing them would have harmed his children's relationships with teachers and other students.[76] Perhaps this is the kind of subtle coercion that the *Engel* Court had in mind when suggesting that the possibility of being excused might not remove all elements of coercion.[77]

Experts testifying in the Pennsylvania trial agreed that the Bible was of great literary and moral value.[78] Nonetheless, one expert testified that reading particular Bible verses from the New Testament without comment or explanation might be harmful to Jewish students.[79] A different expert testified that reading from the Holy Scriptures but not reading from the New Testament would be a "sectarian" practice.[80] That same expert testified that reading from the New Testament would be "non-sectarian," although he apparently meant among Christian faiths.[81]

When striking down the practice, the district court found:

> The reading of the verses, even without comment, possesses a devotional and religious character and constitutes in effect a religious observance. The devotional and religious nature of the morning exercises is made all the more apparent by the fact that the Bible reading is followed immediately by a recital in unison by the pupils of the Lord's Prayer. The fact that some pupils, or theoretically all pupils, might be excused from attendance at the exercises does not mitigate the obligatory nature of the ceremony for . . . Section 1516 . . . unequivocally requires the exercises to be held every school day in every school in the Commonwealth. The exercises are held in the school buildings and perforce are conducted by and un[d]er the authority of the local school authorities and during school sessions. Since the statute requires the reading of the 'Holy Bible', a Christian document, the practice . . . prefers the Christian religion.[82]

Way: Reconstructing Engel, 67 STAN. L. REV. 479, 488 (2015) ("Catholics thought Bible reading required the guiding hand of clergy; schools (and Protestants) thought the Bible could speak for itself.").

[74] *Schempp*, 374 U.S. at 206 ("The appellees Edward Lewis Schempp, his wife Sidney, and their children, Roger and Donna, are of the Unitarian faith . . . .").

[75] *Id*. at 208.

[76] *See id*.

[77] *See supra* notes 47–48 and accompanying text; *see also* Daren C. Rich, *Establishment and Exclusion: Why the Protection of the First Amendment's Establishment Clause Should Be Applied to Adults*, 28 ST. LOUIS U. PUB. L. REV. 591, 604 (2009) ("[T]he *Engel* and *Schempp* Courts reasoned that the ability to be excused from participating in prayers or Bible reading did not remedy the Establishment Clause violation.").

[78] *See Schempp*, 374 U.S. at 210.

[79] *Id*. at 209 ("But if portions of the New Testament were read without explanation, they could be, and in his specific experience with children Dr. Grayzel observed, had been, psychologically harmful to the child and had caused a divisive force within the social media of the school.").

[80] *Id*. at 210 ("[R]eading of the Holy Scriptures to the exclusion of the New Testament would be a sectarian practice.").

[81] *Id*. ("Dr. Weigle stated that the Bible was non-sectarian. He later stated that the phrase 'non-sectarian' meant to him non-sectarian within the Christian faiths.").

[82] *Id.* at 210–11.

Thus, the Pennsylvania district court struck down the Pennsylvania statute as a violation of constitutional guarantees.[83]

The Maryland trial court upheld the constitutionality of that state statute, an opinion that was affirmed on appeal.[84] Mrs. Madalyn Murray and her son, William, professed atheists,[85] had challenged the Maryland law[86] requiring the "reading, without comment, of a chapter in the Holy Bible and/or the use of the Lord's Prayer."[87]

When affirming the Pennsylvania opinion and reversing and remanding the Maryland opinion,[88] the *Schempp* Court explained that "religion has been closely identified with our history and government,"[89] but also noted that religious freedom is "likewise as strongly imbedded in our public and private life.[90] The Court elaborated on why we have an Establishment Clause. The First "Amendment's purpose was not to strike merely at the official establishment of a single sect, creed or religion, outlawing only a formal relation such as had prevailed in England and some of the colonies,"[91] but was to "create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion."[92] These basic conclusions regarding the robustness of Establishment Clause guarantees "have been long established, recognized and consistently reaffirmed."[93] While acknowledging that some commentators "continue to question their history, logic and efficacy," the Court commented that "[s]uch contentions, in the light of the consistent interpretation in cases of this Court, seem entirely untenable and of value only as academic exercises."[94] The Court thus made clear that sectarian education in the public schools could not pass muster.

D. ESTABLISHMENT AND SECULAR SCHOOLBOOKS

The evolving Establishment jurisprudence seemed to emphasize two points: (1) religious education must not occur in public schools and (2) public funds must not be used to support religious education. That understanding of the Clause's limitations was also emphasized in *Board of Education of Central School District No. 1 v. Allen*.[95]

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[83] *Id*. at 210 ("The trial court . . . [struck] down the practices and the statute requiring them.").

[84] *Id*. at 212 ("[T]he trial court . . . sustained it without leave to amend. The Maryland Court of Appeals affirmed, the majority of four justices holding the exercise not in violation of the First and Fourteenth Amendments.").

[85] *Id*. at 211 ("The petitioners, Mrs. Madalyn Murray and her son, William J. Murray III, are both professed atheists.").

[86] *Id*.

[87] *Id*. Corinna Lain suggests that the Court's focus on the Pennsylvania case rather than the Maryland case was due in part to the religious views of the differing parties. *See supra* note 73, at 533 ("Whereas the facts of *Schempp* spanned seven pages (beginning with the introduction of the named plaintiffs as devout Unitarians), the facts of *Murray* were relegated to two short paragraphs, appearing almost as an afterthought in the case.").

[88] *Id*. at 227.

[89] *Id*. at 212.

[90] *Id*. at 214.

[91] *Id*. at 217 (quoting *Everson*, 330 U.S. at 31 (Rutledge, J., dissenting)).

[92] *Id*. (quoting *Everson*, 330 U.S. 1, 31–32 (Rutledge, J., dissenting)).

[93] *Id*.

[94] *Id*.

[95] Board of Education v. Allen, 392 U.S. 236 (1968).

At issue in *Allen* was a New York law requiring "local public school authorities to lend textbooks free of charge to all students in grades seven through 12."[96] The loaned textbooks would also go to students in parochial schools.[97] The question at hand was whether the New York law violated Establishment guarantees.[98]

The *Allen* Court described *Everson* as "most nearly in point for today's problem,"[99] although the Court admitted that "the line between state neutrality to religion and state support of religion is not easy to locate."[100] The Court likely thought *Everson* to be on point because that case also involved indirect state support of religious schools, where the support itself was secular rather than sectarian.[101] There are, of course, other ways to understand *Everson*. For example, Justice Black, who authored *Everson*,[102] dissented in *Allen*.[103] He argued that:

> [The transportation reimbursement at issue in *Everson*] 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.[104]

However, "upholding a State's power to pay bus or streetcar fares for school children cannot provide support for the validity of a state law using tax-raised funds to buy school books for a religious school."[105]

Justice Black was making two different points. General public benefits like police and fire protection are different from books, which have a very close connection to the educational process.[106] In addition, even secular

[96] *Id*. at 238.
[97] *Id*.
[98] *Id*.
[99] *Id*. at 241–42.
[100] *Id*. at 242.
[101] Gary N. Mozer, *The Crumbling Wall Between Church and State: Agostini v. Felton, Aid to Parochial Schools, and the Establishment Clause in the Twenty-First Century*, 31 CONN. L. REV. 337, 349 (1998)) ("[S]imilar to the buses in Everson, the secular textbook loans were provided via a general lending program that had a 'secular legislative purpose' and that provided an indirect secular aid benefit to parents and children.").
[102] *See Everson*, 330 U.S. at 3.
[103] Ironically, some claim that *Allen* applied *Everson*, much to Justice Black's disappointment. *See* Stephen J. Safranek, *Can Science Guide Legal Argumentation? The Role of Metaphor in Constitutional Cases*, 25 LOY. U. CHI. L.J. 357, 381 (1994) ("The viewpoint of the *Everson* majority easily prevailed twenty-one years later in *Board of Education v. Allen*, much to the dismay of Justice Black, the author of the *Everson* opinion."). But this fails to capture Justice Black's claim that the viewpoint of the Everson majority was that the State could provide support for public services for sectarian schools as long as those services were not remotely connected to education.
[104] *Allen*, 392 U.S. at 252 (Black, J. dissenting).
[105] *Id*. (Black, J., dissenting).
[106] *Id*. at 252–53 (Black, J., dissenting) ("[I]t is not difficult to distinguish books, which are the heart of any school, from bus fares, which provide a convenient and helpful general public transportation service."); *see also* Strasser, *supra* note 16, at 551 ("In *Board of Education v. Allen*, 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.").

books can be used to promote the school's religious mission, which puts the State in the position of supporting religious instruction.[107]

The *Allen* Court emphasized that "only textbooks approved by public school authorities could be loaned."[108] The statute at issue "does not authorize the loan of religious books, and the State claims no right to distribute religious literature."[109] Thus, the books themselves would not have religious content.[110]

The *Allen* Court understood that loaning the books would be of some benefit to the schools but noted that the payment of bus fares upheld in *Everson*, like the provision of police and fire services, was of some help to religious schools and nonetheless did not violate constitutional guarantees.[111] While recognizing that "books are different from buses,"[112] the Court emphasized the fact that only secular books were authorized.[113] Because the Court rejected that "all teaching in a sectarian school is religious or 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,"[114] the Court was confident that the New York schoolbook loan program did not run afoul of Establishment guarantees.[115] Just as the provision of secular aid like bus transportation or police and fire services did not violate constitutional guarantees, the provision of secular schoolbooks was similarly permitted.[116]

E. CIRCULAR MATTERS

Allen suggests that the State is permitted to loan secular materials to parochial schools because the focus of Establishment guarantees is to prevent state support of sectarian teaching. Yet, there are various ways to support sectarian views, for example, the State might refuse to permit students from learning anything contrary to religious teaching. The Court has made it clear

[107] *Allen*, 392 U.S. at 252 (Black, J., dissenting) ("[B]ooks for use by sectarian schools, which, although 'secular,' realistically will in some way inevitably tend to propagate the religious views of the favored sect.").

[108] *Id*. at 241.

[109] *Id*. at 244.

[110] 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, 518 (1996) (noting that "the statute authorized only the loan of secular books, and each book loaned was approved by public school officials").

[111] *Allen*, 392 U.S. at 242 ("As with public provision of police and fire protection, sewage facilities, and streets and sidewalks, payment of bus fares was of some value to the religious school, but was nevertheless not such support of a religious institution as to be a prohibited establishment of religion within the meaning of the First Amendment.").

[112] *Id*. at 244.

[113] *Id*. at 244–45 ("[E]ach book loaned must be approved by the public school authorities; only secular books may receive approval.").

[114] *Id*. at 248.

[115] *Id*. ("We are unable to hold, based solely on judicial notice, that this statute results in unconstitutional involvement of the State with religious instruction or that s 701, for this or the other reasons urged, is a law respecting the establishment of religion within the meaning of the First Amendment.").

[116] Some suggest that both *Everson* and *Allen* were internally inconsistent. *See* Holland, *supra* note 14, at 1604 ("*Allen* incorporated *Everson*'s inconsistency between rationale and holding by adopting both *Everson*'s broad prohibition against the use of tax money to support religious institutions and *Everson*'s inadequate reconciliation of that language with the holding that the challenged subsidies were permissible.").

that Establishment guarantees preclude the State from prohibiting teaching particular content in schools solely because that content is not in accord with particular religious beliefs.

At issue in *Epperson v. Arkansas* was "the constitutionality of the 'anti-evolution' statute which the State of Arkansas adopted in 1928 to prohibit the teaching in its public schools and universities of the theory that man evolved from other species of life."[117] The Arkansas Supreme Court reversed the trial court's decision invalidating the statute, instead upholding the validity of "the statute as an exercise of the State's power to specify the curriculum in public schools."[118]

The *Epperson* Court reversed, striking down the statute because "Arkansas' law selects from the body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict with a particular religious doctrine; that is, with a particular interpretation of the Book of Genesis by a particular religious group."[119] The Court explained that the "First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."[120] This neutrality precludes the State from acting in certain ways: "the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma."[121]

The *Epperson* Court recognized the State's power to prescribe public school curriculum as a general matter but cautioned that the "State's undoubted right to prescribe the curriculum for its public schools does not carry with it the right to prohibit . . . the teaching of a scientific theory or doctrine where that prohibition is based upon reasons that violate the First Amendment."[122] The law at issue could not "be defended as an act of religious neutrality"[123] because the state "did not seek to excise from the curricula of its schools and universities all discussion of the origin of man."[124] Instead, the state purpose "was confined to an attempt to blot out a particular theory because of its supposed conflict with the Biblical account, literally read."[125]

The *Epperson* Court did not ban any mention of religion or the Bible from public schools. On the contrary, the "study of religions and of the Bible from a literary and historic viewpoint, presented objectively as part of a secular program of education, need not collide with the First Amendment's

[117] Epperson v. State of Ark., 393 U.S. 97, 98 (1968).
[118] *Id*. at 101.
[119] *Id*. at 103.
[120] *Id*. at 104.
[121] *Id*. at 106.
[122] *Id*. at 107.
[123] *Id*. at 109; *see also* Amanda Harmon Cooley, *Framers' Fidelity and Thicket Theory in Educational Establishment Clause Jurisprudence*, 58 SAN DIEGO L. REV. 1, 25 (2021) ("Because the Arkansas act was not one 'of religious neutrality,' the Court held that the antievolution teaching statute was a plain violation of the Establishment Clause.").
[124] *Epperson*, 393 U.S. at 109; *see also* Naomi Rivkind Shatz, *Unconstitutional Entanglements: The Religious Right, the Federal Government, and Abstinence Education in the Schools*, 19 YALE J.L. & FEMINISM 495, 503 (2008) ("The Court further stated that the Arkansas law was not neutral with respect to religion, because it did not seek to excise all discussions of the origins of humankind from school curricula but merely to prohibit the teaching of one theory that conflicted with the Biblical account of the origins of man.").
[125] *Epperson*, 393 U.S. at 109.

prohibition,"[126] although "the State may not adopt programs or practices in its public schools or colleges which 'aid or oppose' any religion."[127] Because the anti-evolution statute had been adopted to promote religious doctrine,[128] that law could not pass constitutional muster.[129] *Epperson* stands as a bulwark against the use of religious materials in the public schools, unless that use is severely delimited.[130]

The Court addressed similar issues in *Edwards v. Aguillard*,[131] which involved a Louisiana law precluding the teaching of evolution unless accompanied by instruction in creation science.[132] While the Court understood that the statute's "stated purpose is to protect academic freedom"[133] and "the Court is normally deferential to a State's articulation of a secular purpose,"[134] that did not end the matter. There is a requirement that "the statement of such purpose be sincere and not a sham."[135]

If the legislative intent had been "to maximize the comprehensiveness and effectiveness of science instruction,"[136] the legislature "would have encouraged the teaching of all scientific theories about the origins of humankind."[137] But that had not been the purpose of the law, because "teachers who were once free to teach any and all facets of this subject are now unable to do so."[138] The Court refused to "be blind in this case to the legislature's preeminent religious purpose in enacting this statute,"[139] which "was to restructure the science curriculum to conform with a particular religious viewpoint."[140] The Court likened what had happened here to what

[126] *Id*. at 106.
[127] *Id*. (citing *Schempp*, 374 U.S. at 225).
[128] Matthew J. Brauer, Barbara Forrest & Steven G. Gey, *Is It Science Yet?: Intelligent Design Creationism and the Constitution,* 83 WASH. U. L.Q. 1, 11 (2005) ("The effect of the statute—that is, to omit from public school curricula any references to evolution—was so permeated with religion that the Court felt it could only have been motivated by an impermissible religious purpose: to protect the dominant religious dogma from other theories that proponents of the dominant religion viewed as sacrilegious.").
[129] Some disagree with the Court's analysis. *See*, *e.g.*, Lael Daniel Weinberger, *Religion Undefined: Competing Frameworks for Understanding "Religion" in the Establishment Clause*, 86 U. DET. MERCY L. REV. 735, 762–63 (2009) ("The Court struck down this law as an establishment of religion, proclaiming that "teaching and learning" must not "be tailored to the principles or prohibitions of any religious sect or dogma." But the law did not so much as mention religion. The only reason for considering it religious was that it harmonized with a particular worldview—a theistic worldview that believes in a creator God."). *But see* Jeffrey F. Addicott, *Storm Clouds on the Horizon of Darwinism: Teaching the Anthropic Principle and Intelligent Design in the Public Schools*, 63 OHIO ST. L.J. 1507, 1558 (2002) ("If the goal of public education is to develop critical thinking apart from the dogma of religious beliefs, few can argue with the inherent soundness of the majority opinion in Epperson. Not only should students be presented with the full flow of available knowledge based on objective reasoning, be it fact or theory, but it is certainly not the function of the state to promote or indoctrinate students in a particular religious view.").
[130] Edward J. Eberle, *Religion in the Classroom in Germany and the United States*, 81 TUL. L. REV. 67, 102 (2006) ("A case like *Epperson v. Arkansas* would appear to place an insurmountable roadblock to public support for religious instruction in public schools.").
[131] Edwards v. Aguillard, 482 U.S. 578 (1987).
[132] *Id*. at 581 ("The Creationism Act forbids the teaching of the theory of evolution in public schools unless accompanied by instruction in 'creation science.'") (citing La. Rev. Stat. Ann. § 17:286.4A).
[133] *Id*. at 586.
[134] *Id*.
[135] *Id*. at 586–87.
[136] *Id*. at 588.
[137] *Id*.
[138] *Id*. at 588–89.
[139] *Id*. at 590.
[140] *Id*. at 593.

had happened in *Epperson*.[141] "As in *Epperson*, the Legislature passed the Act to give preference to those religious groups which have as one of their tenets the creation of humankind by a divine creator."[142] The Court concluded: "Because the primary purpose of the Creationism Act is to advance a particular religious belief, the Act endorses religion in violation of the First Amendment."[143] The State is precluded from promoting religion.[144]

F. THE TEN COMMANDMENTS

One way to promote religion is to start the day with prayer. Another way is to teach religious doctrine. Yet another way is for schools to try to promote religion more passively,[145] for example, by posting the Ten Commandments on the walls.

At issue in *Stone v. Graham* was the constitutionality of a "Kentucky statute requir[ing] the posting of a copy of the Ten Commandments . . . on the wall of each public classroom in the State."[146] The State of Kentucky had argued that the requirement served "a secular legislative purpose."[147] Indeed, the legislature had required that each display have a notation in small print at the bottom: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States."[148] Yet, requiring the posting of such a notation was not itself enough to establish that the legislative purpose

[141] *See* Julia Clementi, *The First Religious Charter School: A Viable Option for School Choice or Prohibited Under the State Action Doctrine and Religion Clauses?*, 92 FORDHAM L. REV. 2151, 2167 (2024) (noting that the *Edwards* "Court relied on *Epperson* to strike down the state law, reasoning that the Louisiana law's purpose was to promote a religious theory or to prohibit the teaching of a scientific theory that certain religious sects did not prefer"); Carolyn Depoian, *Homosexuality, the Public School Curriculum and the First Amendment: Issues of Religion and Speech*, 18 L. & SEX. 163, 170 (2009) ("Scholars have noted that similarly to *Edwards*, the Court in *Epperson* invalidated a state statute on constitutional grounds because it was intended to promote the biblical story of creationism.").

[142] *Edwards*, 482 U.S. at 593.

[143] *Id*.

[144] Douglas P. Vanden Berge, *The Establishment Clause: Historical Analysis and Current Application to Public Education*, 24 WILLAMETTE L. REV. 503, 512 (1988) ("The *Edwards* Court found that the Louisiana statute was similarly a product of a fundamentalist Christian view and primarily was designed to promote that religion."); David J. Hacker, *Warning! Evolution Lies Within: Preserving Academic Freedom in the Classroom with Secular Evolution Disclaimers*, 16 WASH. U. J.L. & POL'Y 333, 340 (2004) ("*Epperson* and *Edwards* demonstrate that states may neither criminally prohibit the teaching of evolution, nor make the teaching of evolution contingent upon the adequate teaching of creation-science.").

[145] The Court has suggested that the Ten Commandments posting at issue in *Stone* was less "passive" than the posting of the Ten Commandments on Texas State Capitol grounds. *See* Van Orden v. Perry, 545 U.S. 677, 691 (2005) ("The placement of the Ten Commandments monument on the Texas State Capitol grounds is a far more passive use of those texts than was the case in *Stone*, where the text confronted elementary school students every day."). Needless to say, this is a different use of passive—presumably, the Ten Commandments display at issue in Stone did not jump at students. *Cf.* Strasser, *supra* note 57, at 1154 ("[O]ne might well want to know in what respects the Texas monument is peculiarly passive that would not accurately have been said about the Kentucky courthouse displays. . . . Of course, neither display did anything."); Charles Kelbley, *Modeling Church and State: The Ideological Use of History in Establishment Clause Jurisprudence,* 38 OHIO N.U. L. REV. 639, 700 (2012) (discussing "a dubious distinction between a 'passive' presence of the Commandments on the Texas Capitol grounds and an 'activist' presence in Kentucky classrooms in the earlier Stone case").

[146] Stone v. Graham, 449 U.S. 39, 39 (1980).

[147] *Id*. at 41 (citing 1978 Ky. Acts, ch. 436, § 1 (effective June 17, 1978), Ky. Rev. Stat. § 158.178 (1980)).

[148] *Id*. (citing 1978 Ky. Acts, ch. 436, § 1 (effective June 17, 1978), Ky. Rev. Stat. § 158.178 (1980)).

was secular rather than religious—"an 'avowed' secular purpose is not sufficient to avoid conflict with the First Amendment."[149]

The *Stone* Court noted that reading Bible verses and the Lord's Prayer had been struck down in *Schempp*, "despite the school district's assertion of such secular purposes as 'the promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature.'"[150] That secular purposes could be offered for a particular policy was not enough to immunize that policy from constitutional invalidation.

The *Stone* Court recognized that the "pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature,"[151] noting that the "Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind [the Court] to that fact."[152] Although where "integrated into the school curriculum, . . . the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like,"[153] there was no such integration in the school curriculum in this case.

The fact that the Ten Commandment displays were privately funded[154] did not save the requirement from constitutional invalidation, "for the mere posting of the copies under the auspices of the legislature provides the 'official support of the State . . . Government' that the Establishment Clause prohibits."[155] The *Stone* Court concluded that the requirement violated Establishment Clause guarantees.[156]

Stone might be contrasted with another case involving the posting of the Ten Commandments. In *Van Orden v. Perry*, the Court addressed whether "the Establishment Clause of the First Amendment allows the display of a monument inscribed with the Ten Commandments on the Texas State Capitol grounds."[157] The *Van Orden* Court acknowledged that "the Ten Commandments are religious—they were so viewed at their inception and so remain,"[158] although "the Ten Commandments have an undeniable historical meaning."[159]

When upholding the constitutionality of the Texas display,[160] the Court took special pains to speak approvingly of *Stone*.[161] The *Van Orden* Court noted that the Court had "been particularly vigilant in monitoring compliance

[149] *Id*.
[150] *Id*. (citing *Schempp*, 374 U.S. at 223).
[151] *Id*.
[152] *Id*.
[153] *Id*. at 42 (citing *Schempp*, 374 U.S. at 225).
[154] *See id*. at 39.
[155] *Id*. at 42 (citing *Schempp*, 374 U.S. at 222).
[156] *Id*. at 42–43.
[157] Van Orden v. Perry, 545 U.S. 677, 681 (2005).
[158] *Id*. at 690.
[159] *Id*.
[160] *Id*. at 692 ("We cannot say that Texas' display of this monument violates the Establishment Clause of the First Amendment.").
[161] *Id*. at 690 ("There are, of course, limits to the display of religious messages or symbols. For example, we held unconstitutional a Kentucky statute requiring the posting of the Ten Commandments in every public schoolroom.") (citing *Stone*, 449 U.S. at 39.

with the Establishment Clause in elementary and secondary schools." [162] The Court explained "*Stone*—along with *Schempp* and *Engel*—was a consequence of the 'particular concerns that arise in the context of public elementary and secondary schools.'"[163] The special concerns that arise in the primary and secondary school context[164] are due in part to the impressionable nature of the students and their vulnerability to pressure from others.[165] But those considerations did not weigh as heavily when a public display on Capitol grounds was at issue, so the *Van Orden* Court could distinguish what was at issue before it from what had been at issue in *Stone*.

G. RELIGIOUS EXERCISE AFTER SCHOOL HOURS

While the Court has been vigilant about religious exercise during school hours, it has adopted a different analysis with respect to after-school activities, impressionable nature of the students notwithstanding. Further, the worries about sectarian activities taking place at school on tax-funded property[166] and the possible perception of the blending of secular and sectarian education[167] do not play the same role in after-school activities.

At issue in *Board of Education of Westside Community Schools v. Mergens by & Through Mergens* was whether requiring that student religious groups be permitted to meet on school premises after school violates Establishment guarantees.[168] The Court offered several reasons to believe the requirement passed constitutional muster. First, because the requirement prohibited "discrimination on the basis of 'political, philosophical, or other' speech as well as religious speech,"[169] there was sufficient evidence to believe the purpose was secular.[170] That was allegedly true even if "some legislators were motivated by a conviction that religious speech in particular was valuable and worthy of protection."[171]

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[162] *Id*. at 691 (citing *Edwards*, 482 U.S. at 583–84).

[163] *Id*. (citing *Edwards*, 482 U.S. at 584–85). For a different case handed down on the same day in which the Court struck down Ten Commandments displays at two Kentucky county courthouses, see McCreary Cnty. v. Am. C.L. Union of Ky., 545 U.S. 844, 850 (2005) ("Executives of two counties posted a version of the Ten Commandments on the walls of their courthouses."), where the Court offered a more expansive understanding of *Stone*. *See id*. at 859.

[164] Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 559 (2022) (Sotomayor, J., dissenting) ("The reasons motivating this vigilance inhere in the nature of schools themselves and the young people they serve."); *see also* Caroline Mala Corbin, *When Teachers Misgender: The Free Speech Claims of Public School Teachers*, 1 J. FREE SPEECH L. 615, 620 (2022) (discussing "the additional responsibilities a school has with regard to the young impressionable students entrusted to its care"); Isaac Unah & Catherine M. Blalock, *The Twilight of Brown: Empirical Analysis of Re-Segregation and Voluntary Adoption of School Integration Policies Across the United States*, 30 U. FLA. J.L. & PUB. POL'Y 227, 235 (2020) (discussing "primary and secondary schools populated by underage and highly impressionable young children").

[165] Marianna Moss, *How Are Reasonable Children Coerced? The Difficulty of Applying the Establishment*

Clause to Minors, 10 U.C. DAVIS J. JUV. L. & POL'Y 379 (2006) (discussing students' "susceptibility to peer pressure, as well as [to] the pressure from school officials"); Deanna N. Pihos, *Assuming Maturity Matters: The Limited Reach of the Establishment Clause at Public Universities*, 90 CORNELL L. REV. 1349, 1353 (2005) (discussing the notion that "college students are older and more mature and are, therefore, less impressionable than primary and secondary level students").

[166] *See supra* notes 32–33 and accompanying text.

[167] *See supra* note 51 and accompanying text.

[168] Bd. of Educ. of Westside Cmty. Schs. v. Mergens, 496 U.S. 226, 231 (1990).

[169] *Id*. at 248.

[170] *Id*.

[171] *Id*. at 249.

The *Mergens* Court reasoned that students would not attribute particular significance to the school's permitting this club among others to meet after school. "[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."[172] The Court was confident that these "secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis."[173] Further, the Court was confident that "there is little if any risk of official state endorsement or coercion where no formal classroom activities are involved and no school officials actively participate."[174] In any event, the school had control[175] over whether students would misperceive endorsement, because the school can disavow endorsement[176] and then "students will reasonably understand that the school's official recognition of the club evinces neutrality toward rather than endorsement of religious speech."[177]

The *Mergens* Court acknowledged that permitting the religious club to meet after school would "provide the club with an official platform to proselytize other students,"[178] but it also implied that the "incidental benefits [that] accrued to religious groups . . . [would] not amount to an establishment of religion."[179] But providing a platform to proselytize is not an incidental benefit to a religious group like loaning secular schoolbooks which would not be used to teach religious doctrine.[180] Further, the State involvement in the promotion of this religious activity was not limited to permitting the group to use a room after school because the school would also promote the club through state channels.[181] Here, tax-supported facilities would be used to promote prayer and religious teaching.

The *Mergens* Court noted that this would take place during noninstructional time,[182] whereas noninstructional time was defined as "time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends."[183] Yet, two points might be made. First, some instruction might be taking place in other clubs, which means that this might not qualify as noninstructional time.[184] Second, what is permitted here

[172] *Id*. at 250.
[173] *Id*.
[174] *Id*. at 251.
[175] *Id*. ("[T]he school itself has control over any impressions it gives its students.").
[176] *Id*. ("[A] school [could] make[] clear that its recognition of respondents' proposed club is not an endorsement of the views of the club's participants.").
[177] *Id*.
[178] *Id*. at 247–48.
[179] *Id*. at 248. While the Court's comments about the incidental benefits were made with respect to another case, the Court suggested that the logic of that case "applies with equal force" to the logic of the case at hand. *See id.*
[180] *See supra* notes 112–116 and accompanying text.
[181] *Mergens*, 496 U.S. at 268. (Marshall, J., concurring) ("Students would be alerted to the meetings of the religion club over the public address system; they would see religion club material posted on the official school bulletin board and club notices in the school newspaper; they would be recruited to join the religion club at the school-sponsored Club Fair.").
[182] *See id*. at 235.
[183] *See id*. at 236 (citing 20 U.S.C. § 4072(4)).
[184] *See id*. at 240 ("[A] French club would directly relate to the curriculum if a school taught French in a regularly offered course or planned to teach the subject in the near future. A school's student government would generally relate directly to the curriculum to the extent that it addresses concerns, solicits opinions, and formulates proposals pertaining to the body of courses offered by the school. If

has striking similarities to what was struck down in *McCollum*—sectarian activity is occurring on publicly supported school premises while secular teaching has allegedly stopped,[185] and school authorities are cooperating to facilitate the sectarian activity.[186]

The point here is not that *Mergens* is on all fours with *McCollum*. Here, students who did not wish to engage in this religious activity or participate in any of the clubs were simply free to leave school,[187] and the *Mergens* Court noted that in this case, unlike *McCollum*, the students were not required to stay in the building.[188] But the *Mergens* Court stopped its analysis after noting that students could leave: the Court did not discuss whether this difference was important, for example, in whether the use of a "tax-supported public school system to aid religious groups to spread their faith"[189] would have been upheld in *McCollum* if students could have left the building. Instead, the *Mergens* Court upheld the program at issue against an Establishment challenge, implying that *McCollum* did not raise any constitutional difficulties.[190]

In *Lamb's Chapel v. Center Moriches Union Free School District*, the Court offered an analysis similar to what had been offered in *Mergens*[191] to explain why a school permitting its facilities to be used after school for "'social, civic, and recreational' purposes"[192] could not refuse to permit a religious group from using those facilities to address such subject matters "from a religious standpoint."[193] But the implicit claim that the State cannot refuse to support teaching merely because it is from a religious standpoint is a repudiation of traditional establishment doctrine. That said, however, the Court emphasized that the presentation "would not have been during school hours, would not have been sponsored by the school, and would have been open to the public, not just to church members."[194]

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participation in a school's band or orchestra were required for the band or orchestra classes, or resulted in academic credit, then those groups would also directly relate to the curriculum.").

[185] *But see supra* note 184 and accompanying text.

[186] *See supra* note 26 and accompanying text.

[187] *See* Zorach v. Clauson, 343 U.S. 306, 320 (Frankfurter, J., dissenting) (noting the importance of being free to leave).

[188] *Mergens*, 496 U.S. at 251 (1990).

[189] Ill. *ex rel.* McCollum v. Bd. of Ed. of Sch. Dist. No. 71, Champaign Cnty., 333 U.S. 203, 210 (1948).

[190] *Mergens*, 496 U.S. at 253 ("[W]e hold that the Equal Access Act does not on its face contravene the Establishment Clause."). The Court found that the act and its application did not violate Lemon Test. *See id.* at 248–53. Here, there was no complaint about the Lemon Test. However, that test was often criticized when used to strike down policies favoring religion. *See*, *e.g.*, McCreary County v. American Civil Liberties Union of Kentucky of Kentucky, 545 U.S. 844, 900–01 (2005) (Scalia, J., dissenting). Sometimes, the Test was expressly modified in a way to favor religion. *See* Agostini v. Felton, 521 U.S. 203 (1997) (merging third prong into second prong), thereby overruling Aguilar v. Felton. 473 U.S. 402 (1985). *Agostini* was unusual in that it overruled a case involving the very same defendants who has lost in *Aguilar*. *See Agostini*, 521 U.S. at 208 ("In Aguilar v. Felton, 473 U.S. 402, (1985), this Court held that the Establishment Clause of the First Amendment barred the city of New York from sending public school teachers into parochial schools to provide remedial education to disadvantaged children pursuant to a congressionally mandated program.") In *Aguilar*, *Lemon* had been criticized. *See Aguilar*, 473 U.S. at 419–20 (Burger, C.J. dissenting).

[191] In both cases, the Court cited Widmar v. Vincent, 454 U.S. 263 (1981) (striking down university refusal to permit religious group to use university facilities) to explain why the Establishment challenge must fail. *See Mergens*, 496 U.S. at 235; Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 395 (1993).

[192] *Lamb's Chapel*, 508 U.S. at 391.

[193] *Id*. at 393.

[194] *Id*. at 395.

So, too, in *Good News Club v. Milford Central School*, the Court discussed whether a school could prevent use of the facilities after school hours by a club in which the children would *inter alia* memorize Scripture and hear Bible lessons.[195] The Court reasoned that "the Club teaches morals and character development to children,"[196] although "in a nonsecular way."[197] The Court "disagree[d] that something that is 'quintessentially religious' or 'decidedly religious in nature' cannot also be characterized properly as the teaching of morals and character development from a particular viewpoint,"[198] and the Court "conclude[d] that Milford's exclusion of the Club from use of the school, pursuant to its community use policy, constitutes impermissible viewpoint discrimination."[199] Again, the Court reasoned that "club's meetings were held after school hours, not sponsored by the school, and open to any student who obtained parental consent, not just to Club members."[200] The Court concluded that Establishment Clause guarantees do not "foreclose private religious conduct during nonschool hours merely because it takes place on school premises where elementary school children may be present."[201]

The Court in *Mergens*, *Lamb's Chapel*, and *Good News Club* upheld the traditional analysis precluding teaching sectarian doctrine during school hours in public schools. In that respect, the Court had captured the traditional doctrine, although the Court holding that public school facilities had to be open to use by religious groups during after-school hours[202] discounted the *McCollum* rationale that tax-supported public school facilities should not be used to promote sectarian activity,[203] and it ignored the difficulties posed by state support of education from a religious viewpoint, even if after school.

II. RECENT TRENDS IN ESTABLISHMENT JURISPRUDENCE

Establishment jurisprudence has evolved over the past several decades, although a couple of rules remain constant: (1) No school-sponsored prayer and (2) No state support of sectarian teaching in public school during regular hours. However, some recent cases suggest that those rules may not last much longer.

[195] Good News Club v. Milford Cent. Sch., 533 U.S. 98, 103 (2001).
[196] *Id*. at 108.
[197] *Id*.
[198] *Id*. at 111.
[199] *Id*. at 112.
[200] *Id*. at 113.
[201] *Id*. at 115 (emphasis added).
[202] *See* Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 572 (2009) (noting that the Court has interpreted the Constitution to permit support of religious schools, voucher programs and the ability of religious groups to pray and engage in religious activities after schools hours); Paul Horwitz, *Churches As First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C.R.-C.L. L. REV. 79, 128 (2009) ("[T]he Court has emphasized that religious entities are as entitled as any secular entities to engage in speech in the public square, including the use of public fora such as after-hours public school programs."); Pruitt, *supra* note 1, at 293 ("[P]ublic schools cannot bar religious groups . . . from using their buildings when they otherwise open themselves after hours for community use.").
[203] *See supra* notes 32–33 and accompanying text.

A. THE NEW EVERSON

Recently, the Court modified Establishment Clause jurisprudence in a way that makes it unrecognizable in approach, although not always in result. For example, the Court recently decided a case which in some ways was reminiscent of *Everson*,[204] although the Court's analysis differed from the *Everson* Court's in striking ways.

At issue in *Trinity Lutheran Church of Columbia, Inc. v. Comer* was whether the Trinity Lutheran Church Child Learning Center would receive state aid to purchase a rubberized playground surface for its playground area.[205] The Missouri Department of Natural Resources had offered grants to nonprofits that scored well in light of certain criteria to make their playgrounds safer.[206] The Child Learning Center would have been awarded a grant but for it being religiously affiliated[207]—the reason that it being religiously affiliated made a difference was that the Missouri Constitution precluded the State from using public monies to support religious institutions.[208]

The Church sued the Director of the Department of Natural Resources, arguing that the denial of the funds violated free exercise guarantees.[209] The District Court granted the Department's motion to dismiss, and the Eighth Circuit affirmed.[210] The United States Supreme Court reversed and remanded the decision.[211]

When explaining why the Eighth Circuit decision could not stand, the *Trinity Lutheran* Court reasoned that the "Free Exercise Clause 'protect[s] religious observers against unequal treatment' and subjects to the strictest scrutiny laws that target the religious for 'special disabilities' based on their 'religious status.'"[212] Thus, those who are religiously observant should not

[204] Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 471 (2017) (Breyer, J., concurring in the result) ("The Court stated in *Everson* that 'cutting off church schools from' such 'general government services as ordinary police and fire protection . . . is obviously not the purpose of the First Amendment.' 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. I see no significant difference.") (citing *Everson*, 330 U.S. at 17–18).

[205] *Id*. at 453 ("The Missouri Department of Natural Resources offers state grants to help public and private schools, nonprofit daycare centers, and other nonprofit entities purchase rubber playground surfaces made from recycled tires.").

[206] *Id*. at 455 ("Due to limited resources, the Department cannot offer grants to all applicants and so awards them on a competitive basis to those scoring highest based on several criteria, such as the poverty level of the population in the surrounding area and the applicant's plan to promote recycling.").

[207] *See id*. at 456.

[208] *Id*. at 455 ("That policy, in the Department's view, was compelled by Article I, Section 7 of the Missouri Constitution . . . That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship.").

[209] *Id*. at 456 ("Trinity Lutheran sued the Director of the Department in Federal District Court. The Church alleged that the Department's failure to approve the Center's application, pursuant to its policy of denying grants to religiously affiliated applicants, violates the Free Exercise Clause of the First Amendment.").

[210] *See id*.

[211] *See id*. at 467.

[212] *Id*. at 458 (citing Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 533, 542 (1993)); *see also* Leo O'Malley, *An Establishment Clause Eulogy: The Rise and Fall of the Status/use Distinction*, 37 NOTRE DAME J.L. ETHICS & PUB. POL'Y 279, 295–96 (2023) ("[A]ccording to the Court, both *Trinity*

be punished merely because they are religious. But an important part of any such analysis involves an understanding and appreciation of Establishment guarantees, which have long distinguished between the support of secular versus sectarian institutions and practices.[213]

The *Trinity Lutheran* Court cited to *Everson*, explaining:

> In the course of ruling that the Establishment Clause allowed New Jersey to extend that public benefit to all its citizens regardless of their religious belief, we explained 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."[214]

The Court's citing to *Everson* makes sense because *Everson* is an important case in establishment jurisprudence[215] and because it discussed the impermissibility of discriminating on the basis of faith. But *Everson* was discussing individual members of faith, whereas the *Trinity Lutheran* Court did not stop there but included *religious institutions* within the category of religious observers.

The *Trinity Lutheran* Court reasoned, "The Department's policy expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character."[216] Allegedly, the Department of Resources was making the Church "renounce its religious character in order to participate in an otherwise generally available public benefit program, for which it is fully qualified."[217] But establishment jurisprudence has distinguished between religious institutions and religious individuals for decades, which is why the *Everson* Court was cautioning that religious or nonreligious (natural) persons should not be treated differently because of their faith or lack thereof.

The Court has long recognized "the internal tension in the First Amendment between the Establishment Clause and the Free Exercise Clause."[218] But the *Trinity Lutheran* Court is offering an analysis that goes far beyond tension and makes the Clauses very difficult if not impossible to reconcile.[219] The Establishment Clause has been understood to preclude state

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Lutheran and *Espinoza* stand for the principle that, where an entity is denied a public benefit on the basis of its religious identity, such an exclusion 'must be subjected to 'the strictest scrutiny.'").

[213] *See*, *e.g.*, Comm. For Pub. Ed. & Religious Liberty v. Nyquist, 413 U.S. 756, 786 (1973) ("[I]f the grants are offered as an incentive to parents to send their children to sectarian schools by making unrestricted cash payments to them, the Establishment Clause is violated.") The *Nyquist* Court would of course not have made the same claim about incentives to attend secular schools.

[214] Trinity Lutheran, 582 U.S. at 459 (citing *Everson*, 330 U.S. at 16).

[215] *See supra* note 10 and accompanying text (noting that *Everson* is a seminal case in modern Establishment Clause jurisprudence).

[216] *Trinity Lutheran*, 582 U.S. at 462.

[217] *Id*. at 466.

[218] Tilton v. Richardson, 403 U.S. 672, 677 (1971); *see also Nyquist*, 413 U.S. at 788 ("[T]his Court repeatedly has recognized that tension inevitably exists between the Free Exercise and the Establishment Clauses.").

[219] *But see* Locke v. Davey, 540 U.S. 712, 719 (2004) ("[T]here are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause.").

support of religion.[220] But the *Trinity Lutheran* Court is suggesting that the denial of support of a religious institution because of its religious nature violates free exercise guarantees,[221] which means that respecting establishment limitations by refusing to use public monies to support a sectarian institution is now a free exercise violation.

A different but related issue is whether there is room between the Religion Clauses, and the Court has sometimes discussed the "play in the joints" between the Establishment Clause and the Free Exercise Clause. In *Walz v. Tax Comm'n of City of New York*, the Court talked about "a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference."[222] Government sponsorship of religion is what the Establishment Clause prohibits and government interference with religious exercise is what the Free Exercise Clause prohibits, so the *Walz* Court is discussing activity that falls between the Religion Clause prohibitions (that is, it is neither required nor prohibited by either clause).

When the Court discusses "play in the joints" in *Locke v. Davey*,[223] it refers to "state actions permitted by the Establishment Clause but not required by the Free Exercise Clause."[224] This may not be the most felicitous way to describe the term, which is intended to refer to the "wiggle room"[225] between the Clauses. That wiggle room is not captured by the *Locke* formulation unless properly understood because something permitted by the Establishment Clause might not only *not* be required by the Free Exercise Clause but be prohibited by it.[226] But something prohibited by the Free Exercise Clause is impermissible and hence not within the wiggle room between the Clauses.

One might talk about actions permitted by the Establishment Clause that are permitted but not required by the Free Exercise Clause.[227] In *Locke*, the action permitted by the Establishment Clause and permitted *but not required*

[220] Engel v. Vitale, 370 U.S. 421, 431 (1962) ("When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."); Everson v. Board of Education, 330 U.S. 1, 33 (1947) (Rutledge, J., dissenting) ("The prohibition broadly forbids state support, financial or other, of religion in any guise, form or degree. It outlaws all use of public funds for religious purposes.").

[221] Strasser, *supra* note 24, at 919 ("The Court *may* have been rewriting in another respect, namely, to suggest that the *Everson* Court's cautioning that individual citizens should not be denied public benefits because of their faith has now been expanded to include individual religious institutions.").

[222] Walz v. Tax Comm'n of New York, 397 U.S. 664, 669 (1970).

[223] Locke v. Davey, 540 U.S. 712, 718 (2004).

[224] *Id*. at 719.

[225] Carson *ex rel*. O. C. v. Makin, 596 U.S. 767, 801 (2022) (Breyer, J., dissenting); *see also* Joshua L. Johnston, *A House Built on Sand: The Qualified Immunity Case for Keeping the Smith Doctrine*, 54 ST. MARY'S L.J. 885, 887 (2023) (discussing "some wiggle room, or 'play in the joints,' for governments to pass laws that neither establish nor interfere with religion"); Peter H. Huang, *Book Review: Leo Katz, Why the Law Is So Perverse. Chicago: University of Chicago Press, 2011, Pp. 239, $35 (Cloth)*, 63 J. LEGAL EDUC. 131, 147 (2013) (discussing "'play in the joints' or 'wiggle room'").

[226] Some commentators do not seem to appreciate this difficulty. *See, e.g.*, 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, 351 (2005) ("[T]here was room for a 'play in the joints' between the two clauses, meaning things prohibited by one clause were not required by the other.").

[227] *Cf.* Arlin M. Adams & Sarah Barringer Gordon, *The Doctrine of Accommodation in the Jurisprudence of the Religion Clauses*, 37 DEPAUL L. REV. 317, 333 (1988) ("Voluntary accommodations of religion—actions that fall between acts prohibited by the establishment clause and acts required by the free exercise clause—are a kind of 'benevolent neutrality.'"). This characterization is correct as long as it refers to actions permitted but not required by the Free Exercise Clause.

by the Free Exercise Clause was for the State of Washington to offer qualifying students scholarships to attend private colleges within the State to pursue a theology degree.[228] However, the State of Washington had decided not to offer scholarships to pursue such study,[229] which was also permissible because that was a matter within state discretion.

The *Trinity Lutheran* Court quoted *Locke* for the proposition that "there is 'play in the joints' between what the Establishment Clause permits and the Free Exercise Clause compels."[230] But *Locke* was allegedly distinguishable from what was at issue in *Trinity Lutheran* because in the former case "Davey was not denied a scholarship because of who he *was*; he was denied a scholarship because of what he proposed *to do*—use the funds to prepare for the ministry."[231] In contrast, "Trinity Lutheran was denied a grant simply because of what it is—a church."[232]

It is surprising that the *Trinity Lutheran* Court accepts the validity of *Locke*—one might have expected instead that the *Trinity Lutheran* Court would characterize the refusal to award funds to study theology as hostile to religion and hence prohibited under Free Exercise guarantees.[233] Indeed, the current Court has cast doubt on the vitality of the *Locke* distinction.[234] Nonetheless, a more concerning aspect of the way that the *Trinity Lutheran* Court distinguishes *Locke* is that the Court seems to have fired a "broadside attack"[235] against Establishment guarantees as a general matter.

The *Everson* Court recognized that there was some "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."[236] Here, the *Everson* Court suggested that it is permissible to deny public support of institutions teaching religion, but the *Trinity Lutheran* Court would presumably say that such a denial is a violation of Free Exercise guarantees because the denial of funds is based on the institution's "religious status."[237] Whereas *Everson* was trying to draw lines to distinguish between permissible and impermissible state support of religious institutions, *Trinity Lutheran* was not interested in drawing a line but instead in obliterating one.[238]

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[228] *Locke*, 540 U.S. at 716.

[229] *Id*.

[230] *See* Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 458 (2017) (citing *Locke*, 540 U.S. at 718).

[231] *Id*. at 464.

[232] *Id*.

[233] *See Locke*, 540 U.S. at 726–27 (Scalia, J., dissenting) ("When the State makes a public benefit generally available, that benefit becomes part of the baseline against which burdens on religion are measured; and when the State withholds that benefit from some individuals solely on the basis of religion, it violates the Free Exercise Clause[.]").

[234] *See infra* notes 255–257 and accompanying text.

[235] Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 79 (1963) (Harlan, J. dissenting).

[236] Everson v. Board of Education, 330 U.S. 1, 14 (1947).

[237] *Trinity Lutheran*, 582 U.S. at 458 (citing Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 542).

[238] *Cf. id*. at 478 (Sotomayor, J., dissenting) ("Even assuming the absence of an Establishment Clause violation and proceeding on the Court's preferred front—the Free Exercise Clause—the Court errs. It claims that the government may not draw lines based on an entity's religious 'status.' But we have repeatedly said that it can. When confronted with government action that draws such a line, we have carefully considered whether the interests embodied in the Religion Clauses justify that line."); *see also* Caroline Mala Corbin, *Is There Any Silver Lining to Trinity Lutheran Church, Inc. v. Comer?*, 116 MICH.

A few points might be made about *Trinity Lutheran*. At issue was a public safety benefit for children, so this might seem paradigmatic of what the Constitution permits.[239] Perhaps the function of the Child Learning Center playground could be separated from sectarian education so that making the playground safer would not constitute an establishment violation.[240]

Yet, the issue in *Trinity Lutheran* was not whether the Federal Constitution permits Missouri to award the grant to the Church.[241] Rather, the Missouri Constitution had been interpreted by the Department of Natural Resources to preclude awarding the grant.[242] If indeed the relevant state constitutional provision did not itself violate federal constitutional guarantees,[243] then the Missouri Supreme Court would have been the proper body to decide whether the Department of Natural Resources had interpreted the state constitution correctly.[244]

The *Everson* Court suggested that New Jersey was permitted but not required to reimburse parents for the bus transportation costs of their children who were attending religious school.[245] But *Trinity Lutheran* was about whether Missouri could permissibly refuse to award the funds at issue to a religious institution, so *Trinity Lutheran* was ignoring the careful compromise reached by the *Everson* Court.[246] In addition, the *Trinity Lutheran* opinion was not written in a way that was cabined to apply only to

L. REV. ONLINE 137, 139 (2018) ("There is plenty to criticize about the Trinity Lutheran decision. It eviscerates the Establishment Clause bar against funding religious exercise by not only allowing but mandating that taxpayer money go directly to a church.").

[239] *Trinity Lutheran*, 582 U.S. at 471 (Breyer, J., concurring in the result).

[240] *But see id*. at 473 (Sotomayor, J., dissenting) ("[T]his is a case about whether Missouri can decline to fund improvements to the facilities the Church uses to practice and spread its religious views.").

[241] *Id*. at 458 ("The parties agree that the Establishment Clause of that Amendment does not prevent Missouri from including Trinity Lutheran in the Scrap Tire Program."). *But see id*. at 475 (Sotomayor, J., dissenting) ("The Church seeks state funds to improve the Learning Center's facilities, which, by the Church's own avowed description, are used to assist the spiritual growth of the children of its members and to spread the Church's faith to the children of nonmembers. The Church's playground surface—like a Sunday School room's walls or the sanctuary's pews—are integrated with and integral to its religious mission. The conclusion that the funding the Church seeks would impermissibly advance religion is inescapable.").

[242] *Id*. at 455 ("When the Center applied, 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. That policy, in the Department's view, was compelled by Article I, Section 7 of the Missouri Constitution.").

[243] *See* Strasser, *supra* note 24, at 917 ("The Court offered language suggesting that religious entities should not be treated differently than others, but did not strike down Missouri's State Blaine Amendment requiring that differentiation, nor cast doubt upon the legitimacy of state anti-establishment interests.").

[244] *Cf. id.* at 915 ("Perhaps that provision is best interpreted as not barring religious schools from receiving certain public benefits, although that would be a question best left to the Missouri Supreme Court.").

[245] Everson v. Board of Education, 330 U.S. 1, 16 (1947) ("While we do not mean to intimate that a state could not provide transportation only to children attending public schools, we 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."); *see also* Strasser, *supra* note 24, 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.").

[246] Erwin Chemerinsky & Barry P. McDonald, *Eviscerating A Healthy Church-State Separation*, 96 WASH U. L. REV. 1009 (2019) ("For the first time in its history, the Court ruled that the United States Constitution *requires* states under certain circumstances to provide taxpayer funds to churches and other houses of worship."); Strasser, *supra* note 24, at 913 ("Even if *Everson* were somehow read to permit funding sectarian institutions, *Comer* addressed whether Missouri was precluded from refusing to do so.").

public safety benefits,[247] so it is simply unclear what approach the Court was adopting while pretending to follow *Everson*.[248]

B. PROMOTING SECTARIAN EDUCATION

One possible way to read *Trinity Lutheran* is that the Court is suggesting that public benefits cannot be denied to religious institutions,[249] although some members of the Court counseled against such a reading.[250] The Court soon made clear that it did not have such a limited holding in mind.

At issue in *Espinoza v. Montana Department of Revenue* was a program set up by the Legislature that provided tuition assistance to parents who sent their children to private schools.[251] The Montana Constitution contained a provision barring aid to religious institutions,[252] and the Montana Legislature directed that the program be administered in accord with the state constitution's limitations.[253] The Montana Supreme Court struck down the program,[254] reasoning that it violated the Montana Constitution because there were inadequate safeguards to assure that public monies would not go to sectarian institutions.[255]

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[247] *Trinity Lutheran*, 582 U.S. at 470 (Gorsuch, J., concurring in part) ("[S]ome might mistakenly read it to suggest that only 'playground resurfacing' cases, or only those with some association with children's safety or health, or perhaps some other social good we find sufficiently worthy, are governed by the legal rules recounted in and faithfully applied by the Court's opinion.").

[248] Some suggest that *Trinity Lutheran* is working out *Everson*. See Douglas Laycock, *Churches, Playgrounds, Government Dollars-and Schools?*, 131 HARV. L. REV. 133, 137 (2017) ("*Trinity Lutheran* is part of the Court's continuing effort to work out two competing principles that it first set out in adjacent paragraphs in *Everson v. Board of Education*."). But it seems more accurate to suggest that *Trinity Lutheran* is simply rejecting *Everson*.

[249] *See* John L. Rockenbach, *Everything, but Maybe Nothing: The Supreme Court's Important—but Fragile—Decision in Trinity Lutheran Church of Columbia, Inc. v. Comer: 137 S. Ct. 2012 (2017)*, 97 NEB. L. REV. 525, 546 (2018) ("*Trinity Lutheran* forbids states from distributing generally available public benefits in a way that discriminates on the basis of religion."); Charles J. Russo, M.Div., J.D., Ed.D. & William E. Thro, M.A., J.D., *The Demise of the Blaine Amendment and A Triumph for Religious Freedom and School Choice: Espinoza v. Montana Department of Revenue*, 46 U. DAYTON. L. REV. 131, 151 (2021) ("*Trinity Lutheran* wherein the Court interpreted the Free Exercise Clause as forbidding states from singling out believers or faith-based institutions from generally available public benefits simply because they are religious."); Brooke Reczka, *The Wrong Choice to Address School Choice: Espinoza v. Montana Department of Revenue*, 15 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 237, 242 (2020) ("[I]n *Trinity Lutheran*, the Supreme Court reiterated these principles and expanded the non-discrimination concept to public benefits that were denied to religious entities because of their religious status.").

[250] *See Trinity Lutheran*, 582 U.S. at 468–70 (Gorsuch concurring in part). Justice Thomas joined this partial concurrence; *see also id*. at 468.

[251] Espinoza v. Montana Dep't of Revenue, 591 U.S. 464, 467–68 (2020).

[252] *Id*. at 469–70 ("Article X, section 6, of the Montana Constitution, which contains a "no-aid" provision barring government aid to sectarian schools."). *See* MONT. CODE ANN. § 15–30–3101) ("Aid prohibited to sectarian school . . . The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination.").

[253] *Id*. at 469 ("The Montana Legislature also directed that the program be administered in accordance with Article X, section 6, of the Montana Constitution, which contains a 'no-aid provision barring government aid to sectarian schools.").

[254] *Id*. at 468.

[255] *Id*. at 472 ("The Court explained that the program provided 'no mechanism' for preventing aid from flowing to religious schools, and therefore the scholarship program could not 'under *any* circumstance' be construed as consistent with the no-aid provision.") (citing Espinoza v. Montana Dep't of Revenue, 435 P.3d 603, 613–14 (2018)).

The United States Supreme Court held that the state no-aid provision "expressly discriminates on the basis of religious status"[256] in violation of free exercise guarantees.[257] The Court announced: "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."[258]

The Court was not making a dramatic change by suggesting that the Establishment Clause was not violated by awarding scholarships that could be used at sectarian institutions.[259] But the *Espinoza* Court was going farther when suggesting that states have to fund sectarian education if they choose to fund private secular education at all. What is at issue here is not public benefits like police or fire services,[260] or even rubberized surfaces for playgrounds.[261] Nor is this restricted to state support of *secular* education at private schools. Instead, the Court suggests that if funds are made available to support private secular education, then funds must also be made available to promote sectarian education as well.[262]

Espinoza is surprising for several reasons, not least of which is that the Court even chose to hear it. The Montana Supreme Court had struck down the scholarship program, so it was not as if students would get help attending private secular but not sectarian institutions.[263] Further, the Montana Legislature had enacted the program and directed that it be administered in accord with the state constitution's limitation with respect to aiding sectarian

[256] *Id*. at 487.

[257] *See id*. at 488; *see also id*. at 489 (Thomas, J., concurring) ("The Court correctly concludes that Montana's no-aid provision expressly discriminates against religion in violation of the Free Exercise Clause.").

[258] *Id*. at 487.

[259] *See 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."); s*ee also Espinoza*, 591 U.S. at 530 (Breyer, J., dissenting) ("Nor can I see how it could make a difference that the Establishment Clause might *permit* the State to subsidize religious education through a program like Montana's.").

[260] *See supra* note 17 and accompanying text.

[261] *See supra* note 219 and accompanying text (discussing whether the rubberized surface grant could be construed as promoting secular purposes such as safety); *see also supra* note 106 and accompanying text (distinguishing police and fire protection from something so closely connected to education).

[262] Elliot Ergeson, *One Nation Subsiding God: How the Implementation of the Paycheck Protection Program Revealed the Deteriorating Wall Between Church and State*, 106 MINN. L. REV**.** 2653, 2655 (2022) ("[A]fter *Espinoza v. Montana Department of Revenue*, the government may not exclude religious entities from public benefits, even when those benefits may be used for religious activities."); Wayne Batchis, *The Discriminatory Religion Clauses*, 97 S. CAL. L. REV. 367, 404 (2024) ("This well-established understanding of the religion clauses, that educational choices which are otherwise within the discretion of state and local government must be judicially curtailed due to their religious nature, was not just contradicted, but inverted by *Espinoza* and *Carson*."). In *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), the Court rejected an Establishment Clause challenge to school voucher program where parents were permitted to use vouchers to help their children attend private sectarian schools. *See id.* at 663 ("[W]e hold that the program does not offend the Establishment Clause."). This program was voluntarily adopted by the State of Ohio as a pilot program. *See id.* at 643–44 ("The State of Ohio has established a pilot program designed to provide educational choices to families with children who reside in the Cleveland City School District."); *see also id.* at 644 ("For more than a generation, however, Cleveland's public schools have been among the worst performing public schools in the Nation."). *Espinoza* goes much farther than *Zelman* because it holds that states are required to include sectarian schools if they decide to help parents send their children to private secular schools. *See* Derek W. Black, *Religion, Discrimination, and the Future of Public Education*, 13 U.C. IRVINE L. REV. 805, 813 (2023) ("The question in *Espinoza* was the flipside of *Zelman*: whether the government can exclude private religious schools from voucher programs.").

[263] *See Espinoza*, 591 U.S. at 516 (Ginsburg, J., dissenting) ("[T]he Montana court remedied the state constitutional violation by striking the scholarship program in its entirety. 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.").

institutions.[264] But that means that it is an open question whether the legislature would have passed the provision if they had known that sectarian institutions would also benefit.[265]

That open question raises certain difficulties. The *Espinoza* Court criticized the Montana Supreme Court for not having recognized that the no-aid provision was barred by federal guarantees.[266] Allegedly, if the Montana Supreme Court had recognized that the no-aid provision was unconstitutional, then there would have been no basis for striking down the scholarship program.[267] But if the Montana Supreme Court had found that the law was barred by free exercise guarantees, then the Court might have struck down the program (where the legislature had precluded sectarian support) to allow the Montana Legislature to choose between not having a program at all or instead having a scholarship program that did not discriminate against sectarian institutions.[268] But if that is true, then the plaintiffs might not have benefited by bringing the case (because the legislature might have decided not to have any scholarship program at all), which means that the plaintiffs could not meet standing requirements[269] and the Court simply should not have heard the case in the first place.[270]

In addition, the *Locke* Court had upheld the constitutionality of Washington's refusal to fund theology studies in light of that state's constitutional limitations.[271] Further, in *Trinity Lutheran*, the Court had struck down the Department's refusal to award a grant to the church,[272] but had not struck down the Missouri constitutional limitation on funding

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[264] *See id*. at 469.

[265] *See* Strasser, *supra* note 16, at 588 ("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."). *Cf. Espinoza*, 591 U.S. at 534 (Breyer, J., dissenting) ("The State has simply chosen not to fund programs that, in significant part, typically involve the teaching and practice of religious devotion. And 'a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny.'") (citing Regan v. Taxation with Representation of Wash., 461 U.S. 540, 549 (1983)).

[266] *Espinoza*, 591 U.S. at 487–88 ("When the Court was called upon to apply a state law no-aid provision to exclude religious schools from the program, it was obligated by the Federal Constitution to reject the invitation . . . [and recognize] that this was, indeed, 'one of those cases' in which application of the no-aid provision 'would violate the Free Exercise Clause.'") (citing Espinoza v. Montana Dep't of Revenue, 435 P.3d 603, 614 (2018), *rev'd and remanded,* 591 U.S. 464 (2020)).

[267] *See Espinoza*, 591 U.S. at 488 ("[I]n the absence of such a state law violation, the Court would have had no basis for terminating the program.").

[268] *See* Strasser, *supra* note 16, at 588 ("The Montana Supreme Court might find that the scholarship authorization must be struck down (which is what the Montana Supreme Court already did), 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.").

[269] *See* Kyla Tinsley, *Anti-LGBT Legislation in Florida: A Prime Example of States Mentally Harming LGBT Youth*, 44 N. ILL. U. L. REV. 135, 153 (2024) ("[S]peculative harms are not eligible for a remedy, especially for the limited jurisdiction of federal court."); Ricardo Torres Febre, *The Juridification of Environmental Justice*, 93 REV. JUR. U.P.R. 383, 394 (2024) ("[R]edressability is a key requirement for establishing standing. A plaintiff must demonstrate that a favorable decision is likely to alleviate or reduce their injury.").

[270] *Espinoza*, 591 U.S. at 519 (Ginsburg, J., dissenting) ("[T]his Court had no occasion to address the matter.").

[271] *Id*. at 524 (Breyer, J., dissenting) ("Like the State of Washington in *Locke*, Montana has chosen not to fund (at a distance) 'an essentially religious endeavor'—an education designed to 'induce religious faith.'") (citing Locke v. Davey, 540 U.S. at 716, 721 (2004)).

[272] Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 462 (2017) ("The Department's policy expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character.").

sectarian institutions.[273] It is thus somewhat surprising that the *Espinoza* Court chastised the Montana Supreme Court for not having recognized that the state constitutional provision could not pass muster under federal guarantees when the United States Supreme Court had failed to so hold previously.

C. REQUIRING THE PROMOTION OF SECTARIAN EDUCATION AS A PRACTICAL MATTER

After *Espinoza*, legislatures will have to decide whether to afford scholarships to all private colleges rather than only secular ones. Some but not other legislatures might welcome the opportunity to afford scholarships to both secular and sectarian colleges within the state.[274] But the financial implications of *Espinoza*[275] were not nearly as great as the possible implications of a subsequent education decision by the Court.

At issue in *Carson v. Makin* was a Maine policy limiting which religious schools could receive public monetary support.[276] The Maine Constitution provides that students must be afforded a free public education.[277] However, because Maine has many rural communities with low population density,[278] the State has decided to pay tuition at some private schools[279] rather than incur the expense of creating and supporting public schools in some of the less populated areas.[280] But the State did not wish to pay public funds to schools that were "sectarian."[281]

Two families challenged the nonsectarian limitation as a violation of the Religion Clauses.[282] When upholding the Maine limitation, the First Circuit distinguished *Espinoza* by suggesting that it barred status-based religious

[273] Christopher Tyler Prosser, *The Locke Exception: What Trinity Lutheran Means for the Future of State Blaine Amendments*, 46 PEPP. L. REV. 621, 690 (2019) ("The Court's decision in *Trinity Lutheran* casts doubt on the constitutionality of state Blaine Amendments and may eventually lead to such a decision, but the Court has not yet held the Amendments unconstitutional.").

[274] *Cf*. Farhan I. Mohiuddin, *Getting Paid to Discriminate: The Clash Between Religious Autonomy and Principles of Justice and Fairness*, 59 HOUS. L. REV. 973, 1006 (2022) ("The Court's decision forces state legislatures to lift restrictions on funding for private religious schools, if they choose to fund other private schools.").

[275] *See Espinoza*, 591 U.S. at 469 ("The Montana Legislature allotted $3 million annually to fund the tax credits, beginning in 2016.").

[276] Carson *ex rel.* of O. C. v. Makin, 596 U.S. 767, 775 (2022) ("The 'nonsectarian' requirement for participation in Maine's tuition assistance program remains in effect today."); *id.* ("'[A]ffiliation or association with a church or religious institution is one potential indicator of a sectarian school,' but 'it is not dispositive.'") (citing 979 F.3d 21, 37 (1st Cir. 2020), *rev'd and remanded*, 596 U.S. 767 (2022)).

[277] *Id*. at 773 ("Maine's Constitution provides that the State's legislature shall 'require . . . the several towns to make suitable provision, at their own expense, for the support and maintenance of public schools.' Me. Const., Art. VIII, pt. 1, § 1.").

[278] *Id*. ("But Maine is the most rural State in the Union, and for many school districts the realities of remote geography and low population density make those commands difficult to heed.").

[279] *Id*. ("Maine has sought to deal with this problem in part by creating a program of tuition assistance for families that reside in such areas. Under that program, if an SAU [school administrative unit] neither operates its own public secondary school nor contracts with a particular public or private school for the education of its school-age children, the SAU must "pay the tuition . . . . at the public school or the approved private school of the parent's choice at which the student is accepted.") (citing Me. Rev. Stat. Ann., Tit. 20–A, § 5204(4) (Cum. Supp. 2021)).

[280] *Id*. ("[O]f Maine's 260 school administrative units (SAUs), fewer than half operate a public secondary school of their own.").

[281] *Id*. at 775.

[282] *Id*. at 776. ("In 2018, petitioners brought suit against the commissioner of the Maine Department of Education. They alleged that the 'nonsectarian' requirement of Maine's tuition assistance program violated the Free Exercise Clause and the Establishment Clause of the First Amendment.").

discrimination but the Maine limitation was based on how the funds would be used.[283]

In reversing, the *Carson* Court reasoned that *Trinity Lutheran* and *Espinoza* were dispositive.[284] In the Court's view, Maine "pays tuition for certain students at private schools—so long as the schools are not religious."[285] It did not matter that some religious schools could receive state payments,[286] because sectarian schools could not.[287] The *Carson* Court suggested that a state that decides to provide state support to private schools must include sectarian schools:[288] "Regardless of how the benefit and restriction are described, the program operates to identify and exclude otherwise eligible schools on the basis of their religious exercise."[289]

When the *Allen* Court upheld the New York program whereby textbooks were loaned to students at religious schools, the Court denied 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."[290] So, too, when the *Zorach* Court upheld the release time program, it reasoned that the program at issue did not "undertake religious instruction nor blend secular and sectarian education."[291]

The current Supreme Court does not seem worried about technicalities, such as whether state support would be used to promote religious education or the blending of secular or sectarian education. Indeed, the Court would presumably say that a program that takes into account the considerations that were important to the Court in *Allen* and *Zorach* would itself violate free exercise guarantees.[292] The concerns animating Establishment Clause jurisprudence for decades are now simply ignored.[293]

As a practical matter, Maine is forced to fund sectarian education.[294] But a parent forced to send his or her child to a school that teaches a different faith tradition may not view that state of affairs with equanimity,[295] and the Religion Clauses have long been viewed as designed to reduce religious

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[283] *Id*. at 777.

[284] *Id*. at 780 ("*Trinity Lutheran* and *Espinoza* suffice to resolve this case.").

[285] *Id*. at 781.

[286] *Id*. at 775 ("'[A]ffiliation or association with a church or religious institution is one potential indicator of a sectarian school,' but 'it is not dispositive.'") (citing 979 F.3d 21, 37 (1st Cir. 2020), *rev'd and remanded*, 596 U.S. 767 (2022)).

[287] *Id*. ("The 'nonsectarian' requirement for participation in Maine's tuition assistance program remains in effect today.).

[288] *Id*. at 785 ("As we held in *Espinoza*, a 'State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious.'") (citing *Espinoza*, 591 U. S. 464, 487 (2020)).

[289] *Id*. at 789.

[290] Board of Ed. of Central School Dist. No. 1 v. Allen, 392 U.S. 236, 248 (1968).

[291] Zorach v. Clauson, 343 U.S. 306, 314 (1952).

[292] *See* Carson *ex rel.* of O. C. v. Makin, 596 U.S. 767, 789 (2022) ("Maine's 'nonsectarian' requirement for its otherwise generally available tuition assistance payments violates the Free Exercise Clause of the First Amendment. Regardless of how the benefit and restriction are described, the program operates to identify and exclude otherwise eligible schools on the basis of their religious exercise.").

[293] *Id*. at 810 (Sotomayor, J., dissenting) ("Today, the Court leads us to a place where separation of church and state becomes a constitutional violation.").

[294] *Id*. at 809 (Sotomayor, J., dissenting) ("From a practical perspective, today's decision directs the State of Maine (and, by extension, its taxpaying citizens) to subsidize institutions that undisputedly engage in religious instruction.").

[295] *Id*. at 797 (Breyer, J., dissenting) ("State funding of religious activity risks the very social conflict based upon religion that the Religion Clauses were designed to prevent.").

strife.[296] The Court is taking the Nation down a dangerous road,[297] and no one can be sure where this road will eventually go.

D. RELIGIOUS ACTIVITY IN THE PUBLIC SCHOOLS

Traditional modern Establishment Clause jurisprudence prohibits state support of sectarian education and religious activity in the public schools during regular hours. *Trinity Lutheran*, *Espinoza*, and *Carson* together suggest that state funding of sectarian education is no longer a concern under Establishment guarantees and that free exercise guarantees require state support of sectarian education when there is support of private secular education. The view that the Establishment Clause precludes sectarian education in public schools may also soon be viewed as a quaint doctrine that no longer represents constitutional guarantees.

In *Kennedy v. Bremerton School District*,[298] the Court addressed among other issues whether a public high school football coach had violated Establishment guarantees by engaging in prayer on the 50-yard line after a game. The game had not been played during regular school hours, although the coach was a school employee who was at a school event and was performing official duties.[299]

Prior to the 50-yard line prayers that were at issue in this case, the coach had been conducting prayers in the locker room pre- or post-game.[300] When the principal learned of these activities, the coach was told that he had to stop these religious activities with the students because of Establishment guarantees.[301] The coach stopped the locker room prayers[302] but informed the school through counsel that he felt religiously compelled to offer prayers of thanks at midfield after the games.[303]

The District eventually decided not to renew Coach Kennedy's contract.[304] He sued the district for violating his First Amendment rights.[305] The District Court and Ninth Circuit Court of Appeals found for the school district.[306] When reversing the Ninth Circuit,[307] the *Kennedy* Court noted that

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[296] *Cf.* Zelman v. Simmons-Harris, 536 U.S. 639, 725 (2002) (Breyer, J., dissenting) ("In a society as religiously diverse as ours, the Court has recognized that we must rely on the Religion Clauses of the First Amendment to protect against religious strife, particularly when what is at issue is an area as central to religious belief as the shaping, through primary education, of the next generation's minds and spirits."); *id*. at 686 (Stevens, J., dissenting) ("Whenever we remove a brick from the wall that was designed to separate religion and government, we increase the risk of religious strife and weaken the foundation of our democracy.").

[297] Martha M. McCarthy, *State Aid to Religious Schools: The Saga Continues*, 394 ED. L. REP. 13, 29 (2021) ("The Supreme Court seems to be heading in a dangerous direction in its church/state litigation that devalues the Establishment Clause and elevates the Free Exercise Clause above any state efforts to bar the use of state funds for religious purposes or to keep public and sectarian affairs discreet.").

[298] Kennedy v. Bremerton Sch. Dist., 597 U.S. 507 (2022).

[299] *Id.* at 552 (Sotomayor, J., dissenting).

[300] *Id.* at 515 ("[T]he team at times engaged in pregame or postgame prayers in the locker room.").

[301] *Id.* at 516.

[302] *Id.* at 538.

[303] *Id.* at 517 ("On October 14, through counsel, Mr. Kennedy sent a letter to school officials informing them that, because of his 'sincerely-held religious beliefs,' he felt 'compelled' to offer a 'post-game personal prayer' of thanks at midfield.").

[304] *Id.* at 520.

[305] *Id.* ("After these events, Mr. Kennedy sued in federal court, alleging that the District's actions violated the First Amendment's Free Speech and Free Exercise Clauses.").

[306] *Id.* at 521.

[307] *Id.* at 544.

the school district had "sought to restrict Mr. Kennedy's actions at least in part because of their religious character."[308] The School District had claimed that it had been seeking to avoid violating Establishment guarantees,[309] but the Court gave that argument "short shrift."[310]

The *Kennedy* Court explained that the Establishment Clause "must be interpreted by 'reference to historical practices and understandings.'"[311] Which ones? That is not entirely clear, because the Court sometimes takes historical practices seriously and at other times just ignores them.[312]

The Court may have been alluding to history to inform the kind of coercion it believes necessary to trigger Establishment guarantees, noting that the "government may not, consistent with a historically sensitive understanding of the Establishment Clause, 'make a religious observance compulsory'"[313] or "force citizens to engage in 'a formal religious exercise.'"[314] But even that concession must be understood in light of the Court's noting that there was "no evidence that students have been *directly* coerced to pray with Kennedy,"[315] which suggests that the Court may be setting a high bar for even triggering Establishment guarantees. For example, while some students had said that they felt pressured to join the coach in his prayers,[316] the majority discounted that testimony because the students had not been clear enough about where and when they had felt this pressure.[317] Needless to say, this Court does not share the *Engel* sensitivity with respect to the subtle coercion students might feel even if formally given a choice.[318]

The *Kennedy* Court characterized the coach as someone who merely wanted to have a quiet moment on the 50-yard line but just happened to have been noticed by others.[319] But such a description is difficult to reconcile with

[308] *Id.* at 526.

[309] *Id.* at 532 ("[T]he District argues that its suspension of Mr. Kennedy was essential to avoid a violation of the Establishment Clause.").

[310] *See* Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of New Mexico, 458 U.S. 832, 846 (1982); *see also Kennedy*, 597 U.S. at 546 (Sotomayor, J., dissenting) ("The Court now charts a different path, yet again paying almost exclusive attention to the Free Exercise Clause's protection for individual religious exercise while giving short shrift to the Establishment Clause's prohibition on state establishment of religion.").

[311] *Kennedy*, 597 U.S. at 535 (citing Town of Greece, N.Y. v. Galloway, 572 U.S. 565, 576 (2014)).

[312] *See*, *e.g.*, Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 459 (2017) (discussing an historical tradition but then simply rejecting it as representing free exercise guarantees); *see also id*. at 487 (Sotomayor, J., dissenting) (noting that the rule rejected by the Court had "a historical pedigree identical to that of the provision in *Locke*").

[313] *Kennedy*, 597 U.S. at 537 (citing Zorach v. Clauson, 343 U.S. 306, 314 (1952)).

[314] *Id*. (citing Lee v. Weisman, 505 U.S. 577, 589 (1992)).

[315] *Id*. at 520.

[316] *Id*. at 562 (Sotomayor, J., dissenting) ("[S]ome students reported joining Kennedy's prayer because they felt social pressure to follow their coach and teammates.").

[317] *Id*. at 539 ("For all we can tell, the concerns the District says it heard from parents were occasioned by the locker-room prayers that predated Mr. Kennedy's tenure or his postgame religious talks, all of which he discontinued at the District's request."). *But see id*. at 555 (Sotomayor, J., dissenting) ("[S]everal parents reached out to the District saying that their children had participated in Kennedy's prayers solely to avoid separating themselves from the rest of the team.").

[318] *See supra* notes 62–63 and accompanying text.

[319] *See Kennedy*, 597 U.S. at 538 ("Mr. Kennedy's proposal to pray quietly by himself on the field would have meant some people would have seen his religious exercise.").

the coach having made multiple media appearances to announce that he planned to offer a prayer on the 50-yard line after the homecoming game.[320]

In her dissent, Justice Sotomayor explained that this case raised "whether a school district is required to allow one of its employees to incorporate a public, communicative display of the employee's personal religious beliefs into a school event, . . . [even if] part of a longstanding practice."[321] At least one worry raised by *Kennedy* is whether such personal "compelled" religious displays by school employees must be permitted during the school day, especially if there is no formal coercion requiring a student to take part. While one can only imagine the facts of the Court's next case involving school employees engaging in prayer while performing official duties, one can be confident that the analysis and, quite possibly, the result will be utterly incompatible with modern Establishment Clause jurisprudence.

CONCLUSION

Modern Establishment Clause jurisprudence has evolved over the past several decades. The Court has attempted to balance numerous considerations because the "First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."[322] Regrettably, the current Supreme Court has made a mockery of modern Establishment jurisprudence so that neither courts nor commentators can confidently describe what the Establishment Clause requires, permits, and prohibits.

The Court's current approach is especially dangerous in a very religiously diverse Nation, like ours, with a multitude of sincerely held religious beliefs and practices. It would be unsurprising for various individuals to feel religiously compelled to act in ways that are anathema to the sincerely held religious beliefs of others, and the current Court has not manifested an understanding or appreciation of the kinds of conflicts that might arise if we continue down the path the Court has created. The Court must stop issuing decisions that ignore constitutional guarantees and good public policy before the Nation suffers the foreseeable consequences.

[320] *See id*. at 551 (Sotomayor, J., dissenting) ("Before the homecoming game, Kennedy made multiple media appearances to publicize his plans to pray at the 50-yard line, leading to an article in the Seattle News and a local television broadcast about the upcoming homecoming game.").

[321] *Id*. at 558 (Sotomayor, J., dissenting).

[322] Epperson v. Arkansas, 393 U.S. 97, 104 (1968).