NOT CONGRESS, BUT THE JUDICIARY: HOW THE ROBERTS COURT'S RELIGION CLAUSE DECISIONS ARE CREATING AN ESTABLISHMENT OF RELIGION

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The text of the First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[1] The first two of these clauses, commonly known as the Establishment Clause and the Free Exercise Clause, deal with freedom of religion. The Establishment Clause reflects the widespread consensus at the time of independence that there should be no nationally established church.[2] The Free Exercise Clause was designed to protect both the beliefs and the actions associated with an individual's religion.[3] Together, these two clauses were intended to guard against religious discrimination and persecution. However, from the very beginning, courts have "struggled to find a balance between the religious liberty of believers, who often claim the right to be excused or 'exempted' from laws that interfere with their religious practices, and the interests of society reflected in those very laws."[4]

This paper will explore the natural tension between the Religion Clauses and how the Supreme Court has succeeded and failed in balancing that tension. Part I will examine the original understanding of the Religion Clauses and what history can tell us about how we should interpret an "establishment of religion." Part II will then trace the Court's Religion Clause jurisprudence from the start of the modern era through the inception of the Roberts Court, attempting to identify a reliable definition of an "establishment." Part III will focus on the Roberts Court's Free Exercise jurisprudence and related case law, arguing that the Court has manipulated this jurisprudence to suit its predominantly conservative Christian leanings. Finally, the

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[1] U.S. CONST. amend. I.

[2] Marci A. Hamilton & Michael McConnell, *The Establishment Clause*, INTERACTIVE CONST., https://constitutioncenter.org/interactive-constitution/interpretation/amendment-i/interps/264 (last visited April 16, 2021).

[3] Frederick Gedicks & Michael McConnell, *The Free Exercise Clause*, INTERACTIVE CONST., https://constitutioncenter.org/interactive-constitution/interpretation/amendment-i/interps/265 (last visited April 16, 2021).

[4] *Id.*

paper will conclude that the current Court's jurisprudence amounts to an inappropriate establishment of religion.

I. HISTORICAL CONTEXT OF THE DRAFTING OF THE RELIGION CLAUSES AND THE INTENT BEHIND THEM

From the moment the first European colonists arrived in the present-day United States, they brought along complicated beliefs about the relationship between government and religion. Many of these colonists came to the new continent to flee religious persecution in Europe, yet established new systems of religious oppression in their new colonies, simply substituting their own religion for the one they had fled.[5] Linking government authority to a specific religion through a state establishment of that religion was a deeply engrained practice for these colonists, as such establishment had been the practice in Europe for centuries.[6] Yet the colonists also had reason to want to eradicate such establishment in their new home: they had witnessed centuries of "violent, destabilizing, and oppressive battles over the relationship between government and religion" that had toppled monarchies and resulted in the death and persecution of an appallingly high percentage of the population.[7] The Virginia Declaration of Rights was a clear example of the tension at the time between claims of religious tolerance and assertions of authority by the religious group in power—in one part, the document declared that "all men are entitled to the free exercise of religion," and then in another it went on to state that all citizens had a duty to "practice *Christian* forbearance, love, and charity towards each other."[8]

In spite of this tension, the overall trend during the period was towards greater religious tolerance and freedom. On the eve of the Revolutionary War, nine of the thirteen colonies had a state establishment of religion.[9] However, the changes brought about by the war led five of those colonies to disestablish "immediately, and with little discussion."[10] By 1800, only three states had established churches remaining.[11] Every one of the

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[5] Vincent J. Samar, *Religion/State: Where the Separation Lies*, 33 N. ILL. U. L. REV. 1, 3–4 (2012).
[6] *See* HOWARD GILLMAN & ERWIN CHEMERINSKY, THE RELIGION CLAUSES: THE CASE FOR SEPARATING CHURCH AND STATE 23–24, 38 (2020).
[7] *Id.* at 21.
[8] Samar, *supra* note 5, at 6 (emphasis added).
[9] John K. Wilson, *Religion Under the State Constitutions, 1776-1800*, 32 J. CHURCH & STATE 753, 754 (1990) (defining establishment of religion in terms of direct tax aid for a church).
[10] *Id.* at 755.
[11] *Id.* at 773.

nineteen state constitutions drafted between 1776 and 1800 included a provision for the protection of religious freedom, and the abundant changes to state constitutions throughout the founding period demonstrated a clear trend of expanding religious liberty.[12]

While the Founders increasingly agreed that there should be no formal establishment of religion in the new nation, discrepancies remained as to what exactly they defined as an establishment and how the line separating government and religion should be drawn. Many of the colonists had fled from a government that appointed and paid religious leaders and passed laws mandating how its subjects worshipped.[13] The Founders viewed varying levels and combinations of these actions as an "establishment," with debates arising over individual components such as financial aid to churches, religious tests for public office, and religious exemptions from public laws and duties such as military service. These debates continued through the drafting of the Bill of Rights and the early years of independence.[14]

Three distinct schools of thought, represented by three of the most relevant and well-known Founders, influenced the drafters of the Bill of Rights with regards to religion.[15] Roger Williams, known as the father of religious freedom in the United States,[16] advocated a view of "positive toleration" which required that the government "foster[] a climate conducive to all religion."[17] His primary concern was that government entanglement with religion would "corrupt and undermine religion."[18] Where Williams saw separation as a means of protecting the church from the state, Thomas Jefferson saw separation as a means of protecting the state from the church.[19] While Jefferson supported freedom and toleration for diverse religious doctrines and exercises, he did not believe that religious practitioners had a right to exemptions from general social

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[12] *Id.* at 768.
[13] GILLMAN & CHEMERINSKY, *supra* note 6, at 23–24.
[14] *Id.* at 36 ("Debates about the proper relationship between church and state continued during the drafting of the Bill of Rights and the early experiences of governing under the new Constitution.").
[15] LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1158–59 (2d ed. 1988).
[16] GILLMAN & CHEMERINSKY, *supra* note 6, at 25.
[17] TRIBE, *supra* note 15, at 1159.
[18] GILLMAN & CHEMERINSKY, *supra* note 6, at 60.
[19] TRIBE, *supra* note 15, at 1159.

duties.[20] James Madison believed that both the church and the state were better off if they were each free of the other's control and influence.[21] He did not give religion a special status, but rather saw religion as one of multiple types of "factions" that needed to be protected, and insisted that "in a free government the security for civil rights must be the same as that for religious rights."[22]

While historical analyses of the First Amendment typically focus on the political leaders of the time, there is, of course, one other powerful group whose ideas influenced the development of the nation: the clergy. As the Founders shaped the new country through the Revolution, the Articles of Confederation, and the Constitutional Convention, many members of the clergy addressed the relationship between religious conviction and the rule of law directly in their sermons.[23] Many modern scholars have pointed to the prominence of Christianity at the time of the drafting of the Constitution as support for their argument that more mandatory religious accommodation is required. However, the accumulated sermons of the time instead show a general belief that true liberty could only be achieved by widespread obedience to democratic laws, and that Christians had a duty to the public good or the good of the whole that must be considered when deciding whether to follow the law.[24]

While it left much open to debate, the disestablishment/free exercise framework that the drafters of the First Amendment ultimately embraced resolved two fundamental issues: (1) it rejected the long-standing European practice of connecting governmental authority to a specific religion, and (2) it maintained that while the government should be secular, the presence of religion in society was beneficial.[25] At face value, the Religion Clauses would therefore seem to work together to accomplish Madison's goal of preserving everyone's civil and religious rights: the Free Exercise Clause preserves individuals' rights to practice a religion if they so choose, while the Establishment Clause prevents the religious majority—via the government—from forcing their beliefs or practices on others.

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[20] GILLMAN & CHEMERINSKY, *supra* note 6, at 40.
[21] TRIBE, *supra* note 15, at 1159.
[22] GILLMAN & CHEMERINSKY, *supra* note 6, at 60–61.
[23] Marci A. Hamilton, *Religion, the Rule of Law, and the Good of the Whole: A View from the Clergy*, 18 J.L. & POLITICS 387, 392 (2002).
[24] *Id.* at 395.
[25] GILLMAN & CHEMERINSKY, *supra* note 6, at 60–61.

However, the Supreme Court has acknowledged that in applying them, it has "struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other."[26] This tension arises between a requirement of government neutrality derived from the Establishment Clause and the idea that under the Free Exercise Clause the government must accommodate some level of religious practice.[27] The Court has often attempted to ease this perceived tension between the clauses by holding that certain accommodations of religious practices mandated by the Free Exercise Clause do not amount to establishing religion in a way that violates the Establishment Clause.[28]

II. THE SUPREME COURT'S ATTEMPTS TO BALANCE THE RELIGION CLAUSES AND DEFINE AN "ESTABLISHMENT OF RELIGION"

While the Court has historically treated the two Religion Clauses independently, developing separate jurisprudence for each, the tension between them makes it impossible to truly interpret one without regard to the other. Defining an improper "establishment of religion" cannot be done in a vacuum—it requires interpreting and balancing both clauses. The Supreme Court's attempts to do so have given us an abundance of case law, but ultimately it is not clear that the Justices have been any more successful in agreeing on a clear, consistent definition of an establishment than the Founders were.

Two primary theories color the Court's Religion Clause jurisprudence.[29] The first is the accommodationist theory. It holds that the Establishment Clause was intended to ensure that religious groups were advanced only by voluntary followers, not by government bolstering or support.[30] Accommodationist theory interprets the Establishment Clause as allowing for religion in government and even government support for religion, so long as the government does not coerce religious

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[26] Walz v. Tax Commission, 397 U.S. 664, 668–69 (1970).
[27] *Amdt1.1.3 Relationship Between Establishment Clause and Free Speech Clause*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-1-3/ALDE_00001021/#ALDF_00005929 (last visited April 16, 2021).
[28] *Id.*
[29] *See* TRIBE, *supra* note 15, at 1160.
[30] *Id.* at 1160–61 (referring to accommodationism as voluntarism).

participation or favor one religion over another.[31] With regards to the Free Exercise Clause, accommodationist theory supports more exemptions for religious practitioners and is generally associated with the "least restrictive means" or strict scrutiny approach.[32] Thus, the central premise of accommodationist theory has been characterized by some scholars as the idea that "religion is different–that is, better than–other forms of human belief and expression."[33] This seems to directly contradict with Madison's belief that religious rights and other civil rights should be equally protected.

The second theory, separatism, reflects the Madisonian view that "both religion and government function best if each remains independent of the other."[34] It interprets the Establishment Clause as being intended to build a strong wall between church and state, with no government entanglement with religion.[35] However, this does not mean no interaction between government and religion whatsoever, as such strict separationism would be impossible.[36] Rather, scholars have defined separation under the Establishment Clause as requiring that the government not create any religious incentives or effects.[37] With regards to the Free Exercise Clause, it requires that the government "not act with animus toward religion" but does not provide for special religious exemptions to general laws.[38] In particular, it emphasizes that free exercise does not give religious individuals the right to inflict injury on or discriminate against others.[39] Separationist doctrine has interpreted the Religion Clauses as prohibiting favoritism not only of one religion over another, but also of religion over non-religion.[40]

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[31] GILLMAN & CHEMERINSKY, *supra* note 6, at 12.
[32] *Id.* at 14; *see also* Frank S. Ravitch, *A Funny Thing Happened on the Way to Neutrality: Broad Principles, Formalism, and the Establishment Clause*, 38 GA. L. REV. 489, 537 (2004) ("Accommodationist arguments are most common under the Free Exercise Clause. In that context, accommodationism would support exemptions from laws of general applicability.").
[33] Stephen G. Gey, *Why is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75, 110 (1990).
[34] TRIBE, *supra* note 15, at 1161.
[35] GILLMAN & CHEMERINSKY, *supra* note 6, at 12.
[36] Ravitch, *supra* note 32, at 535–36.
[37] *See, e.g.*, John H. Garvey, *What's Next After Separationism?*, 46 EMORY L.J. 75, 75 (1997) ("Separationism is a theory about cause and effect. *Lemon v. Kurtzman* states the rule: the government must not cause religious effects." (footnotes omitted)).
[38] GILLMAN & CHEMERINSKY, *supra* note 6, at 13.
[39] *Id.*
[40] *See e.g.*, Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947).

Of course, these theories are an oversimplification, as the interpretations and beliefs of all of the Justices fall on a spectrum, and the modern Court's jurisprudence cannot easily be separated into accommodationist or separationist decisions.[41] The Court has fluctuated between leaning towards one or the other, often falling at various points on the spectrum between them.[42] Further, some scholars have argued that the Court's jurisprudence is best understood by dividing the cases into sub-categories and applying the theories to them individually.[43] For example, under the Establishment Clause, the Court may have taken a strict separationist approach to school prayer cases but an accommodationist approach to governmental regulations.[44] Understanding these theories and tracing how they have been applied is nonetheless important to defining what constitutes an establishment of religion. It helps us draw the line between accommodating free exercise and protecting against unconstitutional establishments and see how that line has moved over time.

In its early religion cases, the Supreme Court leaned towards a separationist approach to both clauses.[45] The Supreme Court decided its first major case on the Free Exercise Clause in 1879.[46] This case, *Reynolds v. United States*,[47] dealt with a member of the Church of Jesus Christ of Latter-Day Saints, commonly known as the Mormon Church, who was charged with violating a federal statute prohibiting polygamy and raised as a defense "that it was an accepted doctrine of [his] church 'that it was the duty of male members of said church, circumstances permitting, to practice polygamy.'"[48] The Court held that under the Free Exercise Clause, "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were

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[41] *See* GILLMAN & CHEMERINSKY, *supra* note 6, at 15.
[42] *See id.*
[43] *See, e.g.*, William P. Marshall, *"We Know It When We See It:" The Supreme Court Establishment*, 59 S. CAL. L. REV. 495, 540 (1986) ("If establishment cases are divided into the three specific and distinct contexts present in the case law ((1) the public schools, (2) governmental practices and regulatory programs, and (3) aid to parochial education) a relatively clear and defensible jurisprudence emerges."); Ravitch, *supra* note 32, at 536 ("Thus, separation would be used in the school prayer context, the public school curriculum context, and perhaps the direct aid context, but not in equal access or indirect aid cases. This is not too far from the current situation.").
[44] *See* Marshall, *supra* note 43, at 541, 545.
[45] *See* Garvey, *supra* note 37, at 78 ("Separationism was the rule in Establishment Clause cases for three or four decades . . . .").
[46] GILLMAN & CHEMERINSKY, *supra* note 6, at 98.
[47] 98 U.S. 145 (1879).
[48] *Id.* at 161–63.

in violation of social duties or subversive of good order" and unanimously upheld Mr. Reynolds' conviction.[49] In doing so, it cited Thomas Jefferson's statement that the religion clauses "buil[t] a wall of separation between church and State" as "an authoritative declaration of the scope and effect of the amendment."[50] This distinction between belief and action ignored the fact that the text clearly protects religious "exercise" but was a response to the concern that allowing believers to claim religion any time they did not want to obey a general law would undermine the value of a fair government.[51] The Court took some steps in subsequent cases to clarify that while religion did not give a right to be exempted from general social duties, religious disciplines or exercise were protected.[52] However, this approach was not otherwise challenged until the early 1960s.[53]

The first case in modern Establishment Clause jurisprudence was *Everson v. Board of Education*.[54] Justice Black, widely considered one of the main authors of the Court's historical analysis of the Religion Clauses,[55] wrote in *Everson* that "[t]he First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach."[56] However, the Court went on to hold that reimbursements to parents for their children's public transportation fares to and from school were not such a breach, even when that transportation was to and from religious schools.[57] It did so on the ground that the state did not provide money to or in any way support the religious schools, it merely offered "a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools."[58] Nonetheless, the Court in *Everson* exhibited strong separationist ideas, emphasizing that the Establishment Clause prohibits the government not only from aiding one religion or preferring one religion over another, but also from aiding *all* religions.[59]

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[49] *Id.* at 164, 168.
[50] *Id.* at 164.
[51] Gedicks & McConnell, *supra* note 3.
[52] GILLMAN & CHEMERINSKY, *supra* note 6, at 100–02.
[53] *Id.* at 102.
[54] 330 U.S. 1 (1947); County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 656 (1989) (Kennedy, J., concurring in part) (identifying *Everson* as the first case in the Court's modern Establishment Clause jurisprudence).
[55] *See* TRIBE, *supra* note 15, at 1160.
[56] *Everson*, 330 U.S. at 18.
[57] *Id.* at 3, 18.
[58] *Id.* at 18.
[59] *Id.* at 15.

In the 1960s and 70s, the Court maintained its separationist approach to the Establishment Clause but shifted to applying an accommodationist approach to the Free Exercise Clause, providing more protection for religious exemptions.[60] The seminal Establishment Clause case during this time was *Lemon v. Kurtzman*,[61] in which the Court created a three-part test for Establishment Clause violations. The test was subject to almost immediate scrutiny, but nonetheless remained the dominant rule for Establishment Clause problems for decades,[62] and has been described as "the very symbol of strict separation."[63] It stated that to avoid a violation, a law or government practice must (1) have a secular purpose, (2) neither advance nor inhibit religion, and (3) not create "an excessive government entanglement with religion."[64] This three-part test, which has come to be known as the *Lemon* test, attempted to combine and reconcile three previously distinct approaches to Establishment Clause problems: the secular purpose doctrine originating from *Abington School District v. Schempp*,[65] the principal or primary effects doctrine from *Board of Education v. Allen*,[66] and the excessive entanglement test from *Walz v. Tax Commission*.[67] Applying the new test, the Court struck down two state statutes that provided financial aid to private schools, finding that they created an "excessive entanglement" with religion because they provided direct aid to or operated for the benefit of religious schools.[68]

Two years later, the Court decided *Committee for Public Education and Religious Liberty v. Nyquist*,[69] holding that series of state laws which provided financial aid to private schools through a variety of means violated the effects prong of the

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[60] GILLMAN & CHEMERINSKY, *supra* note 6, at 16; *see also* Garvey, *supra* note 37, at 78 ("Separationism was the rule in Establishment Clause cases for three or four decades . . . .").
[61] 403 U.S. 602 (1971).
[62] Geoffrey McGovern, Lemon v. Kurtzman I (*1971*), THE FIRST AMENDMENT ENCYC., https://mtsu.edu/first-amendment/article/437/lemon-v-kurtzman-i (last visited April 16, 2021).
[63] Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 56 (1997).
[64] *Lemon*, 403 U.S. at 612–13 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).
[65] 374 U.S. 203 (1963).
[66] 392 U.S. 236 (1968).
[67] 397 U.S. 664 (1970); McGovern, *supra* note 62.
[68] *Lemon*, 403 U.S. at 613–14.
[69] 413 U.S. 756 (1973).

Lemon test.[70] In doing so, it again rejected the accommodationist idea that coercion was a necessary element of an Establishment Clause claim, citing *Abington*.[71]

Meanwhile, the Court made a significant shift towards recognizing and protecting religious exemptions from general laws, thus adopting an accommodationist approach to the Free Exercise Clause.[72] In *Braunfeld v. Brown*,[73] Chief Justice Warren maintained much of the beliefs-not-actions language from *Reynolds* but stated that while laws with an express purpose or effect to advance or oppose a religion are unconstitutional, "if the State regulates conduct by enacting a general law . . . to advance the State's secular goals, the statute is valid despite its indirect burden on religious observances unless the State may accomplish its purpose by means which do not impose such a burden."[74] This language suggested a "least restrictive means" test.[75] Justice Brennan, while dissenting on the result with regards to the Free Exercise Clause, did so by more explicitly laying out "the typical 'strict scrutiny/compelling state interest/least restrictive means' test that is normally associated with the protection of fundamental liberties in the modern era of Supreme Court decision making."[76]

Just two years later, in a majority opinion authored by Justice Brennan, the Court officially adopted this view, holding that any general law imposing an indirect burden on religion was subject to "strict scrutiny."[77] The belief-action distinction was thus replaced by a compelling-interest test, which said that the government could not enforce even a neutral, generally applicable law that interfered with religious exercise unless there was a "compelling" interest at stake.[78] However, the powerful protections suggested by this test never fully materialized,[79] and in 1972, the Court's opinion in *Wisconsin v. Yoder*[80] highlighted a number of problems with this approach.[81]

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[70] *Id.* at 759, 798.
[71] *Id.* at 786 (citing Abington Sch. Dist. v. Schempp, 374 U.S. 203, 222–23 (1963).
[72] *See* GILLMAN & CHEMERINSKY, *supra* note 6, at 16.
[73] 366 U.S. 599 (1961).
[74] *Id.* at 607.
[75] GILLMAN & CHEMERINSKY, *supra* note 6, at 103.
[76] *Id.* at 103–04; *Braunfeld*, 366 U.S. at 610–16 (Brennan, J., dissenting).
[77] GILLMAN & CHEMERINSKY, *supra* note 6, at 104–05; Sherbert v. Verner, 374 U.S. 398 (1963).
[78] Gedicks & McConnell, *supra* note 3.
[79] *Id.*
[80] 406 U.S. 205 (1972).
[81] GILLMAN & CHEMERINSKY, *supra* note 6, at 107.

Yoder dealt with members of the Old Order Amish religion and the Conservative Amish Mennonite Church who refused to send their children to school after they completed the eighth grade and were charged with a violation of Wisconsin's compulsory school attendance law for children under the age of sixteen.[82] Overturning their conviction, the majority opinion found that forcing the Amish community to send their children to two additional years of schooling would have a drastic impact on their religious exercise and emphasized the "independence and successful social functioning of the Amish community" as a reason that compelling the additional schooling was not necessary.[83] This led Justice Douglas to declare in dissent that the "emphasis of the Court on the 'law and order' record of this Amish group of people is quite irrelevant. A religion is a religion irrespective of what the misdemeanor or felony records of its members might be."[84] The *Yoder* opinion thus had "the potential of embroiling the justices in very complicated and controversial assessments of the value of certain religious practices and the importance of various government interests."[85] Nonetheless, the Court continued to apply strict scrutiny for at least sixteen more years.

In the late 1980s and early 90s, the Court's Free Exercise jurisprudence reversed directions, shifting back to a separationist approach.[86] It began with a loosening of the *Sherbert/Yoder* approach in *Lyng v. Northwest Indian Cemetery Protective Association*[87]. In *Lyng*, the Court held that there was no need for a "'compelling justification' when evaluating the 'incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs.'"[88] This case, which dealt with road construction and timber harvesting in "sacred areas" of a national forest,[89] the destruction of which would "virtually destroy" the ability of certain Native American tribes to practice their religion,[90] represented exactly the sort of circumstances that proponents of the strict scrutiny approach argued it would protect against.

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[82] *Yoder*, 406 U.S. at 207.
[83] *Id.* at 218–19, 226–27.
[84] *Id.* at 246 (Douglas, J., dissenting).
[85] GILLMAN & CHEMERINSKY, *supra* note 6, at 108.
[86] *Id.* at 16.
[87] 485 U.S. 439 (1988).
[88] GILLMAN & CHEMERINSKY, *supra* note 6, at 110 (quoting *Lyng*, 485 U.S. at 450–51).
[89] *Lyng*, 485 U.S. at 442.
[90] *Id.* at 451.

However, by relegating the destruction of these tribes' ability to practice their religion to merely an "incidental effect," the Court failed to do so in this case.

Two years later, the Court officially abandoned the strict scrutiny approach in *Employment Division v. Smith*.[91] In *Smith*, the Court addressed the issue of whether the Free Exercise Clause permits a state "to include religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug, and . . . to deny unemployment benefits to persons dismissed from their jobs because of such religiously inspired use."[92] Upholding the denial of benefits, the Court baldly stated "[w]e have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[93] Rather, the Court explained, it had only struck down a neutral, generally applicable law as applied to religiously motivated acts when other constitutional protections—not just the Free Exercise Clause—were also implicated.[94] Although *Smith* did not return to the belief-action doctrine that held sway in Free Exercise cases for nearly a century, it echoed the same concerns that religious exemptions permit an individual "to become a law unto himself."[95]

In 2004 the Court addressed the issue of whether a state, pursuant to its own constitutional provisions, could deny funding for religious instruction that would be permissible under the Establishment Clause without violating the Free Exercise Clause in *Locke v. Davey*.[96] The answer to that question was a resounding yes, with the Court declaring that treating funding for religious education in preparation for ministry differently than education for other professions was not evidence of impermissible hostility towards religion.[97] On the contrary, the Court found that avoiding funding a religious education was a key antiestablishment interest.[98] The case revolved around a state scholarship program that assisted the top students in the state with expenses related to an in-state postsecondary education.[99] Pursuant to a provision of the state constitution, the scholarship

[91] 494 U.S. 872 (1990).
[92] *Id.* at 874.
[93] *Id.* at 878–79.
[94] *Id.* at 879–82.
[95] GEDICKS & MCCONNELL, *supra* note 3 (quoting Reynolds v. United States, 98 U.S. 145 (1879)).
[96] 540 U.S. 712, 719.
[97] *Id.* at 721.
[98] *Id.* at 722.
[99] *Id.* at 715–16.

could not be used to pursue a degree in devotional theology.[100] A student pursuing a devotional theology degree challenged the denial of his scholarship under the Religion and Free Speech Clauses.[101] A panel of the Ninth Circuit concluded that the State had singled out religion for unfavorable treatment, and the exclusion must therefore be narrowly tailored to achieve a compelling state interest.[102] The Ninth Circuit found that the State's interests in not creating an establishment were not compelling, and thus the exclusion of the student from the scholarship program was unconstitutional.[103] The Supreme Court reversed, emphasizing that there are some accommodations for religion which would be permissible under the Establishment Clause but are not required by the Free Exercise Clause.[104]

Although the *Lemon* test remained the dominant rule for Establishment Clause cases throughout the 1990s and early 2000s, a closer look at the way it was applied reflects the start of a shift in this jurisprudence during that time as well. Historically,

> [m]ost Justices have hesitated to pursue a rigorous application of the accommodation principle in the [E]stablishment [C]lause context because it would eviscerate the notion of separation of church and state, which a working majority on the Court has considered central to the [E]stablishment [C]lause ever since [it] was originally articulated in Everson.[105]

However, a minority of Justices began infusing the accommodationist approach into Establishment Clause thinking as early as the 1980s.

At first glance, this rather tumultuous and inconsistent history of Supreme Court jurisprudence seems to give us little guidance on how we should or must define an establishment of religion. Indeed, the Court's Establishment Clause cases in the modern era have been described as "legendary in their

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[100] *Id.*
[101] *Id.* at 718.
[102] *Id.*
[103] *Id.*
[104] *Id.* at 718–19.
[105] Gey, *supra* note 33, at 97.

inconsistencies."[106] However, there are a few not-insignificant themes we can pull from the chaos.

The first is that an establishment involves government action that either creates incentives to conform or causes religious effects. Prior to the Roberts Court's inception, a majority of the Court never favored an accommodationist approach to the Establishment Clause.[107] Rather, the Court has generally followed a separationist approach. As discussed above, a separationist approach to the Establishment Clause focuses on the idea that the government must not cause religious effects.[108] It interprets the Religion Clauses as prohibiting not just favoritism of one religion or another, but also religion over non-religion.

The second is that rights under the Religion Clauses are not absolute. A number of ideas follow from this principle. For one, freedom of religion does not always entail treating religious entities exactly the same as secular entities. Treating religious organizations differently than secular organizations is sometimes necessary to avoid creating an establishment, and thus not inherently impermissible animus to religion. This is particularly true in the context of preventing the key establishment fears of the Founders: sponsorship, financial support, and active involvement of the sovereign in religious activity. Thus, differentiating religious organizations from similar secular organizations with regards to qualifications for receiving grants is not animus to religion, but rather reflects the government's important interest in not providing direct financial support to a religious organization. For another, there are numerous government interests (in addition to not creating an establishment) that must be balanced against accommodation of religion. These interests include the interest in maintaining a peaceful, organized society through generally applicable laws

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[106] Marshall, *supra* note 43, at 495.

[107] *See* County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 627–28 (O'Connor, J., concurring in part and concurring in the judgment) ("[T]his Court has never relied on coercion alone as the touchstone of the Establishment Clause analysis."); GILLMAN & CHEMERINSKY, *supra* note 6, at 52–54 (stating that under an accommodation/equality approach the government violates the Establishment Clause only if it coerces religious participation, establishes a church, or favors some religions over others, and that Justices O'Connor and Souter in *County of Allegheny v. ACLU, Greater Pittsburgh Chapter* strongly argued that equality alone has never been the Establishment Clause test); Garvey, *supra* note 37 ("Separationism was the rule in Establishment Clause cases for three or four decades . . . .").

[108] Garvey, *supra* note 37 ("Separationism is a theory about cause and effect. *Lemon v. Kurtzman* states the rule: the government must not cause religious effects." (footnotes omitted)).

and the interest in protecting the safety and civil rights of third parties.

From these patterns, we can begin to create a coherent definition of an establishment of religion: an unconstitutional establishment is any government action that causes religious effects by incentivizing a specific religion, or any religion over non-religion. Some religious exemptions may be provided without creating an establishment, but not when they conflict with the public interest or cause broad third-party harms, as this favors religion over non-religion. Further, while express animus towards one religion may create an establishment of another, this does not include treating religious institutions differently in the name of avoiding an establishment.

III. ANALYSIS OF THE ROBERTS COURTS' DECISIONS AS CREATING AN ESTABLISHMENT OF RELIGION

Although the text of the First Amendment provides only that "*Congress* shall make no law respecting an establishment of religion,"[109] the Supreme Court has interpreted the Fourteenth Amendment as extending the First Amendment, including the Religion Clauses, to the states.[110] Subsequently, courts have upheld Establishment Clause challenges against government actions implemented by a wide variety of branches and government actors, ranging from state and federal legislation to policies drafted and implemented by executive branch agencies to courthouse decorations ordered by state justices.[111] Therefore, this section will examine the Roberts Court jurisprudence as law creating an establishment of religion.

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[109] U.S. CONST. amend. I (emphasis added).
[110] Everson v. Bd. of Educ., 330 U.S. 1, 8 (1947).
[111] *See, e.g.*, Lee v. Weisman, 505 U.S. 577 (1992) (finding that a school board policy of allowing principals to invite members of the clergy to offer prayers as part of formal graduation ceremonies violated the Establishment Clause); County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573 (finding, *inter alia*, that county violated the Establishment Clause with nativity scene at county courthouse); Lemon v. Kurtzman, 403 U.S. 602 (1971) (finding that state statutes providing financial aid to religious schools violated the Establishment Clause); American Atheists, Inc. v. Duncan, 637 F.3d 1095 (10th Cir. 2010) (finding that state officials who authorized the use of the state highway patrol logo on crosses along the roadway violated the Establishment Clause); Glassroth v. Moore, 335 F.3d 1282 (11th Cir. 2003) (finding against the Chief Justice of the Alabama Supreme Court in an Establishment Clause challenge against his installation of a religious monument in the Alabama State Judicial Building).

In one significant line of cases, the Roberts Court addresses Free Exercise exemptions to general anti-discrimination laws. The first two, *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC.*[112] and *Our Lady of Guadalupe School v. Morrissey-Berru*,[113] use an overbroad interpretation of the Establishment Clause to create an exemption to neutral laws of general applicability even under *Smith*. In *Smith*, the Court held that the Free Exercise Clause did not require religious exemptions to generally applicable laws enacted with a secular purpose, simply because they imposed an incidental burden on religious beliefs.[114] Although its scope has been significantly limited by statutory and judicial carveouts, *Smith* remains the binding precedent in cases decided under the Free Exercise Clause, such as *Hosanna-Tabor* and *Our Lady of Guadalupe*.

The one exception to the rule against religious exemptions is the ministerial exception, which prevents the government from interfering in the hiring, training, or firing of ministers on Establishment Clause grounds.[115] In *Hosanna-Tabor*, the Court drastically expanded this previously narrow doctrine, applying it to an elementary school teacher in a religious school who took a leave of absence after being diagnosed with narcolepsy and was subsequently fired.[116] The teacher filed a charge for wrongful termination in violation of the Americans with Disabilities Act, but the school raised a Free Exercise defense, claiming that she was a minister or "called teacher" who had been fired because "her threat to sue the Church violated [its] belief that Christians should resolve their disputes internally."[117] *Our Lady of Guadalupe* extended this holding to teachers at Catholic elementary schools who had less religious training than the teacher in *Hosanna-Tabor* and did not carry any title that designated them as "ministers" or other than lay teachers.[118] One of these teachers had filed suit under the Age Discrimination in Employment Act, while the other alleged that she was fired because she requested a leave of absence due to a breast cancer diagnosis.[119] Together, these cases take any employer that can claim to be a religious organization outside the realm of neutral anti-discrimination laws and prevent the government from

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[112] 565 U.S. 171 (2012).
[113] 140 S. Ct. 2049 (2020).
[114] Emp. Div. v. Smith, 494 U.S. 872, 878–79 (1990).
[115] *See Hosanna-Tabor*, 565 U.S. at 188.
[116] *Id.* at 190–92.
[117] *Id.* at 178–80.
[118] *Our Lady of Guadalupe*, 140 S. Ct. at 2055.
[119] *Id.* at 2058–59.

protecting any employees of such organizations, no matter what their job description or grievance.

Recently, the Court decided yet another highly contentious Free Exercise case—*Fulton v. City of Philadelphia*.[120] *Fulton* addressed whether the City of Philadelphia violated the Free Exercise Clause by refusing to renew its foster care contract with a private foster care agency, Catholic Social Services (CSS), unless CSS agreed to certify same-sex couples as foster parents.[121] Philadelphia's foster care system relies on its relationships with private foster care agencies like CSS, with whom it enters standard annual contracts.[122] State law grants these agencies the authority to certify prospective foster families and provides statutory criteria which the agencies must consider in certifying families.[123] When the Department of Human Services needs to place a child in foster care, it sends a request to the contracted agencies, who report whether any of their certified families are available, and then places the child with what it views as the most suitable of those available families.[124] After a newspaper quoted a spokesman for the Archdiocese of Philadelphia as saying that CSS would not certify prospective foster parents in same-sex marriages, an inquiry was launched, and the Department stated that it would no longer refer children to CSS because CSS's refusal to certify same-sex couples violated the non-discrimination requirements of its contract with the City and the City's Fair Practices Ordinance.[125]

The District Court held that the non-discrimination requirements of CSS's contract and the Fair Practices Ordinance were neutral and generally applicable under *Employment Division v. Smith* and denied preliminary relief.[126] The Third Circuit affirmed.[127] In petitioning the Supreme Court for certiorari, CSS not only challenged the Third Circuit's holding that the City's actions were permissible under *Smith*, but also asked the Court to reconsider *Smith*.[128] Instead, the six-justice majority held that the case fell outside *Smith* because the policies at issue were not

[120] 141 S. Ct. 1868 (2021).
[121] *Id.* at 1874.
[122] *Id.* at 1875.
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *Id.* at 1876.
[127] *Id.*
[128] *Id.*

neutral and generally applicable.[129] It did so by referencing the "most favored nation" approach to religious exemptions, which states that a law cannot be considered neutral and generally applicable if it contains any categorical exemptions that are comparable to the requested religious exemption. This suggests a return to the pre-*Smith* accommodationist approach of broad recognition for religious exemptions, severely limiting the applicability of *Smith* without explicitly overturning it.

In each of these three cases, the Court's decision prioritizes an organization's claimed Free Exercise rights over the rights of individuals to not be discriminated against and the public interest in a more open and accepting society. Such prioritizing runs counter to the Court's precedent and the intentions of the Founders. The Court has declared that it is a "fundamental principle of the Religion Clauses," that the First Amendment "gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities."[130] When examining the pre-Roberts Court Free Exercise jurisprudence, a general pattern of denying religious exemptions is evident. This is true even during the period when the Court followed an accommodationist approach to the Free Exercise Clause and was ostensibly most supportive of religious exemptions.[131] During that period, the Court frequently denied Free Exercise claims by finding that the challenged law served a compelling government interest or that a low standard of scrutiny applied because of the specific context.[132] Thus, the Court has consistently refused to require Free Exercise exemptions to general laws when the law furthers a secular public interest.

Further, prior to the Roberts Court, "the [C]ourt had never approved an exemption that shifted serious burdens onto third parties, with the single exception of a case involving a church's control over its membership."[133] The Court has also explicitly taken notice of the burdens to third parties when determining whether a religious accommodation under the Free Exercise Clause amounts to an establishment of religion. In

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[129] *Id.* at 1877.
[130] Est. of Thornton v. Caldor, Inc., 472 U.S. 703, 710 (1985) (citing Otten v. Baltimore & O.R. Co., 205 F.2d 58, 61 (2d. Cir. 1953)).
[131] Stephen M. Feldman, *Religious Minorities and the First Amendment: The History, The Doctrine, and The Future*, 6 U. PA. J. CONST. L. 222, 265 (2003).
[132] *Id.*
[133] Micah Schwartzman, Richard Schragger, & Nelson Tebbe, *Religious Privilege in Fulton and Beyond*, SCOTUSBLOG (Nov. 2, 2020, 9:29 AM), https://www.scotusblog.com/2020/11/symposium-religious-privilege-in-fulton-and-beyond/.

Estate of Thornton v. Caldor, Inc.,[134] the Court found that a state law which gave all employees an unqualified right to observe a Sabbath any day of the week, regardless of the burden placed on their employer or coworkers, violated the Establishment Clause. The Court emphasized the burden on others in finding that the statute's primary effect was to advance a particular religious practice. In doing so, the Court cited a "fundamental principle of the Religion Clauses," that the First Amendment "gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities." This makes sense, given the widely accepted and longstanding interpretation of the Establishment Clause as prohibiting not only government favoritism for one religion over another, but also favoritism for religion over non-religion.

The Roberts Court has addressed financial aid to religious institutions in two cases, *Trinity Lutheran Church v. Comer*[135] and *Espinoza v. Montana Department of Revenue*[136]. These decisions are in sharp contrast to the pre-Roberts Court precedent in cases such as *Locke v. Davey*,[137] in which a seven-Justice majority held that a government scholarship program's disqualification of students pursuing a devotional theology degree did not violate the Free Exercise Clause, because the State's interest in not providing any aid to religion under their state constitution's anti-establishment clause was a substantial interest.[138] In *Trinity Lutheran*, the Roberts Court attempted to distinguish its predecessor's holding in *Locke* on the basis of practice versus identity.[139] In *Locke*, the Court said, the student could still receive the scholarship without disavowing his religious beliefs; he simply could not use the scholarship to fund his ministerial training.[140] While in *Trinity Lutheran*, the church preschool could not receive a playground grant without disavowing its identity as a church.[141] This distinction was on weak ground, as the law did not prohibit an individual from practicing their religion—rather, it refused to subsidize religious education and practice by providing direct funding to a church.[142]

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[134] 472 U.S. 703 (1985).
[135] 137 S. Ct. 2012 (2017).
[136] 140 S. Ct. 2246 (2020).
[137] 540 U.S. 712 (2004).
[138] *Id.*
[139] *Trinity Lutheran*, 137 S. Ct. at 2019.
[140] *Locke,* 540 U.S. at 725.
[141] *Trinity Lutheran*, 137 S. Ct. at 2023–24.
[142] *See id.* at 2022.

This already weak distinction falls apart in the face of the Court's decision in *Espinoza*. In *Espinoza*, the Court held that the application of a similar state constitution provision to a tax credit for parents who sent their children to private school violated the Free Exercise Clause because it discriminated against parents who sent their children to religious private schools versus those who sent their children to secular private schools.[143] In doing so, the Court incorrectly claimed that the case "turn[ed] expressly on religious status and not religious use."[144] However, much like in *Locke*, the parents or students did not have to disavow their religious beliefs in order to receive a tax credit, they simply could not use the tax credit to fund a religious education.[145] Nonetheless, the majority rejected this obvious comparison to *Locke*, finding that the two cases were distinct.[146] Before *Trinity Lutheran*, the Court had never held that the Free Exercise Clause mandated providing government funding to a religious organization. Yet in *Espinoza*, the Roberts Court effectively declared that a state cannot provide financial support for secular education without providing the same support to religious education.

The argument for these two cases, at its core, is that providing funding to secular institutions while not providing equivalent funding or opportunities to compete for funding to religious institutions constitutes impermissible animus to religion. However, such an argument flies in the face of long-established jurisprudence. Prior to the Roberts Court, it was "well-established that governmental actions primarily aimed at avoiding violations of the Establishment Clause have a legitimate secular purpose,"[147] and that "there is no substantial burden placed on an individual's free exercise of religion where a law or policy merely 'operates to make the practice of [the individual's] religious beliefs more expensive.'"[148] In particular, the Court has taken a strong stance against funding religious education,[149] and has explicitly rejected arguments that funding

[143] Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2254, 2262–63 (2020).
[144] *Id.* at 2256.
[145] *Id.* at 2257, 2261.
[146] *Id.* at 2257–58.
[147] Vernon v. City of Los Angeles, 27 F.3d 1385, 1397 (9th Cir. 1994).
[148] Goodall v. Stafford Cnty. Sch. Bd,, 60 F.3d 168, 171 (4th Cir. 1995) (quoting Braunfeld v. Brown, 366 U.S. 599, 605 (1961) (plurality opinion)).
[149] Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 772 (1973) ("Primary among those evils have been sponsorship, financial support, and active involvement of the sovereign in religious activity." (first citing Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970); and then citing Lemon v. Kurtzman, 403 U.S. 602, 612 (1971)).

of religious schools should be permitted under the Establishment Clause simply because it serves Free Exercise purposes.[150] Further, the Court has summarily rejected claims that the Free Exercise Clause is violated by not funding private religious education as an alternative to public schools[151] and that state constitutional provisions prohibiting any tax dollars from going to funding religious education that will prepare students for the ministry are animus to religion.[152] Additionally, a closer look at the oral arguments in *Locke v. Davey* indicate that the Court's opinion in that case was heavily influenced by a desire to avoid limiting the ability of states to strictly enforce their constitutional prohibitions against religious funding and compelling states to include religious schools in any voucher program[153]—exactly what was done in *Espinoza*.

Moreover, The Roberts Court has shielded its religion decisions through its relevant standing jurisprudence. Standing is the capacity of a party to bring a legal challenge. In 1968, the Supreme Court ruled almost unanimously that because the Establishment Clause effectively acts as a limitation on Congress' exercise of its taxing and spending powers, any federal taxpayer has standing to challenge the expenditure of federal funds to finance instruction in religion.[154] This rule stood for nearly four decades before the Roberts Court denied a taxpayer's right to challenge the Bush administration's federally funded faith-based initiatives.[155] Then four years later, the Court denied a state taxpayer's right to bring an Establishment Clause challenge against tax credits for tuition payments to a religious school.[156] These cases paved the way for *Trinity Lutheran* and *Espinoza*, and significantly limited the likelihood of any party being able to bring an Establishment Clause challenge against government funding of religious institutions.

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[150] *Nyquist*, 413 U.S. at 788–89.
[151] *See, e.g.*, Brusca v. State Bd. of Educ., 405 U.S. 1050 (1972) (mem.), *aff'g* 332 F. Supp. 275 (E.D. Mo. 1971) (affirming a judgment rejecting such claims).
[152] Locke v. Davey, 540 U.S. 712, 725 (2004).
[153] Jason S. Marks, *Spackle for the Wall? Public Funding for School Vouchers After* Locke v. Davey, 61 J. MO. BAR 150, 155-56; Sarah M. Lavigne, Comment, *Education Funding in Maine in Light of* Zelman *and* Locke*: Too Much Play in the Joints?*, 59 ME. L. REV. 511, 526-27 (2007). *See* Transcript of Oral Argument at 4, 7, Locke v. Davey, 540 U.S. 712 (2004) (No. 02-1315), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2003/02-1315.pdf.
[154] Flast v. Cohen, 392 U.S. 83, 88 (1968).
[155] *See* Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 593 (2007).
[156] Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 129–30 (2011).

Through the cases discussed above, the current Court has eviscerated the Establishment Clause and created a religious privilege for Christians under an overly broad interpretation of the Free Exercise Clause. That privilege demands equal treatment for religious organizations when it comes to receiving funding and benefits but special treatment when it comes to exemptions from general laws. Such a privilege is counter to the Court's precedent that there is "room for play in the joints" between the Religion Clauses and highlights the problems when one or both is "taken to extremes." It also incentivizes individuals and organizations to frame their violation of general laws in terms of religious exercise, particular religious exercise that aligns with the majority, and limits the ability of minority religions to bring claims. Scholars have made compelling arguments that minority religious litigants are more likely to succeed under Establishment Clause claims than Free Exercise Claims.[157]

The empirical data supports this idea that the Roberts Court favors religion, and specifically mainstream Christianity as opposed to the minority religions the Religion Clauses were intended to protect. Under the three previous chief justices, the Court ruled in favor of religion approximately half of the time.[158] As of the 2019 term, the Roberts Court had ruled in favor of religion 83.3% of the time.[159] Notably, all of the pro-religion rulings from the Warren Court benefited minority religious groups, while the Roberts Court heavily favors mainstream Christianity.[160]

Returning the Religion Clauses to their intended function involves reframing the way we think about religion and why the Founders chose to set it apart in the Constitution. Many have pointed to the Religion Clauses as evidence that religious values and beliefs should be valued above secular morals and beliefs. However, this runs counter to the idea that the Establishment Clause prohibits favoring religion over non-religion. I would argue that religion was granted a special status under the Constitution not because of its unique value, but rather because of its unique vulnerability. This is not to say that religion in

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[157] *See, e.g.*, Feldman, *supra* note 131.
[158] The Warren Court ruled in favor of religion 45.5% of the time, the Burger Court 51.4% of the time, and the Rehnquist Court 58.1% of the time. Lee Epstein & Eric A. Posner, *The Roberts Court and the Transformation of Constitutional Protections for Religion: A Statistical Portrait*, 2022 SUP. CT. REV. (forthcoming 2022) (manuscript at 7 fig. 2).
[159] *Id.*
[160] *Id.* at 8.

society is not valuable—if it were not, its vulnerability would not matter and the Founders would not have needed to protect it. However, believing that the Founders set religion apart for its unique value leads to religious privilege and confusing case law, while a viewpoint that religion is unique for its vulnerability to discrimination leads to a narrower interpretation of both clauses and a focus on preventing the evils the Founders feared.