# FINDING THE CORRECT BALANCE BETWEEN THE FREE EXERCISE OF RELIGION AND THE ESTABLISHMENT CLAUSES

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**ABSTRACT**

The First Amendment's Free Exercise and Establishment Clauses were meant to guarantee freedom of religion for all persons living in the United States. This was to be done by ensuring that government could not establish a state religion nor interfere with individual practices and beliefs so long as they did not violate public morals. The idea was to have the two clauses operate together to ensure state separation in matters of religion. However, recent caselaw involving government accommodations to religious organizations has emphasized the Free Exercise Clause with little or no attention afforded the Establishment Clause. As a result, intermediate factors like entanglement, endorsement, general applicability, and neutrality, that previously were used to assist the separation of church and state, are now called into question. This Article attempts to rekindle these factors by attaching a public/private distinction to the way the two clauses are understood, to ensure a more certain and clearer basis for the separation of church and state.

## I. INTRODUCTION

It is not uncommon in the United States to hear people say that the U.S. Constitution protects freedom of religion. Nor is it uncommon in the United States to hear that there is a separation of church and state.[1] In fact, however, no such language is present anywhere in the Constitution, including its 27 amendments. What is found in the First Amendment are two clauses often referred to as the "religious clauses." They are the "Establishment Clause" and the "Free Exercise Clause."[2] The

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[1] Hana M. Ryman & J. Mark Alcorn, *The Establishment Clause (Separation of Church and State)*, THE FIRST AMENDMENT ENCYCLOPEDIA, https://www.mtsu.edu/first-amendment/article/885/establishment-clause-separation-of-church-and-state (last visited July 22, 2022).

[2] U.S. CONST. amend. 1. I should note here that Article VI of the Constitution states: "no religious Test shall ever be required as a Qualification to any Office or public

Establishment Clause prohibits government from establishing a state religion or endorsing any particular religious practice or belief.[3] The Free Exercise Clause prohibits government from interfering with individual religious practices and beliefs so long as the practices don't undermine public morals.[4] Two problems of interpretation often arise, however. One problem occurs when people seek to follow a practice, believing that it is protected by the Free Exercise Clause, when in fact it is contrary to some governmental law or regulation. The other is when people seek to follow a practice they believe is protected by the Free Exercise Clause but is contrary to some governmental law or regulation; and also when benefits that the government affords to the public at large are denied to individuals or groups that expressly want to use them in connection with their religious preferences. Limitations on the use of public funds in such cases is usually explained to avoid government endorsement of the religious preference.[5]

In this Article, I will focus first on how the Supreme Court's interpretations of the religious clauses prior to 2012 made use of specific interpretative factors like entanglement, endorsement, general applicability, and neutrality to resolve conflicting issues. Next, I will identify how some of the Court's

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Trust under the United States." U.S. CONST. art. VI, cl. 3. Whether that language will continue to be consistent with the aforementioned religious clauses will depend on how the latter are interpreted.

[3] "There are three major competing approaches to [understanding] the establishment clause," among possible others: "Strict Separation," "Neutrality Theory," and "Accommodation/Equality." For any particular case, the result may depend upon the theory chosen. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1192 (3d ed. 2006). Strict separation "says that to the greatest extent possible government and religion should be separated." *Id.* "State power is no more to be used to handicap religions than it is to favor them." Everson v. Board of Educ., 330 U.S. 1, 18 (1947). State neutrality theory holds that "government must be neutral toward religion; that is, the government cannot favor religion over secularism or one religion over others." CHEMERINSKY, CONSTITUTIONAL LAW, *supra* at 1193. "Every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion." The accommodations approach says: "the Court should interpret the establishment clause to recognize the importance of religion in society and accommodate its presence in government." CHEMERINSKY, CONSTITUTIONAL LAW, *supra* at 1196. In other words, "government violates the establishment clause only if it literally establishes a church, coerces religious participation, or favors one religion over others." *Id.* (citing Lee v. Weisman, 505 U.S. 577, 587 (1992)). *See also* LINDA GREENHOUSE, JUSTICE ON THE BRINK: THE DEATH OF RUTH BADER GINSBURG, THE RISE OF AMY CONEY BARRETT, AND TWELVE MONTHS THAT TRANSFORMED THE SUPREME COURT 14 (2021).

[4] *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1366 (6th ed. 2019).

[5] *See, e.g.*, Locke v. Davey, 540 U.S. 712, 722 (2004).

more recent departures from its previous modes of interpretation have made it difficult for lower courts and the public at large to understand which governmental actions are currently permissible and which are not. The approach I plan to take will put privacy at the center of the Free Exercise Clause and the public good at the center of the Establishment Clause. Following this approach should give rise to an overall understanding of how the two clauses might operate together such that some of the intermediate factors the Supreme Court has recently pushed aside may now be rethought to resolve conflicts between the two clauses. My hope is to delineate how the two clauses can be made complementary.

Section II will take up Supreme Court decisions involving the Establishment Clause in the last ten years and what might be the current understanding of the clause. Section III will offer a similar review of the Free Exercise Clause. Section IV will then draw out difficulties lower courts and the public at large are likely to confront based on some of the Court's most recent decisions. Section V will provide a philosophical approach, based on privacy and the common good, to assist the Supreme and lower courts in reestablishing how to resolve apparent conflicts between the clauses. Section VI will then review some of the recent cases the Court has decided to see if they might come out differently applying the criteria I am suggesting. Finally, section VII will consider how moral criticisms, especially from social conservatives, have also affected claims for maintaining a separation between church and state. A brief conclusion follows.

## II. ESTABLISHMENT CLAUSE

The First Amendment to the U.S. Constitution opens with "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…."[6] The first clause is referred to as the "Establishment Clause"; the second, "The Free Exercise Clause." These two clauses, along with several other unrelated provisions and proposed amendments to the Constitution comprise The Bill of Rights. Their purpose was to garner enough States to ratify the new Constitution that had been proposed at the Philadelphia Convention of 1787 but for

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

which there were concerns at the time over whether it would provide adequate protections for individual and states' rights.[7]

The specific concerns giving rise to the Establishment Clause reflect the fact that during colonial times, prior to the United States' independence, many southern states established by law the Church of England for their communities; while most New England states recognized "localized Puritan (or 'Congregationalist')" denominations.[8] In most of these locations "clergy were appointed and disciplined by colonial authorities and colonists were required to pay religious taxes and (often) to attend church services."[9] This led, following independence, to a general agreement among the former colonies that there should be no nationally recognized church."[10] That consensus, which became a basis for the First Amendment, would also eventually lead to all states disestablishing religion by 1833[11] and the Supreme Court applying the Establishment Clause to the States via the Fourteenth Amendment Due Process Clause in 1947.[12]

Most jurists agree that it would violate the Establishment Clause "for the government to interfere with a religious organization's selection of clergy or religious doctrine; for religious organizations or figures acting in a religious capacity to exercise governmental power; or for the government to extend benefits to some religious entities and not others without adequate secular justification."[13] However, beyond these limitations, there is much disagreement over how far the Establishment Clause extends.[14]

In 1971, in the consolidated case *Lemon v. Kurtzman*,[15] an 8-0 majority of the Supreme Court put down a test to resolve Establishment Clause violations,[16] which (as will be shown

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[7] ROGER A. BRUNS, A MORE PERFECT UNION: THE CREATION OF THE UNITED STATES CONSTITUTION 15 (National Archives and Records Service 1978), https://files.eric.ed.gov/fulltext/ED247177.pdf.
[8] Marci A. Hamilton & Michael McConnell, *The Establishment Clause*, NATIONAL CONSTITUTION CENTER, https://constitutioncenter.org/the-constitution/amendments/amendment-i/interpretations/264 (last visited Aug. 4, 2022).
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] Everson v. Bd. of Educ., 330 U.S. 1, 8 (1947).
[13] Hamilton & McConnell, *supra* note 8.
[14] *Id.*
[15] 403 U.S. 602 (1971).
[16] *Id.* at 612.

below) the Court began to deviate from and has now overruled.[17] The case involved two statutes: a Pennsylvania statute that provided state aid in the form of reimbursement for nonpublic school teacher salaries, textbooks, and instructional materials in certain specified secular subjects, and a Rhode Island statute that gave teachers in nonpublic elementary and secondary schools a 15% supplement to their salaries to maintain them on a par with salaries paid in the State's public schools.[18] Both aid provisions had been given to church-related schools.[19] In holding both aid programs unconstitutional, the Court set forth three concerns lying behind creation of the Establishment Clause: "sponsorship, financial support, and active involvement of the sovereign in religious activity."[20] The test that the Court then created to resolve these concerns provided "[f]irst, that the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; [and] finally, the statute must not foster 'an excessive government entanglement with religion.'"[21] Applying the test to the two statutes, the Court did not believe either of the first two prongs were violated.[22] The legislatures sought to promote high quality secular education, which is a legitimate legislative purpose, and took steps to restrict their aid to apply only to secular and not sectarian functions.[23] However, the Court found numerous potential issues present for government engagement with religion, from determining who and how one teaches,[24] to how costs get separated,[25] to community involvement in funding education possibly based on religious bias,[26] to its own acceptance that "the choice has been made that government is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government."[27] This last point is particularly interesting, for as will be seen below, the Court has since changed its view of what the Establishment Clause requires, from complete exclusion of government, to

[17] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022). *See infra* note 29 and accompanying text.
[18] *Id.* at 606–07.
[19] *Id.* at 607.
[20] *Id.* at 612.
[21] *Id.* at 612–13 (citation omitted).
[22] *Id.* at 613.
[23] *Id.*
[24] *Id.* at 618–21.
[25] *Id.* at 621–22.
[26] *Id.* at 622–23.
[27] *Id.* at 625.

government being neutral between religious and non-religious activities, thus nullifying the *Lemon* test.

Although for purposes of this Article I will be focusing on accommodations to religion, I do note other areas where the Establishment Clause has been applied, as these may become relevant in the future and may offer some support in the school area as well. In *Emerson v. Board of Education*,[28] the Court allowed a state statute designed to assist parents sending their children to public or parochial schools by reimbursing the schools for student transportation expenses.[29] In *Board of Education v. Allen*,[30] the Court allowed local school boards to loan textbooks to students attending private religious schools to cover non-religious subjects.[31] In so holding, the Court asked:

> what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.[32]

More recently, in *Zelman v. Simmons-Harris*,[33] the Court went further to hold that the Establishment Clause did not prohibit tuition assistance vouchers to parents who may choose to send their children to parochial schools.[34] In the area of government-sponsored prayer, the Court has held unconstitutional public

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[28] 330 U.S. 1 (1947).
[29] *Id.* at 17–18.
[30] 392 U.S. 236 (1968).
[31] *Allen*, 392 U.S. at 238–241, 248–49. However, in *Aguilar v. Felton*, the Court, fearing government entanglement with religion, prohibited public school teachers from being paid to assist low-income students in religious schools. 473 U.S. 402, 413 (1985). *Aguilar* is now likely overruled by the court's recent abandonment of the *Lemon* test. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427–28 (2022).
[32] *Allen*, 392 U.S. at 243 (quoting Sch. Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203, 222 (1963)). The questions were part of a test the Court had previously adopted in *School District of Abington Township v. Schempp* "for distinguishing between forbidden improvements of the State with religion and those contacts which the Establishment Clause permits[.]" Sch. Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203, 222 (1963).
[33] 536 U.S. 639 (2002).
[34] *Id.* at 643–647, 662–63.

schools leading children in prayer[35] or Bible studies,[36] or offering prayers at graduations[37] and football games.[38] However, prayers spoken at the beginnings of legislative sessions are not prohibited where these are usually steeped in history.[39] Nor are they prohibited at town meetings where the town council will accept the prayer of any faith.[40]

As for government-sponsored religious symbols, such as the display of the Ten Commandments or a Nativity scene in government buildings or on public parks, the approach the Supreme Court previously followed[41] may now be undermined following its recent decision in *Kennedy v. Bremerton School District*, which essentially did away with the "endorsement test."[42] As explained by Justice O'Connor in *Lynch v. Donnelly*,[43] the endorsement test was intended to clarify the third prong of the *Lemon* test by asking "whether government's actual purpose is to endorse or disapprove of religion."[44] Justice O'Connor would later explain this as "focus[ing] upon the perception of a reasonable, informed observer."[45]

Applying the endorsement test, in *Lynch v. Donnelly*, the Court allowed display of a Nativity scene in a public shopping district that was surrounded by other holiday decorations as a sign of the season.[46] The same would not be true if the Nativity scene stood by itself at the top of a staircase in a courthouse.[47] A display of the Ten Commandments with clearly sectarian references and a legislative resolution stating that it was the "embodiment of ethics in Christ" violates the Establishment Clause.[48] However, placing the Ten Commandments on 22 acres of the state capitol grounds along with "17 monuments and 21

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[35] Engel v. Vitale, 370 U.S. 421, 424 (1962).
[36] Sch. Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203, 225 (1963).
[37] Lee v. Weisman, 505 U.S. 577, 598–99 (1992).
[38] Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 294–98 (2000). As this case involves a student-led, student-initiated prayer over the school public address system, prior to each home varsity football game, it remains uncertain if the decision in this case prohibiting the prayer is still good law following the Court's opinion in Kennedy v. Bremerton School District. 142 S. Ct. 2407 (2022).
[39] Marsh v. Chambers, 463 U.S. 783, 794–95 (1983).
[40] Town of Greece v. Galloway, 572 U.S. 565, 591 (2014).
[41] Hamilton & McConnell, *supra* note 8.
[42] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427–28 (2022).
[43] 465 U.S. 668 (1984).
[44] *Id.* at 690 (O'Connor, J., concurring).
[45] Cap. Square Rev. and Advisory Bd. v. Pinette, 515 U.S. 753, 773 (O'Connor, J., concurring).
[46] *Lynch*, 465 U.S. at 680.
[47] *See* Cnty. of Allegheny v. Am. C. L. Union, 492 U.S. 573, 621 (1989).
[48] McCreary v. Am. C. L. Union, 545 U.S. 844, 870 (2005).

historical markers commemorating the 'people, ideals, and events that compose Texan identity'" was deemed to be part of the Nation's tradition of recognizing its historic meaning.[49]

This all amounts to the Court's attempt to create an interpretative approach based on service to the public to avoid possible Establishment Clause violations. The approach allows certain governmental actions including reimbursement for parochial school transportation expenses,[50] purchase of textbooks appropriate to the teaching of secular subjects,[51] and displays of religious symbols as historical markers[52] or parts of a commercial cultural display,[53] so long as the display is not specifically focused on the symbols' religious meaning. In all, government actions must not appear to be too entangled with any production or support of any religious belief or practice. But so long as that requirement was met, the Establishment Clause was not violated by the governmental activity. Of course, the problem that emerges from this approach is how to determine whether an entanglement might be too supportive.[54] This may be why some of the Court's more liberal members have preferred individual investigations upon which compromises might be reached with the more conservative jurists, as opposed to merely adopting some overarching universal rule.[55]

## III. FREE EXERCISE CLAUSE

The Free Exercise Clause provides "Congress should make no law . . . prohibiting the free exercise of religion."[56] Originally, the Free Exercise Clause, like the Establishment Clause, applied only to the federal government.[57] This changed, however, when the Court in *Cantwell v. Connecticut*[58] held that Connecticut's permit and breach of the peace laws violated the

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[49] Van Orden v. Perry, 545 U.S. 677, 681, 690 (2005).
[50] Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947).
[51] Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen, 392 U.S. 236, 248–49 (1968).
[52] *Van Orden*, 545 U.S. at 681, 690.
[53] *Lynch*, 465 U.S. 668 (1984).
[54] *See generally* Paul J. Weber, *Excessive Entanglement: A Wavering First Amendment* Standard, 46 REV. POL. 483, 483–87 (1984), https://www.jstor.org/stable/1406690 (last visited Aug. 4, 2022).
[55] *See, e.g.*, William C. Duncan, *Breyer's record on religious freedom*, SUTHERLAND INSTITUTE (Feb. 16, 2022), https://sutherlandinstitute.org/breyers-record-on-religious-freedom/. It is worth noting here Justice Breyer's dissent in Espinoza v. Montana Dep't of Revenue, 140 S. Ct. 2246, 2282 (2020) (Breyer, J., dissenting).
[56] U.S. CONST. amend. I.
[57] *Free Exercise Clause*, LEGAL INFO. INST., CORNELL L. SCH., https://www.law.cornell.edu/wex/free_exercise_clause (last visited Aug. 4, 2022).
[58] 310 U.S. 296 (1940).

free exercise rights of Jehovah Witnesses to make door-to-door solicitations; this was because the statutes were so broadly written that they gave the government too much discretion to determine which situations were religious.[59] Today, the two clauses govern both the federal and state governments.[60]

Still, how far the Free Exercise Clause applies to limit state and federal laws has been a matter of controversy from the beginning.[61] In *Reynolds v. United States*,[62] for example, the Court held that while Congress could not force the Mormon church to change its belief in polygamy, it could prohibit the practice because marriage was a matter of state regulation.[63] However, in *Wisconsin v. Yoder*,[64] the Court found that Wisconsin's attendance requirement in secondary school to be "in sharp conflict with the fundamental mode of life mandated by the Amish religion."[65] Here, it is worth noting that the analysis was founded upon an earlier decision, *Sherbert v. Verner*,[66] a case in which a Seventh-day Adventist was not given unemployment benefits after being fired for not reporting for work on a Saturday, the Sabbath of her faith.[67] In finding the unemployment action violated the plaintiff's free exercise of her religion, the Court applied a compelling state interest test, which would later be overruled in *Employment Division, Department of Human Resources of Oregon v. Smith*.[68] *Smith* instead asked whether the regulation was of general applicability.[69] That later test would itself eventually be superseded by a federal (and some state) statute(s) to be discussed below. Still, one might wonder what the outcome might have been if *Smith*'s rule of general applicability had been applied in *Yoder*.

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[59] *Id.* at 307.
[60] *See Free Exercise Clause*, *supra* note 57.
[61] *Interpretation and Debate: The Free Exercise Clause*, NAT'L CONST. CTR., https://constitutioncenter.org/the-constitution/amendments/amendment-i/interpretations/265#the-free-exercise-clause (last visited Aug. 5, 2022).
[62] 98 U.S. 145 (1879).
[63] *Id.* at 166.
[64] 406 U.S. 205 (1972).
[65] *Id.* at 217. I would note here that Chief Justice Burger's majority opinion acknowledges a point raised in Justice Douglas' dissent—that there could be a conflict between the interests and desires of Amish children and their parents, but in as much as this was not an issue presented in the case, it was left to the state courts to decide. *Id.* at 230–31.
[66] 374 U.S. 398 (1963).
[67] *Id.* at 220 (citing Sherbert v. Verner, 374 U.S. 398 (1963), *overruled by* Employment Div., Dep't of Hum. Res. of Ore. v. Smith, 494 U.S. 872 (1990)).
[68] 494 U.S. 872 (1990).
[69] *Id.* at 885.

In another case, *Church of Lukumi Babaalu Aye v. City of Hialeah*,[70] following an announcement by the church that it planned to establish a house of worship, a school, cultural center, and museum to bring to the City of Hialeah, Florida, the Afro-Caribbean religion of Santeria, which included offerings of animal sacrifices, the City Council passed ordinances prohibiting animal sacrifices or slaughtering except where licensed by the state.[71] In this case, the Court held the ordinances were specifically directed at the Church of Lukumi and, as such, were not neutral, which meant the *Smith* standard didn't apply and thus couldn't survive strict scrutiny.[72]

At this point, it is also worth affording some attention to another line of cases, mostly at the state level, concerning the extent of parental responsibility for the health care of their children. Both the Church of Christ, Scientists (aka Christian Scientists) and Jehovah's Witnesses believe prayer, rather than traditional medicine or medical therapies, can heal the sick.[73] This belief has given rise to a number of court cases at the state level where parents have been charged with failing to secure adequate medical treatment for their children.[74] While parents have the right to make their own medical decisions for themselves, courts have been "reluctant to endorse such choice when it might result in harm to children."[75] This reluctance prompted, in the 1970s, 44 states passing medical exemptions "allowing parents to refuse medical treatment based on their membership in churches eschewing medical treatment."[76] In 1984, following the death of their two-year-old child due to an obstructed bowel, two Massachusetts parents were charged and convicted of involuntary manslaughter.[77] That case was never appealed, perhaps because the church did not want a decision that would be binding in similar cases.[78] Two years later, Christian Scientist parents of a child in Florida were charged with "felony child abuse and third degree murder for refusing to

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[70] 508 U.S. 520 (1993).
[71] *Id.* at 526–27.
[72] *Id.* at 546.
[73] Thurman Hart, *Christian Scientists*, THE FIRST AMENDMENT ENCYCLOPEDIA (2009), https://www.mtsu.edu/first-amendment/article/1322/christian-scientists (last visited Aug. 8, 2022).
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.*

administer insulin to their daughter, a diagnosed diabetic."[79] Thus far, the U.S. Supreme Court has not addressed how far the Free Exercise clause might extend to protect parents in matters regarding child safety. This important issue was raised by Justice Douglas in *Wisconsin v. Yoder*, where the parents were "seeking to vindicate not only their own free exercise claim, but those of their high-school-age children."[80]

However, the Court did deny certiorari in a Minnesota case in which a natural father was awarded $1.5 million in compensatory damages for the death of his child in the care of her Christian Scientist mother, stepfather, and their agents.[81] It was undisputed that the child's "caregivers failed to seek medical help in the three days leading to his death, despite continuous and dramatic indications that [he] was ill with a life-threatening disease."[82] The Minnesota Court of Appeals denied punitive damages as a violation of Free Exercise.[83] However, it did allow compensatory damages against the mother, stepfather, and some of their Christian Scientist treatment assistants, noting that the U.S. Supreme Court in *Cantwell v. Connecticut*, had stated: "Although one is free to believe what one will, religious freedom ends when one's conduct offends the law by, for example, endangering a child's life."[84] Since then, there have been no other cases at the Supreme Court level, and the exact meaning of its statement in *Cantwell* has been left unresolved.

This brief review of earlier Establishment and Free Exercise cases is not meant to wholly encompass the cases' holdings. It is doubtful that a singular point of view could be easily fitted to these cases. Rather, it is meant to show that even early on in the history of the Clauses, there was much debate and uncertainty as to how they might stack up when poised against each other. Such uncertainty cannot be resolved by the all-too-familiar approach of simply looking to who is doing the interpretation, a liberal or conservative justice, or by divining a possible purpose the interpretation might be serving. It is going to require a clearer understanding of the way the two clauses are best suited to operate together.

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[79] The parents were not convicted. *Id.*
[80] 406 U.S. at 241 (Douglas, J., dissenting).
[81] Lundman v. First Church of Christ, Scientist, 516 U.S. 1092 (1996), *cert. denied*, Lundman v. McKown, 530 N.W. 2d 807 (Minn. Ct. App. 1995).
[82] Lundman v. McKown, 530 N.W. 2d 807, 828 (Minn. Ct. App. 1995).
[83] *Id.* at 816.
[84] *Id.* at 817 (citing Cantwell v. Connecticut, 310 U.S. at 303–04).

## IV. DIFFICULTIES IN THE WAY THE TWO CLAUSES ARE INTERPRETED

How has the Court's recent understanding of the relationship between the Establishment Clause and the Free Exercise Clause undermined separation of church and state? Here, it is important to see that the establishment restrictions aren't always based just on the First Amendment. Some states, as will be seen below, have establishment restrictions written into their state constitutions. In those cases, the disestablishment challenge that usually arises is whether the First Amendment's Free Exercise clause limits the state's constitutional establishment clause, where it is thought to be broader than the federal Establishment Clause. For instance, in *Locke v. Davey*,[85] Washington State had a scholarship program for talented students, but the money could not be used to obtain a theology degree under a provision of the Washington state constitution that prohibited funding religious education.[86] The provision was challenged by Joshua Davey, who forfeited his scholarship after seeking to major in pastoral ministries.[87] The U.S. Supreme Court, in a 7-2 decision delivered by then Chief Justice Rehnquist, ruled that the state could choose not to fund a particular category of education and that the Free Exercise Clause is not violated so long as neither the scholarship program nor the state constitution exhibits animus toward religion.[88]

This view, insofar as the federal Establishment Clause was involved, would change beginning with *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunities Commission*.[89] In that case, the Court, eight years after *Locke*, considered how far federal establishment of a religion extended where the challenge was based on a disability claim.[90] In that case, Cheryl Perich, a teacher at the school, filed a lawsuit for violation of the Americans with Disabilities Act after she was dismissed following being diagnosed and treated for narcolepsy.[91] The school argued that the Court-created "ministerial exception" under the First Amendment applied to bar any anti-discrimination action against a religious

[85] 540 U.S. 712 (2004).
[86] *Id.* at 715.
[87] *Id.* at 717.
[88] *Id.* at 724–25.
[89] 565 U.S. 171 (2012).
[90] *Id.*
[91] *Id.* at 178–79.

institution.[92] The Sixth Circuit had held that Perich's role was not ministerial in nature as she taught secular as well as religious subjects, although she was a commissioned minister.[93] But the Supreme Court, in a unanimous decision written by Chief Justice Roberts, reversed the lower court's decision, finding that Perich's status as a commissioned minister outweighed the secular aspects of her job.[94] The Court also rejected the EEOC's claim that the "ministerial exception" was limited to just hiring and firing decisions.[95] Instead, the Court stated: "The exception instead ensures that the authority to select and control who will minister to the faithful—a matter 'strictly ecclesiastical'—is the church's alone."[96] In his concurring opinion, Justice Alito added that the ministerial exception

> should apply to any "employee" who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith. If a religious group believes that the ability of such an employee to perform these key functions has been compromised, then the constitutional guarantee of religious freedom protects the group's right to remove the employee from his or her position.[97]

*Hosanna-Tabor* would provide a basis for later claims involving teachers at religious schools who challenge loss of their jobs but are less obviously ministers. In *Our Lady of Guadalupe School v. Morrissey-Berru*,[98] teachers at two Catholic primary schools in Los Angeles brought civil age and medical discrimination employment suits after being terminated from their teaching positions.[99] Even though neither had formal ministerial training or the title of being a minister, the school argued that the teachers fell under the ministerial exception of *Hosanna-Tabor* because they taught religion along with other subjects and were obligated to teach children Catholic values and

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[92] *Id.* at 180.
[93] *Id.* at 181.
[94] *Id.* at 192.
[95] *Id.* at 194.
[96] *Id.* at 194–95 (citation omitted).
[97] *Id.* at 199 (Alito, J., concurring) (joined by Justice Kagan).
[98] 140 S. Ct. 2049 (2020).
[99] *Id.* at 2058.

participate in liturgical activities.[100] In deciding in favor of the schools, Justice Alito, writing for a seven member majority, stated:

> What matters, at bottom is what an employee does. . . . As elementary school teachers responsible for providing instruction in all subjects, including religion, they were the members of the school staff who were entrusted most directly with the responsibility of educating their students in the faith. And not only were they obligated to provide instruction about the Catholic faith, but they were also expected to guide their students, by word and deed, toward the goal of living their lives in accordance with the faith.[101]

Applying this understanding, the majority went on to argue that it was clear that the petitioners fell within the ministerial exception of *Hosanna-Tabor*.[102] Justice Thomas wrote a concurring opinion to "reiterate my view that the Religion Clauses require civil courts to defer to religious organizations' good-faith claims that a certain employee's position is 'ministerial.'"[103] Justice Sotomayor dissented, claiming that the majority had misclassified the teachers because neither had formal training or the title of minister, nor had either school even required its religion teachers to be Catholic.[104] The dissent pointed out that the net effect of the decision may be a loss of employment law protections for thousands of lay employees working in religious schools.[105]

This removal of government involvement in religious activities would seem to represent a departure from the Court's earlier holding in *Employment Division, Department of Human Resources of Oregon v. Smith*.[106] In *Smith*, two employees at a private drug rehabilitation center were denied unemployment benefits after being fired for ingesting peyote while performing a religious ritual of the Native American church.[107] The petitioners

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[100] *Id.* at 2057–59.
[101] *Id.* at 2064, 2066.
[102] *Id.* at 2069.
[103] *Id.* at 2069–70 (Thomas, J., concurring).
[104] *Id.* at 2081 (Sotomayor, J., dissenting) (joined by Justice Ginsburg).
[105] *Id.*
[106] 494 U.S. 872 (1990).
[107] *Id.* at 874.

claimed that the denial of benefits violated their First Amendment right to the Free Exercise of Religion.[108] The Oregon Supreme Court had held that the denial was permissible because consumption of peyote was a crime under Oregon law.[109] The Supreme Court, per Justice Scalia, agreed stating:

> The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is "compelling"—permitting him, by virtue of his beliefs, "to become a law unto himself,"—contradicts both constitutional tradition and common sense.[110]

These rulings raise a number of questions. Has the Supreme Court since changed its mind concerning its holding in *Smith*? Or might it now just be willing to allow for greater deference when the party involved is a "minister"? If the latter, what is legally required to be shown to prove that one is a minister? Is it just a good faith deference to be afforded the organization employing the person, as Justice Thomas suggested?

After controversies with religious groups began to arise following the Court's decision in *Smith*, Congress passed and President Clinton signed the Religious Freedom and Restoration Act of 1993 (RFRA).[111] Under the terms of that Act, federal laws

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[108] *Id.*

[109] *Id.* at 875.

[110] *Id.* at 885 (citations omitted).

[111] 42 U.S.C.A. §§ 2000bb-20000bb-4 (2012). Another more restrictive statute protecting religious land use and prisoners was adopted in 2000, the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §§ 2000cc (2000). In *City of Boerne v. Flores*, the Court ruled in a case that attempted to apply RFRA to override a historical district zoning restriction to expand a church in Boerne, Texas, that federal RFRA did not apply to the states and Congress did not have the power to make it so under Section 5 of the Fourteenth Amendment. City of Boerne v. Flores, 521 U.S. 507 (1997). As a result, many states adopted their own RFRA-like statutes to protect the free exercise of religion, even when it may conflict with their own statutes. *See* Jonathan Griffin, *State Religious Freedom Restoration Acts*, NAT'L

"shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless the law was in furtherance of a compelling interest and the least restrictive in the furtherance of that interest.[112] In effect, this Act was an attempt to reestablish what had been the balancing test prior to *Smith* under *Sherbert v. Verner*[113] and *Wisconsin v. Yoder*.[114] The significance of this statute is how it might implicate future cases involving government intrusion on the free exercise of religion, since it now appears that the political branches are willing to prevent federal laws from too much interference with religious free exercise.[115]

For example, following the passage of the Patient Protection and Affordable Care Act of 2010 (ACA),[116] the Department of Health and Human Services (HHS) adopted a regulation requiring all for-profit employers of more than fifty employees "to provide [insurance] coverage, without cost sharing, for '[a]ll Food and Drug Administration [(FDA)] approved contraceptive methods, sterilization procedures, and patient education and counseling," if the employee is a woman with reproductive capacity.[117] The regulation was challenged by Hobby Lobby Stores, Inc., whose owners claimed that their business had been organized around principles of the Christian faith and that use of certain contraceptives was immoral.[118] The Court, in a 5-4 majority opinion, per Justice Alito, held first that RFRA applies to corporations since corporations are composed of people to achieve desired ends.[119] Second, the Court held that HHS had not shown that its method of providing health care benefits to employees without forcing religious corporations to violate their beliefs was the least restrictive way to achieve its

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CONF. OF STATE LEGIS. (May 4, 2017), https://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx.

[112] 42 U.S.C. § 2000bb-1.

[113] 374 U.S. 398 (1963) (holding that denial of unemployment benefits to a Seventh-Day Adventist because she refused to accept work on Saturdays violated her ability to freely exercise her religion).

[114] 406 U.S. 205, 217 (1972) (holding that Wisconsin's requirement that children attend public school to age 16 were in "in sharp conflict with the fundamental mode of life mandated by the Amish religion" and not justified by the state's asserted compelling interest given the preparation for life these children are being prepared for).

[115] Since 1993, similar RFRA laws were adopted at a number of state legislatures. Jonathan Griffin, *supra* note 111.

[116] 42 U.S.C.A. § 300gg-13(a)(4).

[117] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 697 (2014) (citing 77 Fed. Reg. 8725 (Feb. 15, 2012)).

[118] *Id.* at 701–02.

[119] *Id.* at 706.

compelling interest since the government could have provided these benefits directly to the employees.[120]

Here, it is important to expose a concern that arose between Justice Alito's majority opinion and Justice Kennedy's concurring opinion, which the dissent was quick to point out. Justice Kennedy, who provided the necessary fifth vote to the Court's 5-4 majority, acknowledged in his concurrence first that "[t]here are many medical conditions for which pregnancy is contraindicated [and that] [i]t is important to confirm that a premise of the Court's opinion is the assumption that the HHS regulation here at issue furthers a legitimate and compelling interest in the health of female employees."[121] This was an important declaration because it shows that there are compelling interests at stake warranting governmental intrusion on religion, provided the intrusions are narrowly tailored.

Second, Kennedy argued that the HHS regulation was not narrowly tailored and that he only agreed with the majority in that "the means [the government] uses to regulate [must be] the least restrictive way to further its interest. As the Court's opinion explains, the record in these cases shows that there is an existing, recognized, workable, and already-implemented framework to provide coverage."[122] Kennedy was referring to the fact that HHS had "allowed the same contraception coverage in issue here to be [directly] provided to employees of nonprofit religious organizations, as an accommodation to the religious objections of those entities."[123] Still, even with this caveat in mind, and even taking account that this was a statutory case rather than a constitutional one, the fact remains that there appears to be two very different readings possible of what the Court was saying in *Hobby Lobby*. Certainly, it was extending the First Amendment Free Exercise Clause to apply to corporations. Beyond that was its concern that HHS had failed to ensure its regulation was narrowly tailored. Could this latter concern have been met by HHS following the approach it had adopted for non-profits, or does it assume that free exercise limits what government can do in providing for the health and well-being of individuals by allowing corporations to speak on their behalf? As Justice Kennedy writes, the Court properly never answered whether a new government program perhaps operating similarly

[120] *Id.* at 728.
[121] *Id.* at 737 (Kennedy, J., concurring).
[122] *Id.* at 737–38.
[123] *Id.* at 738.

to what had been established for nonprofits would satisfy the RFRA concern raised by the plaintiffs; that was just being assumed.[124]

Justice Ginsburg writing in dissent noted: "Impeding women's receipt of benefits 'by requiring them to take steps to learn about, and to sign up for, a new [government-funded and administered] health benefit' was scarcely what Congress contemplated."[125] Justice Ginsburg also questioned: "[W]here is the stopping point to 'let the government pay' alternative?"[126] What is curious about this case is the creation of a kind of inverse to what we think of as the establishment/free exercise conflict. Normally, we think of government as being prohibited from establishing a state religion, while at the same time not interfering with what individual members of the public believe. Here, the concern seems to be whether religion can undermine what the government needs to do to provide for the health and well-being of the public.

In another case, the state of Missouri had a program to offer qualifying organizations funds to purchase recycled tires to resurface playgrounds.[127] Trinity Lutheran Church of Columbia would have fit within the law's organizational requirements but was disqualified from participating in the program because the Missouri Constitution provides: "no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion."[128] Trinity Lutheran sued, claiming the state's refusal to allow it to participate in the program violated its free exercise of religion.[129] The U.S. Supreme Court, in a 7-2 decision written by Chief Justice Roberts, first noted that the parties agreed that the Establishment Clause did not prohibit Missouri from allowing a religious organization to participate in the funding program.[130] The Court was asked to decide whether the Free Exercise Clause required allowing them to participate.[131] Chief Justice Roberts described the resolution to this question as a "'play in the joints' between

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[124] *Id.* at 738–39; *see id.* at 764–65 (Ginsburg, J., dissenting).
[125] *Id.* at 765–66 (Ginsburg, J., dissenting).
[126] *Id.* at 766.
[127] Trinity Lutheran Church of Columbia v. Comer, 137 S. Ct. 2012, 2017 (2017).
[128] *Id.*; MO. CONST. art. I, § 7.
[129] *Comer*, 137 S. Ct. at 2018.
[130] *Id.* at 2019. ("The parties agree that the Establishment Clause . . . does not prevent Missouri from including Trinity Lutheran in the Scrap Tire Program.").
[131] *See id.* ("[T]his Court has repeatedly confirmed that denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion.").

what the Establishment Clause permits and the Free Exercise Clause compels."[132] Here, the Court held that the exclusion of churches from what otherwise would be a neutral secular aid program merely because of its *status* as a church violated their free exercise of religion.[133] Justice Thomas, in his concurrence, would go further to prohibit laws that facially discriminate against religion absent a state interest "of the highest order."[134] Justice Gorsuch also wrote in a separate concurring opinion that the distinction the Court followed between laws that discriminate based on religious *status* versus religious *use* was untenable, opening the door to whether religious *use* of government funds might be allowed in the future.[135] Justice Breyer also concurred, writing that the First Amendment was not meant to exclude religious organizations from participating in government benefits designed to preserve the health and safety of children.[136] But in a strong dissent, Justice Sotomayor, after reviewing the history behind the Religious Clauses and the Court's past precedent noted that

> [a]t bottom, the Court creates the following rule today: The government may draw lines on the basis of religious status to grant a benefit to religious persons or entities but it may not draw lines on that basis when doing so would further the interests the Religion Clauses protect in other ways. Nothing supports this lopsided outcome. Not the Religion Clauses, as they protect establishment and free exercise interests in the same constitutional breath, neither privileged over the other. Not precedent, since we have repeatedly explained that the Clauses protect not religion but "the individual's freedom of conscience,"—that which allows him to choose religion, reject it, or remain undecided. And not reason, because as this case shows, the same interests served by lifting government-imposed burdens on certain religious entities may sometimes be equally served by

[132] *Id.* at 2019.
[133] *Id.* at 2022–24.
[134] *See id.* at 2025 (Thomas, J., concurring) (joined by Justice Gorsuch).
[135] *See id.* at 2026 (Gorsuch, J., concurring).
[136] *Id.* at 2027 (Breyer, J., concurring).

> denying government-provided benefits to certain religious entities.[137]

She then states that the case raises a serious Establishment Clause concern as it directly requires a state to fund a religious organization in a way that would assist the spreading of its message and views.[138] Obviously, the criticism that Justice Gorsuch expresses about the status/use distinction would only further Justice Sotomayor's concern.

In a related 2020 case, *Espinoza v. Montana Department of Revenue*,[139] the Court considered whether Montana's program that afforded parents who send their children to private non-sectarian schools a tax-credit but no similar credit to parents who send their children to sectarian schools violated the Free Exercise Clause.[140] Petitioners were low-income mothers who wanted to use the money for their children's tuition at Stillwater Christian School.[141] The Montana Supreme Court struck down the program based on a provision in the state constitution prohibiting the use of public funds for religious education.[142] In overturning the state Supreme Court's decision, Chief Justice Roberts stated that the state court had applied the "no-aid" provision so as to discriminate against religious schools in violation of the First Amendment Free Exercise Clause.[143] Montana was concerned with establishing a greater separation of church and state than what the Constitution guaranteed. However, the Court found that this concern did not satisfy strict scrutiny.[144] Justice Thomas, however, writing in concurrence, questioned the Court's earlier Establishment Clause interpretations, which held that the government "must remain both completely separate from and virtually silent on matters of religion," issues not addressed by the present case.[145] Justice Alito, also writing in concurrence, argued that regardless of the

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[137] *Id.* at 2040 (Sotomayor, J., dissenting) (citations omitted).
[138] *See id.* at 2041 ("[The Court] holds not just that a government may support houses of worship with taxpayer funds, but that—at least in this case and perhaps in others—it must do so whenever it decides to create a funding program.").
[139] 140 S. Ct. 2246 (2020).
[140] *Id.* at 2251.
[141] *Id.* at 2252.
[142] *Id.* at 2253 (noting that the Montana Supreme Court decided the scholarship program flouted the State Constitution's "guarantee to all Montanans that their government will not use state funds to aid religious schools").
[143] *Id.* at 2260.
[144] *Id.* at 2260–61.
[145] *Id.* at 2263–64 (Thomas, J., concurring) (joined by Justice Gorsuch).

original motivation for the state's constitutional provision, the no-aid provision itself violates the Free Exercise Clause.[146] And Justice Gorsuch, also writing in concurrence, again challenged the Court's status/use distinction.[147] Justice Ginsburg argued in dissent that Montana's law did not impose any burden on the Free Exercise of religion since the State Supreme Court had struck the program (secular and sectarian) in its entirety before it ever reached this Court.[148] Justice Breyer's dissent highlighted his worry that the Court's approach entangled government with religion, the very thing the Clauses were designed to prevent. He wrote, "[s]etting aside the problems with the majority's characterization of this case, I think the majority is wrong to replace the flexible, context-specific approach of our precedents with a test of "strict" or "rigorous" scrutiny. And it is wrong to imply that courts should use that same heightened scrutiny whenever a government benefit is at issue."[149] Finally, after noting that the petitioners had never challenged the facial constitutionality of the "no-aid" provision under the Free Exercise Clause, Justice Sotomayor dissented, stating that requiring "a State to subsidize religious schools if it enacts an education tax credit . . . 'slights both our precedents and our history,' and 'weakens this country's longstanding commitment to a separation of church and state beneficial to both.'"[150]

The next case worth our attention is *Fulton v. City of Philadelphia*.[151] In that case, the City of Philadelphia contracted with private foster care agencies to place children with qualified foster families. The process involved conducting home evaluations to certify "the family's 'ability to provide care, nurturing and supervision to children,' '[e]xisting family relationships,' and ability 'to work in partnership' with a foster agency.'"[152] Catholic Social Services (CSS) was one such private agency.[153] The City's contract with the private agencies included a non-discrimination clause. There was also a citywide Fair

[146] *Id.* at 2267–68, 2271 (Alito, J., concurring). Justice Alito expressed the opinion that originally the provision was aimed at discriminating against Catholics and may have some of that same effect today.
[147] *Id.* at 2275–76 (Gorsuch, J., concurring).
[148] *Id.* at 2279 (Ginsburg, J., dissenting) (joined by Justice Kagan).
[149] *Id.* at 2281, 2288 (Breyer, J., dissenting) (joined in part by Justice Kagan).
[150] *Id.* at 2292 (Sotomayor, J., dissenting).
[151] 141 S. Ct. 1868 (2021).
[152] *Id.* at 1875 (citing 55 PA. CODE § 3700.64 (2020)).
[153] *Id.* at 1874.

Practices ordinance prohibiting discrimination against same-sex couples.[154]

The City began an investigation into CSS's participation in the program after "a newspaper ran a story in which a spokesman for the Archdiocese of Philadelphia stated that CSS would not be able to consider prospective foster parents in same-sex marriages."[155] That investigation led the City to announce that "it would not enter a full foster care contract with CSS in the future unless the agency agreed to certify same-sex couples."[156]

The District Court ruled that the non-discrimination provision and City Fair Practices were neutral rules of general applicability under *Smith*, and the Third Circuit affirmed.[157] However, the U.S. Supreme Court found the restrictions were neither neutral nor a matter of general applicability but placed a burden on religion.[158] The Court held that because the standard foster care contract allowed for an unspecified exception for sexual orientation except where it might be based on religious belief, *Smith* doesn't apply, and so the case must be evaluated under strict scrutiny.[159]

Here, the Court narrowed how it viewed the case so as to undermine the City's argument, noting "[m]aximizing the number of foster families and minimizing liability are important goals, but the City fails to show that granting CSS an exception will put those goals at risk."[160] Failing to provide a compelling reason for not affording CSS an exception, the Court held that the City's denial of the contract violated Free Exercise.[161] However, notwithstanding the Court's narrowing of its focus, it is worth noting from the concurrence by Justices Alito, Thomas, and Gorsuch (often referred to as the conservative members of the Court) that they would go much further to reverse *Smith* and the exception it provides for neutral rules of general applicability.[162] Instead, they would adopt in its place, a strict scrutiny approach, on the basis that *Smith*'s holding wasn't consistent with the language of the Free Exercise Clause and that it hasn't "provided a clear-cut rule that is easy to apply."[163]

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[154] *Id.* at 1875.
[155] *Id.*
[156] *Id.* at 1875–76.
[157] *Id.* at 1876.
[158] *Id.* at 1877.
[159] *Id.* at 1878.
[160] *Id.* at 1881–82.
[161] *Id.*
[162] *Id.* at 1888 (Alito, J., concurring).
[163] *Id.*

Justice Barrett in her concurrence, however, seemed less certain that *Smith* should be overruled and only strict scrutiny applied, noting "this Court's resolution of conflicts between generally applicable laws and other First Amendment rights—like speech and assembly—has been much more nuanced."[164]

In *Carson v. Makin*,[165] we have a case not all that dissimilar from *Locke v. Davey*.[166] The state of Maine offered tuition assistance to parents who live in a school district that did not have a designated secondary school for their child to attend.[167] The program, however, restricted the kinds of private schools that would be eligible for tuition payments, including a requirement that the school be nonsectarian.[168] The parents of two children sent to private religious schools claimed the restriction violated their Free Exercise of religion under the First Amendment.[169] The Supreme Court, per Chief Justice Roberts, held

> a neutral benefit program in which public funds flow to religious organizations through the independent choices of private benefit recipients does not offend the Establishment Clause. Maine's decision to continue excluding religious schools from its tuition assistance program after *Zelman* thus promotes stricter separation of church and state than the Federal Constitution requires . . . . But as we explained in both *Trinity Lutheran* and *Espinoza*, such an "interest in separating church and state 'more fiercely' than the Federal Constitution . . . 'cannot qualify as compelling' in the face of the infringement of free exercise . . . ." The State pays tuition for certain students at private schools—so long as the schools are not religious. That is discrimination against religion. A State's antiestablishment interest does not justify enactments that exclude some members of the community from an otherwise generally

[164] *See id.* at 1883 (Barrett, J., concurring) (joined by Justice Kavanaugh and in part by Justice Breyer).
[165] 142 S. Ct. 1987 (2022).
[166] 540 U.S. 712 (2004).
[167] *Id.* at 1993.
[168] *Id.* at 1993–94.
[169] *Id.* at 1994–95.

> available public benefit because of their religious exercise.[170]

Justice Breyer, in dissent, argued that the majority opinion provided "almost exclusive" attention to the Free Exercise Clause, paying little or "almost no attention" to the federal Establishment Clause.[171] Justice Sotomayor, in a separate dissent, also argued that "that the Court was 'lead[ing] us . . . to a place where separation of church and state is a constitutional slogan, not a constitutional commitment.'"[172] Her concern would soon show itself in *Kennedy v. Bremerton School District*.[173]

In that case a high school football coach, Joseph Kennedy, lost his job after kneeling in private prayer at the 50-yard line of his school's football stadium following football games.[174] The school district disciplined the coach for fear that an onlooker would view his public action as an endorsement by the school district of the coach's religious beliefs, which would violate the Establishment Clause.[175] Recall Justice O'Conner's concern regarding any appearance of governmental "endorsement." Nevertheless, the Supreme Court held that "a plaintiff may carry the burden of proving a free exercise violation in various ways, including by showing that a government entity has burdened his sincere religious practice pursuant to a policy that is not 'neutral' or 'generally applicable.'"[176] The Court then went on to hold that "[a] government policy will fail the general applicability requirement if it 'prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way,' or if it provides 'a mechanism for individualized exemptions.'"[177] The Court also noted that the neutrality requirement will fail when "it is 'specifically directed at . . . religious practice.'"[178] In either circumstance, strict scrutiny would apply and the government would need to show

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[170] *Id.* at 1997–98 (citing Zelman v. Simmons-Harris, 536 U.S. 639, 652–653 (2002); Widmar v. Vincent, 454 U.S. 263, 276 (1981)).
[171] *Id.* at 2002 (Breyer, J., dissenting) (joined by Justices Kagan and Sotomayor).
[172] *Id.* at 2014 (Sotomayor, J., dissenting) (citing her earlier dissent in Trinity Lutheran Church of Columbia v. Comer, 137 S. Ct. 2012, 2041 (2017)).
[173] 142 S. Ct. 2407 (2022).
[174] *Id.* at 2415.
[175] *Id.* at 2417–18.
[176] *Id.* at 2421–22.
[177] *Id.* at 2422 (citation omitted).
[178] *Id.* (citation omitted).

that "its course was justified by a compelling state interest and was narrowly tailored in pursuit of that interest."[179]

The Court found that the latter neutrality limitation was violated because "the [School] District prohibited 'any overt actions on Mr. Kennedy's part, appearing to a reasonable observer to endorse even voluntary, student-initiated prayer.'"[180] Additionally, because the school gave only Coach Kennedy a negative performance evaluation for failing "to supervise [student-athletes] after games," while not requiring other members of the coaching staff to supervise students after a game, it appeared the evaluation "was a bespoke requirement specifically addressed to Mr. Kennedy's religious exercise," thus violating the general applicability condition.[181] For our purposes, it is also worth noting that the Court viewed Coach Kennedy's speech as "private speech, not government speech,"[182] carried out at the same time "[o]thers working for the District were free to engage briefly in personal speech and activity."[183] The School District's attempt to prevent it, perhaps out of fear of how it might appear to the public, is what likely gave rise to its accepting, what the Court had previously rejected, a "modified heckler's veto, in which . . . religious activity can be proscribed" based on "'perceptions'" or "'discomfort.'"[184] But was this really the case when Kennedy performed his prayer on the 50-yard line of the football stadium, a place not generally open to the public, and often in company with students who might feel coerced to follow the coach's practice?

It is at this point that the Court applied strict scrutiny to the District's reasoning prohibiting Coach Kennedy's private prayer activity. According to the Court, the two Clauses were meant to have "'complementary' purposes, not warring ones where one Clause is always sure to prevail over the others."[185] From this interpretation, the Court viewed the District's application of the so-called "reasonable observer" standard, when connected to the endorsement concern that Justice O'Connor had earlier expressed concern with, to create a vice with "the Establishment Clause on the one side and the Free

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[179] *Id.* (citation omitted).
[180] *Id.*
[181] *Id.* at 2423.
[182] *Id.* at 2424.
[183] *Id.* at 2425.
[184] *Id.* at 2427 (citing Good News Club v. Milford Central School, 533 U.S. 98 (2001)).
[185] *Id.* at 2426 (citation omitted).

Speech and Free Exercise Clauses on the other."[186] Once that was accomplished, the Court believed the District was afforded too much freedom to then decide for itself which way to go.[187] The Court stated the District had been relying on the third prong of the *Lemon* test (discussed above) that "called for an examination of a law's purposes, effects, and potential for entanglement with religion."[188] It then overruled *Lemon*, holding that the Court's precedents since *Lemon* provide "that the Establishment Clause must be interpreted by 'reference to historical practices and understandings.'"[189] Finding no evidence that students were being coerced, the Court went on to hold that adopting the District's approach to Establishment would amount to protecting religious liberty by suppressing it.[190] Justice Thomas wrote a concurrence in which he questioned what kind of analysis "should apply to Free Exercise claims in light of the 'history' and 'tradition' of the Free Exercise Clause" or the government's ability to impose restrictions.[191] His question seemed to suggest very little might apply to restrict the Free Exercise Clause going forward.

But, in a very powerful dissent by Justice Sotomayor, she starts by pointing out that Free Exercise protections differ from those of Free Speech protections because the Establishment Clause "provides a 'specific prohibition on forms of state intervention in religious affairs with no precise counterpart in the speech provisions.'"[192] She argues that endorsement concerns, "properly understood, bear no relation to a heckler's veto" but serve to protect the "political community writ large."[193] Replacing the third prong of the *Lemon* test, with an unspecified history and tradition test offers no guidance to school administrators or lower courts on how to decide future cases.[194] Moreover, the Court misunderstands the prior cases involving school prayer by failing to recognize the kind of coercion, which often involves peer pressure, especially involving primary and secondary students.[195]

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[186] *Id.* at 2427.
[187] *Id.*
[188] *Id.*
[189] *Id.* at 2428.
[190] *Id.* at 2431.
[191] *Id.* at 2433 (Thomas, J., concurring).
[192] *Id.* at 2447 (Sotomayor, J., dissenting) (joined by Justices Breyer and Kagan) (citation omitted).
[193] *Id.* at 2448.
[194] *Id.* at 2450.
[195] *Id.* at 2451.

Justice Sotomayor continues, noting that the Court should not be asking "whether a coach taking a knee to pray on the field would constitute an Establishment Clause violation in any and all circumstances;" Instead, it should be asking "whether permitting Kennedy to continue a demonstrative prayer practice at the center of the football field after years of inappropriately leading students in prayer in the same spot, at that same time, and in the same manner" violates the Establishment Clause by making "students to feel compelled to join him."[196] It was this conduct, taken as a whole, that gave rise to an Establishment Clause violation as the School District feared.[197] Justice Sotomayor's dissent presents a different view, asking whether the coach's history with the school should play a role in a nuanced analysis, as opposed to the strict scrutiny approach adopted by the majority.[198] I would also focus on the very obvious appearance of endorsement present in this case since not everyone would have access to the fifty-yard line immediately following a game who was not an employee or student at the school. That is not an incidental appearance.

What this discussion teaches isn't whether the Establishment Clause and the Free Exercise Clause are complementary or contradictory but rather that they are susceptible to an activist Court (conservative or liberal) manipulating how they work. Clearly, the Court's more recent decisions seem to extend the reach of the Free Exercise Clause, which, as Justice Sotomayor's dissent correctly notes, is at the expense of the Establishment Clause.[199] Perhaps there is an overriding reason for doing this; still, it is hard to imagine what that reason might be. Remember, a different Court, with a different understanding of the Clauses, could very likely come out in favor of the Establishment Clause over the Free Exercise Clause.

That would not be, by itself, an overwhelming concern, if the only places where this occurred were truly borderline cases where justices could have serious disagreements. But that doesn't seem to be the direction in which the Court is going, especially when some of the concurring opinions, as noted above, want to go even further than the majority's decision would require. That is not to say that it might not be appropriate

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[196] *Id.* at 2452.
[197] *Id.* at 2453.
[198] *See id.* at 2450.
[199] *Id.* at 2450–53.

in some cases to write a broader decision, especially if other similar cases are likely to follow or a serious human right may be at stake. However, this should be more the exception than the rule in most cases involving borderline issues, especially if the net effect of a broader decision is likely to undermine another important constitutional provision like Establishment. Unnecessary expansions of either clause, even if they only remain temporarily in place, undermine the idea of rule of law and make the Court appear to be taking sides in a cultural or political conflict. Such a continued perception should not be encouraged if the Court is to maintain the appearance of being a neutral observer and not appear to be just another political branch of the government. That is why separation of church and state is so important. As the public is now becoming increasingly aware of the importance of Court decisions, the need for the Court to show neutrality by ensuring this separation is even more important.

Looking at recent cases, one finds an overabundance of Free Exercise protection and little to no Establishment protection. Are we to assume the Establishment Clause was just adopted to prevent creation of a state religion or to prevent *direct* support of taxpayer assistance for any religion? If the latter, given the issues involving indirect taxpayer contributions, the Court's current position would seem unavailing. Is the Establishment Clause essentially now narrowed to perhaps only the specific establishment concerns that were in the mind of those who wrote and ratified the Constitution and Bill of Rights? If so, what will be the role of religion in terms of government laws and policies heading into the future?

Perhaps a more important question is how the use of religion in law will be applied to people who may not share the same faith? And this is an especially significant problem for a pluralistic society which contains folks from many different and ideologically varying religious and moral points of view. Perhaps, even more significant, as the more recent cases would attest, are the serious concerns over how in a pluralistic society the dignity of all its members will be protected. Will some members be found to be more dignified or deserving of greater respect then others just because they fall under a religious point of view that the Court finds currently appealing? Even saying every religious view should be treated equally doesn't resolve this problem. What about nonbelievers?

Part of the problem is that the Court itself does not appear to have a clear direction on how Free Exercise and Establishment should be interpreted. At times the Court talks about private action versus public action but, even that becomes murky when reading the Court's explanations for its decisions, since there is no clear line to draw. I am not suggesting that all that is lacking is an exact formula that once clarified will provide a clear and simple basis for decision. I doubt, given the variety of different facts likely to arise in the multitude of cases coming before the Court, that a single such formula is even possible. What I am suggesting is the need for a far better way to understand the difference between the two Clauses that can aid in determining where the line should be drawn, such that even allowing for differences of opinions over specific facts, the Court will not seriously undermine the breath of the Clauses involved or its own integrity.

## V. PUBLIC VERSUS PRIVATE APPROACH

Language is a very powerful tool, not just because it allows us to know what may be in another person's mind to the extent he or she will share it but also because it allows the listener to evaluate one's own views when confronted with other perspectives.[200] In this same vein, it is very important that ideas presented before the Supreme Court not just be considered in terms of their momentary results but how they are likely to affect the future, to the extent that future decisions can be predicted.[201] For this reason, I will focus my discussion in this section on how the Court should be thinking about issues arising under the Free Exercise and Establishment Clauses rather than how a particular case should be decided. That said, I realize that some of what I have to say will likely open the door to questioning some previously decided cases, as I will use some previous cases as examples of what I am thinking. That should not be surprising. I feel the Court's lack of a clear understanding between the

[200] In John Stuart Mill's *On Liberty*, one of the arguments Mill uses to protect free expression from censorship, even where the expression may seem justified, is: "[E]ven if the received opinion be not only true, but the whole truth; unless it is suffered to be, and actually is, vigorously and earnestly contested, it will, by most of those who receive it, be held in the manner of a prejudice, with little comprehension or feeling of its rational grounds." John STUART Mill, *On Liberty*, *in* ESSENTIAL WORKS OF JOHN STUART MILL 302, 470 (Max Lerner ed., 1965).

[201] While some predictions may seem more easily foreseeable, others may be less predictable given the uncertainty of facts likely to arise. As a result, the language used to describe how to handle short-term interests needs to be carefully circumvented to avoid overreach into areas where it may not be so easily satisfying.

Establishment and Free Exercise Clauses offers a less than ideal framework to either guide lower courts or even a future Supreme Court in deciding cases.[202] Still, my goal is not specifically to deride any particular prior decision as much as to say how the Court should be thinking about the two Clauses when making any decision. Additionally, as I think will be seen below, the factors that have already been used to decide cases in the past, and sometimes to be questioned by the Court, including entanglement, endorsement, neutrality, and general applicability, were not as misguided as the Court at times seemed to suggest. Rather, they were perhaps not sufficiently general to provide consistent sets of justifications for the cases. They lacked the ability to draw upon more general principles. However, once those background principles are made clear, application of the intermediate factors will be more consistent in helping the Court determine which Clause should govern any particular factual situation.

And so, I will begin by first asking what the two Clauses (Free Exercise and Establishment) are about. Here, it is worth noting that in most of the cases discussed above, the Court took note of the fact that the issue being decided arose in the context of a private school, a private agency, or involved an individual engaged in a private prayer or private speech. This is not at all unexpected since often the way government operates to affect the public good is by engaging with private persons or institutions. Nor should it be unexpected that such conflicts arise from the way the Clauses are written. The Free Exercise Clause protects, as a fundamental right, the religious activities and beliefs of private persons, organizations, and groups.[203] When set alongside the Fourteenth Amendment's Equal Protection Clause, it becomes clear that religious believers should not be discriminated against because of what they believe, who they are, or their status of religious affiliation. That doesn't mean, as was expressed in the *Smith* case, that the religious believer should

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[202] A standard way of proceeding in such matters is for appellate courts including the Supreme Court to consider hypotheticals to discover how a particular decision will likely affect future cases. *See* Allyson N. Ho & Kelly A. Moore, *Understanding Differences Between Trial and Appellate Court Oral Arguments*, NEW YORK L. J. (Aug. 26, 2013), https://www.morganlewis.com/pubs/2013/08/understanding-differences-between-trial-appellate-oral-arguments-new-york-law-journal. But this presumes that there exists a basic framework for unraveling the issues to be considered. If such a framework is absent or unclear, it is not surprising that lower courts will have trouble applying even a Supreme Court decision beyond its facts.

[203] This would seem to follow from a straight-forward reading of the language. U.S. CONST. amend. I.

be exempted from laws of general applicability.[204] Nor does it mean that religious believers are necessarily entitled to a government funded educational environment that supports their particular religious view, as opposed to not being excluded from programs that support the secular aspects of their education.[205] If it did, there would be little place for the Establishment Clause, and it would be extremely hard to keep the government from appearing to favor a particular religious point of view, especially if the majority of recipients of the funding were of one or a small set of doctrinally connected religious faiths. The problem in this situation, as with many similar ones, is figuring out where the boundaries lie. That is why hard and fast rules in close call situations are less helpful than a more nuanced approach.

The Establishment Clause prevents government from establishing a state religion.[206] Anything less would be inconsistent with the straight-forward meaning of the Clause itself. Similarly, the Free Exercise Clause focuses on government not intruding on individual beliefs and religious practices. Again, this is a straight-forward reading of the clause. Moreover, focusing on what these Clauses are about when properly described should offer some direction for how the intermediate factors described above ought to be applied. Privacy issues are most associated with the Free Exercise Clause since most often free exercise claims involve personal choices to pursue one's individual religious beliefs or practices.[207] Public or common good issues are most associated with the Establishment Clause insofar as the Establishment Clause is often thought to protect individuals and groups from having to participate in, support, or conform their behavior to a view inconsistent with their own religious beliefs.[208] Here, establishment claims can also be seen

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[204] Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 878–79 (1990) (citing Reynolds v. United States, 98 U.S. 145, 166–67 (1878)).

[205] *Contra* Steven G. Calabresi & Abe Salander, *Religion and the Equal Protection Clause* 187 (Nw. Univ. L. Sch. Fac. Working Paper, Paper No. 213, 2012), https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1212&context=facultyworkingpapers.

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

[207] In Free Exercise cases, individuals and organizations make claims to what is essentially a personal privacy right to the free exercise of religion against government restrictions often grounded in the Establishment Clause. *See, e.g.*, Emp. Div., Dep't of Hum. Res. Or. v. Smith, 494 U.S. 872 (1990).

[208] Over the years three theories have evolved for how to understand the Establishment Clause. They are the separationist thesis, the neutrality theory, and the accommodationist argument. For a very brief description of these different views, see *First Amendment: Establishment Clause*, CONSTITUTIONAL LAW REPORTER, https://constitutionallawreporter.com/amendment-01/establishment-clause/ (last

to arise when government seeks to protect the general welfare against a free exercise challenge that might give rise to a public harm.[209] In that circumstance, the establishment claim should be understood as protecting against government allowing the encroachment of a religious practice onto those who do not share the same religious point of view.[210]

However, a problem arises that must be resolved first. The government actions will often be connected to private persons, organizations, and behaviors. This connection may stem from a government contract with an organization or from the government imposing criminal, labor, or other duties on operations. Here, it is important to be clear where the line is to be drawn, essentially where private actions of individuals and organizations ends, and governmental action might begin. Indeed, the need for such a separation has given rise to the current Supreme Court arguably going too far in favor of the Free Exercise Clause and not enough in favor of the Establishment Clause.[211] It is also important to ensure that rules of general applicability designed to protect the public not be offset because of a religious connection, especially one unrelated to the purpose of the rule.[212] Thus, the first concern to be considered is what exactly is meant by a private action.

I would begin with a way of thinking about privacy in terms of the Fourth Amendment, tort, and constitutional law.[213] Accordingly, "[a]n action is self-regarding (private) with respect

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visited Nov. 12, 2022); *see also Case Categories: Establishment Clause*, THE FIRST AMENDMENT ENCYCLOPEDIA, https://www.mtsu.edu/first-amendment/encyclopedia/case/128/establishment-clause (last visited Nov. 12, 2022).

[209] I would argue, for example, that in *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), an establishment claim lurked in the background and only didn't come to the floor because the City had allowed *undefined* exceptions to its antidiscrimination policies without providing for a religious exception.

[210] *See id.*

[211] *See* Bradley Girard and Gabriela Hybel, *The Free Exercise Clause vs. The Establishment Clause: Religious Favoritism at the Supreme Court*, HUMAN RIGHTS, AM. BAR ASS'N (July 5, 2022), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/intersection-of-lgbtq-rights-and-religious-freedom/the-free-exercise-clause-vs-the-establishment-clause/ (last visited Nov. 12, 2022).

[212] In *Edwards v. Aguillard*, 482 U.S. 578, 581 (1987), the Court invalidated Louisiana's educational requirement that whenever evolution is taught, creation science must also be taught. The Court found that the Legislature's real goal was not to "provid[e] a more comprehensive scientific curriculum," but rather "to advance the religious viewpoint that a supernatural being created humankind." *Id.* at 586, 590.

[213] VINCENT J. SAMAR, THE RIGHT TO PRIVACY: GAYS, LESBIANS AND THE CONSTITUTION 62–76, 85–117 (1991).

to a group of other actors if and only if the consequences of the act impinge in the first instance on the basic interest of the actor and not on the interests of the specified class of actors."[214] By "in the first instance," I mean that the mere description of the action without the inclusion of any additional facts or causal theories would not suggest a conflict with anyone else's interest.[215] But, here, one needs to be careful because "the breath of meaning often associated with the term *interest* could undo the aforesaid restriction on 'in the first instance.'"[216] To avoid this from happening, I qualify the word "interest" with the adjective "basic." By a "basic interest," I mean an interest "independent of conceptions about facts and social convention," as opposed to "derivative interests" which would be "dependent on the combination of basic interests with conceptions about facts and social conventions."[217]

> There are two general categories of basic interests: freedom and well-being. The category of freedom includes interests in freedom of expression, privacy, freedom of thought, worship, and so on. The category of well-being includes interests in preserving one's life, health, physical integrity (as in not being assaulted), and mental equilibrium (as in not being subject to mental harassment). In neither of these two categories are particular conceptions about facts or social conventions presupposed.[218]

Additionally, the definition pays attention to the fact that privacy concerns are group centered. What may be not be private between someone and their family, like whether the person wears a toupee, may be private between the person and the IRS; conversely, what may not be private between the person and the IRS, for instance his or her annual income, may be private between the person and certain members of his or her family. It should further be noted that the aforesaid definition provides only a prima facie basis for when a privacy claim is present. It does not guarantee that the claim will hold up if there is evidence

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[214] *Id.* at 68.
[215] *Id.* at 67.
[216] *Id.*
[217] *Id.*
[218] *Id.* at 67–68.

that real harm would likely result. In that instance, a determination would need be made as to how far the privacy claim should be protected. This means that if the privacy claim involved a free exercise of religion, there may arise instances where it is legitimate for government to intrude on the free exercise claim to prevent harm. In short, the above analysis opens the door to a further question, namely, what kinds of harm can government legitimately consider in deciding whether free exercise can be set aside. Remember, because government cannot establish religion, the harms it tries to safeguard against cannot be harms that would only be recognized by the religion itself.

Here, it is important to distinguish between the kinds of claims that arise with respect to religion from the kinds that are likely to arise with respect to government action, the latter of which will most probably concern matters that are empirically verifiable and often scientific in nature. It has been noted that one way to distinguish religious claims from scientific ones is that religious claims concern "both the natural and the supernatural."[219] By contrast, scientific claims concern only "the natural world."[220] Indeed, naturalist thinkers will often "draw a distinction between methodological naturalism, an epistemological principle that limits scientific inquiry to natural entities and laws, and ontological or philosophical naturalism, a metaphysical principle that rejects the supernatural."[221] The former are "concerned with the practice of science . . . [and do] not make any statements about whether or not supernatural entities exist."[222] The Natural Academy of Sciences describes the relationship between science and religion as follows:

> Science and religion are based on different aspects of human experience. In science, explanations must be based on evidence drawn from examining the natural world. Scientifically based observations or experiments that conflict with an explanation eventually must lead to modification or even abandonment of that explanation. Religious faith, in contrast, does not depend only

[219] Helen De Cruz, *Religion and Science*, *in* STAN. ENCYCLOPEDIA OF PHIL. § 1.2 (Edward N. Zalta, ed., Winter 2021), https://plato.stanford.edu/archives/win2021/entries/religion-science/.
[220] *Id.*
[221] *Id.* (citation omitted).
[222] *Id.*

> on empirical evidence, is not necessarily modified in the face of conflicting evidence, and typically involves supernatural forces or entities. Because they are not a part of nature, supernatural entities cannot be investigated by science.[223]

I point this difference out because it relates to the First Amendment's concern that government must not establish religion. This means that any claim government makes must be based on something that is empirically testable and logically derivable and not on any preferred metaphysical scheme.[224]

Given this definition of a private action, one sees immediately that certain matters involving religious beliefs and practices would be private because no one else's interest is involved. Personal beliefs and actions that do not affect others are the ideal cases where free exercise ought to be soundly protected. For example, like in *Smith*, if a person uses an otherwise illegal drug as part of a religious ceremony, use of the drug in that context should not be considered illegal, provided the use does not pose a danger to the user or others. Justice Alito, in his concurrence in *Fulton*, noted that the Volstead Act, which implemented the Prohibition Amendment, provided an important exception for the use of sacramental wine in the Catholic mass.[225]

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[223] *Evolution Resources at the National Academies: Science and Religion*, NAT'L ACAD.: SCI., ENG'G, MED., COMPATIBILITY, https://www.nationalacademies.org/evolution/science-and-religion (last visited Aug. 14, 2022).

[224] At this point, I would like to make clear that nothing in this part of the discussion is meant to affirm any greater degree or ultimate truth to either religious or scientific claims. It is not meant to do this for the former because that level of truth may not be available by empirical falsification. It is not meant to get at any greater scientific truth than what can be determined from physical experience because to do so would be to go beyond what the physical is capable of establishing. In his "Introduction" to *[A] Treatise [of Human Nature]*, [David] Hume launches the constructive phase of his project by proposing nothing less than "a compleat system of the sciences, built on a foundation entirely new." (T xvi.6). The new foundation is the scientific study of human nature. He argues that all the sciences have some relation to human nature, "even Mathematics, Natural Philosophy, and Natural Religion." (T xv.4). They are all human activities, so what we are able to accomplish in them depends on understanding what kinds of questions we are able to handle and what sorts we must leave alone. If we have a better grasp of the scope and limits of our understanding, the nature of our ideas, and the operations we perform in reasoning about them, there is no telling what improvements we might make in these sciences.
William Edward Morris & Charlotte R. Brown, *David Hume*, in STAN. ENCYCLOPEDIA OF PHIL. § 3, (Edward N. Zalta ed., Summer 2022).

[225] Fulton v. Philadelphia, 141 S. Ct. 1868, 1884 (2021) (Alito, J., concurring).

However, where someone else's interest would be affected, perhaps because the person was driving or performing life-supporting services, government need not protect the Free Exercise of religion. An exception would arise, however, if there is an alternative means available for government to provide the protection needed, such as providing the services itself, but then only if this would be within the capacity of what government can legitimately do under current circumstances. In other words, if the alternative approach would require legislative approval not readily available to avoid the harm, then such an alternative approach is not reasonably acceptable. If no alternative is available, government can justifiably limit application of the Free Exercise Clause since in such circumstances, it would have a compelling reason to override the privacy right of the individual. For example, if medical service personnel in a public hospital or nursing home environment refused for religious reasons to get the COVID-19 vaccine or wear a mask when serving persons susceptible to infection, it would not violate free exercise for the government agency to terminate or reassign their employment to protect the health and well-being of the patients being served.[226] Assuming both options (termination or reassignment) are available, government should opt for reassignment because satisfying its compelling interest should have the least intrusive effective on individual free exercise.

In one recent case arising out of New York, the employees claimed that use of the COVID-19 vaccine, which they believed was developed from aborted fetal cells, would violate their religion's belief in protecting the sanctity of human life.[227] However, even if true, this would not allow the employees to expose other human beings to a fatal disease. Finding the employee an alternative position, if available, would be better than terminating the employee. What the government would not be justified in doing would be to claim its denial was based on some ultimate truth beyond what experience teaches, whatever that truth might be based upon, for that would itself be a kind of unpermitted establishment. This explains some of the concern that arose in the above refenced case out of New York when the Governor stated: "'God wants' people to be vaccinated—and that those who disagree are not listening to 'organized religion'

[226] *See, e.g.*, Dr. A v. Hochul, 142 S. Ct. 552 (2021) (Mem.) (denying injunctive relief to public hospital workers objecting, on religious grounds, to COVID-19 vaccine requirements imposed by New York).
[227] *Id.* at 553 (Gorsuch, J., dissenting).

or 'everybody from the Pope on down.'"[228] The state is not justified in denying the relevance of the employee's religious belief because government in that case would be affirming an alternative religious-like view in violation of the Establishment Clause. However, no such affirmation occurs if the government's claim is merely that medical evidence establishes severe potentially life-threatening danger to patients by allowing unprotected exposure to personnel who may be affected or perhaps carriers of an airborne virus.

Here, it is important to say something about the difference between a religious reason, which the government has no right to allow or disapprove, and a secular reason. Recent Court decisions have seemed to confuse secular reasons by holding that anytime the government supports a secular exception from an otherwise general rule of applicability, it must necessarily provide a religious exception or be found to disrespect religion.[229] While there may be cases where the government allows a secular exception without affording a similar religious exception as a ruse to disrespect religion, it cannot be assumed that this will always be true. And that is because the two understandings are not identical. A religious view makes a metaphysical claim concerning its ultimate truth that a secular view does not. Consequently, no matter how strongly the secular claim might be, so long as the government's reason for adopting it is confined to an understanding of its utility in terms of human experience, government should not be thought to be establishing a religion in violation of the Establishment Clause.[230] Thus, claims derived from medical science, as in the above example, should always be understood in terms of their practical use in responding to the different ways human experience is measured, and the government should be careful in how it phrases such claims to avoid misunderstandings. So long as government operates within this pragmatic framework and affords no attempt at creating a metaphysical justification for its actions, the Establishment

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[228] *Id.* at 555.

[229] *See* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2422 (2022).

[230] *See* Ilya Somin, *Atheists and Secular Humanists Are Protected by the First Amendment Regardless of Whether Their Belief Systems Are "Religions" or Not*, WASH. POST (Nov. 19, 2014, 11:00 AM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/11/19/atheists-and-secular-humanists-are-protected-by-the-constitution-regardless-of-whether-their-belief-systems-should-be-considered-religions-or-not/.

Clause is not violated. The importance of this understanding can be seen in other contexts as well.

Consider again the situation of the Christian Scientist or Jehovah's Witness who refuses medical treatment for their child on the ground that prayer alone should provide the appropriate approach to treating their child's illness. In that instance, the parents do not have a valid privacy claim with respect to the child's welfare because, notwithstanding the parents' description of what they propose to do, the facts suggest that their action will likely lead to the child's death. In that case, the government acting to support the health and welfare of children can interfere with the parent's choice by acting in *loco parentis* to provide for the child's need for appropriate medical treatment.[231] Obviously, there will be certain limits here. If the medical procedure the government is proposing is not medically sound, then the parents' privacy claim will not necessarily conflict with that of the child's, and a hearing will be necessary to resolve the factual dispute. Also, the government would never be justified in imposing a health care measure on a competent adult who preferred to follow the prayer healing approach of his or her religion, since in that case no one else's interest is at risk and, therefore, government has no compelling reason for undermining the individual's free exercise choice.

It is perhaps at this point that a comment should be made regarding our earlier discussion of the Supreme Court's decision in *Wisconsin v. Yoder*. Recall that in that case the Court held unconstitutional, as a violation of the Free Exercise Clause, Wisconsin's requirement that all children attend public school until age 16, as the requirement was "in sharp conflict with the fundamental mode of life mandated by the Amish religion."[232] Justice Douglas in his dissenting opinion noted,

> I agree with the Court that the religious scruples of the Amish are opposed to the education of their children beyond the grade schools, yet I disagree with the Court's conclusion that the matter is within the dispensation of parents alone. The Court's analysis assumes that the only interests at

[231] "A Latin term meaning 'in [the] place of a parent' or 'instead of a parent.' Refers to the legal responsibility of some person or organization to perform some of the functions or responsibilities of a parent." *In Loco Parentis,* LEGAL INFORMATION INSTITUTE, CORNELL LAW SCHOOL, https://www.law.cornell.edu/wex/in_loco_parentis (last visited Aug. 25, 2022).
[232] Wisconsin v. Yoder, 406 U.S. 205, 217 (1972).

> stake in the case are those of the Amish parents on the one hand, and those of the State on the other. The difficulty with this approach is that, despite the Court's claim, the parents are seeking to vindicate not only their own free exercise claims, but also those of their high-school-age children.[233]

Indeed, Chief Justice Burger acknowledged the issue but held that it was not before the Court.[234] Still, it is worth noting that Justice Douglas' concern may very well pop up in other similar contexts. As such, the Court's decision in *Wisconsin v. Yoder* ought to be limited to its facts and not be considered to provide a broad principle of constitutional interpretation generally.

Before moving forward, one other matter needs clarification: how to evaluate cases where despite the initial description of the action, there is a clear showing of likely harm to others, as was true in some of the cases just discussed. As stated above, if the privacy description is shown not to apply given the kind of action it would oppose, then that should be sufficient for applying a neutral rule of general applicability without further discussion. In effect, government should apply a heightened or intermediate form of scrutiny to access the situation. However, in cases where the initial description of the private action is on its face applicable, as with an adult's preference to be governed by healing prayer rather than medical science, a deeper evaluation into the nature of the likely harm needs to be undertaken before the intrusion on individual privacy should be allowed. Strict scrutiny is that basis so long as any protection it would allow for the government's interest is narrowly drawn. Note, nowhere would I apply a simple rational basis test since there would still be an important religious concern even if it is not a strict privacy concern.

Since the Free Exercise of Religion is a fundamental right provided it is grounded, as argued above, in supporting individual privacy, the only way it can be offset is where the privacy concern it represents is offset by a compelling state interest, and the method chosen to protect the state's interest is the least intrusive on the free exercise claim. Only if both conditions are met can the Free Exercise Clause be set aside in favor of the state fulfilling its interest. Keep in mind that the initial basis for determining whether the state's actions are

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[233] *Id.* at 241 (Douglas, J., dissenting).
[234] *Id.* at 231–32.

legitimate is the Preamble to the U.S. Constitution, where the state's authority is grounded in its ability to "establish Justice, insure domestic Tranquility, provide for the common defence [defense], promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Prosperity."[235] Elsewhere I have argued that these principles can be seen as connected to a still larger obligation on the part of the state to protect individual autonomy, and thus, in situations where a conflict might occur with a fundamental right, autonomy should provide the common denominator for determining which interest is the more important.[236] Consequently, a limitation is imposed on the free exercise of religion in a context where individual privacy is at stake, when there exists a compelling interest in service to the protection of autonomy generally. This is because in such circumstances the Free Exercise Clause must yield way to the state's compelling interest, provided that the means chosen for carrying it out are narrowly drawn. Otherwise, if privacy is not at stake in the free exercise claim because, under the circumstances, the description of the interest itself, without the inclusion of any additional facts or causal theories, would impose consequences on others the state has an obligation to protect, only intermediate and not strict scrutiny need be applied. Under such circumstances, the latter follows from the fact that the state's interest is not derived from any attempt to invade privacy but is provided for by the constitutional provision against state establishment of religion, which allows for an intermediate approach to limiting application of the free exercise clause where harm to others can be precisely identified.[237] The analysis here reflects just how the two religious clauses can be seen as

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[235] U.S. CONST. pmbl.

[236] *See* SAMAR, *supra* note 213, at 90–94.

[237] Another way to understand this distinction is to recognize that because the free exercise right is justified by its protection of individual privacy, which is itself grounded in autonomy, it will only conflict with other *active* rights, similarly grounded in autonomy. Consequently, protection of autonomy becomes the common denominator for deciding which right governs and whether the privacy interest in the free exercise claim need be limited to only ensuring that the intrusion be no more than necessary to achieve the compelling interest at stake. Other non-active, so-called '*passive*' rights, that the free exercise claim may conflict with are not grounded in autonomy. As such, they undermine the privacy aspect of the free exercise claim right from the start, since the claim as described will necessarily exhibit an intrusion on these other passive rights. Consequently, to protect these interests the state need only show that they constitute an important obligation the state has a duty to protect under the Constitution. In short, they are rights that should be protected under the Establishment clause as providing the state's constitutional authority to protect these other rights. *See* SAMAR, THE RIGHT TO PRIVACY, *supra* note 213, at 104–05.

complementarity, by clearly separating the public/private interests such that the former is clearly reflected in the establishment clause while the latter, properly understood, is confined to the free exercise clause.

In sum, if satisfying a religious claim would impose on the public some physical danger, we first need to examine how the claim is being described to see if strict scrutiny ought to apply. However, if on examination the claim is not strictly a privacy matter, heightened and not strict scrutiny should apply. For example, New York's imposition of a mask requirement on religious believers occupying public spaces during the COVID-19 pandemic ought to have been complied with, unless the government is just exhibiting animus toward religion. This would be an example of an intermediate application to ensure the restriction was not in furtherance of some stereotype or bias against religion.[238] In the same manner, a Catholic doctor who refuses to receive a COVID-19 vaccine for fear it was derived from fetal cells should not be prevented from attending to patients *only if* there is a reasonable alternative the doctor will adopt to avoid contamination that would otherwise occur.[239] This latter example shows that the State's need to provide an important reason for its restriction cannot be reduced to just any reason when a religious concern is at stake, even if the concern is not strictly private. It cannot simply be based on cost or efficiency. Considering all that has been said thus far, let's review how my analysis might have applied to decide some of the recent Supreme Court cases described above.

## V. RECONSIDERING THE SUPREME COURT'S RECENT RELIGIOUS CASES

The Court's earlier decision in *Cantwell v. Connecticut* was correct. Connecticut's permit to solicit and breach of peace laws were too broad and did seem to entangle government in a process of interpreting what religious solicitations were appropriate without clear directions. This would leave the free exercise of religion open to any number of interpretations. On the other hand, *Reynolds v. United States* was clearly aimed to protect women, a compelling governmental interest.[240] Some may

[238] *See, e.g.*, Ewan Palmar, *Orthodox Jews Set Fire to Masks in Protest at New York's COVID Restrictions*, NEWSWEEK (Oct. 7, 2020) https://www.newsweek.com/orthodox-jews-mask-protest-new-york-1536946.
[239] *See, e.g.*, Dr.A v. Hochul, 142 S. Ct. 552 (2021) (Mem.) (Gorsuch, J., dissenting).
[240] 98 U.S. 145, 167–68 (1878).

question whether the Court would have reached the same result had the issue been whether either sex should be able to marry more than one partner, but that would be a question for another day. In *Reynolds*, the issue was whether the government's prohibition of plural marriage at the time and in the context, where only men could marry more than one woman, was a compelling enough interest to justify brushing aside the free exercise claim of the individuals involved.[241] So long as there is a reasonable probability, when restricted to only one sex, that plural marriage is likely to be mentally, economically, and possibly physical harmful to the other sex and their offspring, government would seem to have a sufficient compelling interest to prohibit it.

Looking back to the *Lukumi* case, animals, in contrast with humans, have little choice as to how humans will use them, and it is certainly true that animals are regularly used in medical and cosmetic research and for food and clothing.[242] Still, limiting how animals are used where the use is not necessary (I am assuming in the religious context it may be necessary) and especially how they are treated when used (whether, for example, they are made to suffer) should be at least a legitimate governmental interest, if not a compelling one, that can be applied even when an animal is made part of a religious sacrifice.[243] This is because animals, like human beings, have "[t]he capacity for suffering and enjoyment [which] is a *prerequisite for having interests at all*, a condition that must be satisfied before we can speak of interests in a meaningful way."[244]

On a related issue, applying the public/private distinction described above, allowing religious symbols as part of a cultural/economic depiction in a public park or shopping center, especially during holidays, does not violate the Establishment Clause, provided they are not the sole symbols on display. That is to say, other symbols (including religious symbols) must be present and different events must be acknowledged for displays. But perhaps most importantly the religious aspect of the symbols cannot be made the center of governmental attention.[245] Similarly, government payments for secular textbooks and

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[241] *Id.* at 161–68.
[242] *See, e.g.*, Animal Welfare Act, 7 U.S.C. § 2131.
[243] *Id.*; *see also* Animal Welfare Regulations, 9 C.F.R. §§ 1.1-3.142.
[244] Peter Singer, *All Animals Are Equal*, *in* ETHICS: THE BIG QUESTIONS 500, 505 (2nd ed., James Sterba ed., 2009).
[245] *See, e.g.*, Van Orden v. Perry, 545 U.S. 677 (2005); Lynch v. Donnelly, 465 U.S. 668 (1984).

transportation to school, where the school is meeting state education requirements that the government has an obligation to promote should not be seen as problematic. Nor should government financial support for drug and alcohol outreach programs that may have a religious sponsor be a problem, so long as the program does not require any form of religious participation or indoctrination and is clearly connected to meeting nonsectarian educational and health needs that the state would be able to sponsor on its own.[246] This area may, however, give rise to too close an entanglement between the state and the religious organization to ensure that the public funds are not being used for impermissible purposes such as religious training, education, or indoctrination. Thus, adopting a case-by-case evaluation, may be the best kind of approach for a lower court to follow when deciding whether the government has gone too far in its involvement with a particular religious organization. Granted the *Lemon* test left open exactly how the entanglement might be measured, giving rise to some of its criticisms. Still such challenges can be answered by a careful inquiring as to whether the government's involvement exhibits an impermissible establishment of religion and, if not, whether the public's interest is served by allowing some government funding. No compelling interest need be shown since no violation of free exercise is implicated, only an investigation as to whether an impermissible establishment might be involved. The impermissible establishment itself would be the justification for disallowing government funding.

The Court's recent jump to nullify the *Lemon* test in *Kennedy v. Bremerton School District* needs to be rethought.[247] While there is no free exercise right for parents to receive support for their children's religious education, and there is an establishment restriction against government support of religious education, inevitably there will be cases where government support of sectarian schools will be justified. For example, in

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[246] *See What are the rules on funding religious activity with Federal money?* U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES (HHS), https://www.hhs.gov/answers/grants-and-contracts/what-are-the-rules-on-funding-religious-activity-with-federal-money/index.html (last visited Nov.12, 2022).

[247] In *Kennedy v. Bremerton School District*, 142 S. Ct. 2407, 2427 (2022), the Court justified giving up the *Lemon* test because it saw the test as grounded in the belief that government and religion, under the Establishment Clause, had to be totally opposed. But this was a mistake in not seeing how the two Clauses might operate so as not to be contradictory. Entanglement, endorsement, neutrality, and general applicability, as intermediate determiners for how to decide cases, may still have a proper role if only the Court would make clear how the two Clauses should operate.

certain parts of Maine, where public schools may not be already in place, government funds can be earmarked for nonsectarian schools provided they avoid any direct religious use.[248] (I use the word "direct" here intentionally because some indirect effect will likely take place on the school's overall budget.) The difficulty likely to arise when evaluating how funds are being used is the all-too-easy government entanglement via accounting and oversight reviews. This is less a problem when the tuition is provided directly to parents who choose to send their children to educational institutions of their choice, provided the state has qualified the institution as affording adequate secular education, even if some of those institutions also provide religious education.[249] That is because the choice of where to send a child is not determined by the government but by the parents; all the

[248] *See* Carson v. Makin, 142 S. Ct. 1987 (2022).

[249] *See id.* Perhaps some will argue that the earlier cases involving education supported government affording deference to religious education over secular education. But I would argue these that these earlier cases just as much supported government affording wide access to a quality secular education wherever the children might be taught. *Compare* Pierce v. Society of Sisters, 268 U.S. 510 (1925), *with* Meyer v. State of Nebraska, 262 U.S. 390 (1923). *Pierce* involved a challenge by the Society of Sisters, a Catholic organization, to an Oregon statute, the Compulsory Education Act, which required every parent to send their eight- to sixteen-year-old children to public schools as opposed to private or parochial schools. In holding the statute violated the Fourteenth Amendment's liberty provision, the Court noted:

> No question is raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare. . . . Under the doctrine of *Meyer v. Nebraska* . . . we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control.

*Pierce*, 286 U.S. at 534–35. (citation omitted). In *Meyer*, Nebraska had approved a statute prohibiting public and private school teachers from teaching children under the age of ten and before having passed the Eighth grade, subjects in any language other than English. In this case, the Court held the statute to violate the liberty interest protected by the Fourteenth Amendment, noting that "[t]he power of the state to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned. Nor has challenge been made of the state's power to prescribe a curriculum for institutions which it supports." *Meyer*, 262 U.S. at 402. What was at stake was a statute prohibiting the teaching of children subjects in a foreign language where "[i]t is well known that proficiency in a foreign language seldom comes to one not instructed at an early age, and experience shows that this is not injurious to the health, morals or understanding of the ordinary child." *Id.* at 403.

government is doing here is not prohibiting the parent's choice. But even with that said, the payment itself must be restricted to fund only secular activities, so no establishment issue arises.[250] Still, some will argue that allowing any funding, even for the secular education component of a sectarian school, supports the whole school by alleviating some of the school's expenses. This is less true where the expenses come from outside in the form of tuition vouchers to parents as opposed to directly paying the school, since the parents could just as easily apply them to a nonsectarian school as to a sectarian one. Additionally, if the reason for funding private schools is that the private school is the only school in the position to provide education, any incidental benefit to religion is allowable as satisfying, at least, a short-term compelling interest of the state.

Looking at some of the Court's more recent cases, *Locke v. Davey* was correctly decided. The state doesn't have to make scholarships available in every subject area just because it makes it available in some.[251] The state might have very good reasons for making scholarships available to science, mathematics, or humanities students, for example, because of a lack of or need for secular professionals in the area. Additionally, making scholarships for specifically religious studies runs the problem of appearing to put taxpayers on the side of supporting religious beliefs. In short, there would be obvious establishment problems for a state to try and go in this direction. However, if the state makes a scholarship program available to teach secular subjects to all but religious private school participants, that is not a decision based on *use* but *status*, and so long as the religious institution is also teaching those secular subjects, the Court in *Carson v. Makin* was correct to hold such discrimination to be unconstitutional under the Free Exercise Clause and Fourteenth Amendment.[252]

In contrast, the Court's decisions in both *Hosanna-Tabor* and *Our Lady of Guadalupe* seem overbroad. In both cases, the Court determined the teachers were ministers without any real investigation into the matter. Especially in *Our Lady of Guadalupe*, the Court allowed the school to determine whether its teaching employees were ministers or not without any real investigation into when someone is a minister. Granted, were the Court to allow such an investigation, a problem arises if the answer would

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[250] *See* Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen, 392 U.S. 236, 243 (1968).
[251] Locke v. Davey, 540 U.S. 712, 723 (2004).
[252] *See* Carson v. Makin, 142 S. Ct. 1987, 2000 (2022).

require analysis of the institution's religious beliefs. For example, in Judaism, any "person qualified by academic studies of the Hebrew Bible and the Talmud to act as spiritual leader and religious teacher of a Jewish community or congregation" would constitute being a Rabbi.[253] Ordination is not required.[254] And so the concern with carrying out such an investigation by the state would likely be too much government involvement in deciding who is a minister.

A better approach would be to ask whether the law being challenged is generally applicable. In the case of *Hosanna-Tabor*, the Act being challenged was the Americans with Disabilities Act;[255] in the case of *Our Lady of Guadalupe*, the suit involved civil challenges for age and disability discrimination.[256] Since these concerns would apply to any employee, if the schools wanted to claim the teachers it was employing were ministers, the burden should be on the school, not the state, to show why this was the case. And it would be best for the school to do this by having clear provisions in their hiring contracts of how the employee is being viewed by the school and the likely consequence that will befall disputes in the future, such as the ones described above.

Following in this same vein, the problem I see in *Smith* isn't the application of a rule of general applicability,[257] it is the fact that a mere description of the Native American employees' action of using peyote as part of their religious ritual did not suggest a conflict with anyone else's interest, at least not absent a showing of how this implicated their job responsibilities. Granted, they were being hired by a drug counseling agency, but that doesn't dismiss the fact that their drug use was part of a religious ritual any more than if it were part of a medical treatment. Consequently, if that action was to be the basis for denial of unemployment benefits, there would need to be an investigation into what the state's compelling interest was in this context and whether it was narrowly drawn. Absent that, there could be a provision placed in the employment contract that specifically detailed the employees were giving up a right to use drugs, even as part of a religious ritual, provided it could affect them while at work.

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[253] Definition of Rabbi in Judaism, BRITANNICA, https://www.britannica.com/topic/rabbi (last visited Aug. 17, 2022).
[254] *See id.*
[255] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 179 (2012).
[256] Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2058 (2020).
[257] *See* Emp't Div. v. Smith, 494 U.S. 872, 890 (1990).

As for the *Hobby Lobby* case, since that involved a federal statute in which Congress set a higher standard for its own rules of general applicability, there is no constitutional issue regarding the Free Exercise Clause.[258] As the dissent was quick to point out, however, in passing RFRA, Congress was intending to restore the compelling state interest test that applied pre-RFRA where free exercise issues were involved, not to create a new set of protections for religious free exercise.[259]

Here, it is worth noting that less than a week after the *Hobby Lobby* decision, when the Court decided *Wheaton College v. Burwell*,[260] a different problem arose. In that case, the College sought an injunction from having to file the required ESBA Form 700 to enjoin Health and Human Services (HHS) from enforcing provisions of the ACA while its case proceeded on appeal.[261] The College claimed that having to fill out Form 700, which notifies the insurer of its separate obligation to directly provide the required contraceptive coverage to students and employees, makes the College complicit in violating its religious beliefs.[262] Here, the Supreme Court agreed that all the College should have to do to satisfy HHS's requirement was provide written notice to the government that it is a non-profit organization with religious objections to providing contraceptive coverage.[263] It did not have to fill out Form 700.[264] On its face, that decision would seem to be just fine as it is the least intrusive on the College's religious conviction. However, as Justice Sotomayor pointed out in her dissent, the Court was too quick to grant an emergency injunction because there had been no showing in the lower court that the College would suffer any "substantial burden" by having to file the requisite form.[265] The underlying concern here was with the Court's apparent willingness to broaden the free exercise protection beyond its pre-RFRA compelling interest requirement.

In *Trinity-Lutheran*, the Court got it right, although the concurrences of Justices Thomas and Gorsuch went way too far. The Court was correct that there was no good reason for

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[258] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 683 (2014).
[259] *Id.* at 747 (Ginsburg, J., dissenting).
[260] 573 U.S. 958 (2014).
[261] *Id.* at 958.
[262] *See id.*
[263] *Id.*
[264] *Id.*
[265] *Id.* at 963–64 (Sotomayor, J., dissenting) (joined by Justices Ginsburg and Kagan). Indeed, "two Courts of Appeals that have addressed similar claims have rejected them." *Id.* at 964.

disallowing the church from being able to participate in a general program that offered recycled tires to resurface playgrounds. What if the concern related to offering health and safety protections as Justice Breyer points out? Chief Justice Roberts was also correct to read the Missouri Constitution's statement that "no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion"[266] as expressing animus against religion. For the phrase "directly or indirectly" seems to go well-beyond any establishment concern to make the religious entity itself appear as if it were totally independent of the community. How would such a view play out in regard to police or fire protection? Clearly, it is one thing to establish a religion and quite another to simply discard its presence in a way that no other organization would be discarded simply because it is a religion.

I think Justice Gorsuch goes wrong in his dissent when he wants to throw out the status/use distinction. No doubt there will be difficult cases where judgment will be required, but that is exactly what courts do. The point, to use Chief Justice Roberts's phrase of a "'play in the joints' between what the Establishment Clause permits and the Free Exercise Clause compels"[267] is to afford the lower courts the greatest opportunity to make sense of what the case is about. On the other hand, contrary to Justice Thomas's view, any time religion is excluded it cannot, on that basis alone, be assumed that the reason was animus against the religion.[268] It ought to depend very much on why the exclusion is occurring and what interests are being protected.

On the surface, *Espinoza v. Montana Department of Revenue* seems similar to *Trinity-Lutheran*, for as Chief Justice Roberts noted: "the Montana Supreme Court applied the no-aid provision to discriminate against schools" in violation of the First Amendment Free Exercise Clause.[269] However, an important difference is that the state Supreme Court in *Espinoza* had already struck the whole program as applied to both secular and sectarian institutions before the U.S. Supreme Court rendered its decision.[270] This makes the U.S. Supreme Court's judgment appear as an invitation to state governments to offer

[266] Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2017 (2017).
[267] *Id.* at 2019.
[268] *See id.* at 2025 (Thomas, J., concurring).
[269] 140 S. Ct. 2246, 2260 (2020).
[270] *Id.* at 2279 (Ginsburg, J., dissenting).

tax credits to parents whose children attend sectarian schools as an acceptable establishment. Justice Breyer's concern that this gives rise to a deeper entanglement of government involvement with religion is thus correct.[271] I might point out here a further problem with Justice Thomas's expressed concern that establishment does not require that government "must remain both completely separate from and virtually silent on matters of religion."[272] Perhaps not, considering what I have said above. But clearly Justice Thomas goes too far where he gleans from this that government should get involved in and oftentimes express support on matters of religion.[273] The way I have tried to understand the intersection of free exercise and establishment avoids both results by affirming appropriate places where government involvement and speech might be necessary and other places where it clearly is not.

It is worth noting that in *Fulton v. City of Philadelphia*, a somewhat different concern arose.[274] Normally, one would expect, if CSS wanted to participate in Philadelphia's foster care program, it should follow the City's foster care rules and not try to rewrite them. That would be consistent with *Smith*.[275] However, in this case, the Court correctly ruled against the City because the contract did allow for exceptions concerning same-sex couples, at the sole discretion of the Commissioner and for no specified set of reasons.[276] Therefore, since free exercise is a fundamental right, the City's failure to offer an exception for CSS's free exercise claim suggests an animus against CSS's religious belief. Such a decision, like in *Wisconsin v. Yoder*, should be limited to its facts, however. Since what gave rise to the Court's result was Philadelphia's own failure to provide a rational basis for the exceptions, the City's antidiscrimination policy should have survived this challenge had the City limited the exception to apply only if the foster children themselves objected to the placement. The latter concern might then be justified by how well the child would be able to fit into their new home.

Lastly, we come to *Kennedy v. Bremerton School District*, where the Court seems to have made a serious error. Recall in that case the Court's reason for acknowledging Kennedy's right

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[271] *Id.* at 2281 (Breyer, J., dissenting).
[272] *Id.* at 2264 (Thomas, J., concurring).
[273] *Id.* at 2266.
[274] 141 S. Ct. 1868 (2021).
[275] Emp't Div. v. Smith, 494 U.S. 872, 890 (1990).
[276] *Fulton*, 141 S. Ct. at 1878.

to pray on the fifty-yard line following a football game was that the school had allowed other private acts by coaches following a football game such as making a phone call to their families.[277] The problem with the Court's analysis is that these other acts would on their face be thought to be private absent proof of any conflict that might result from there having been performed. However, even just focusing on the description of Kennedy's act, to go onto the fifty-yard line following a football game and there kneel to make a private prayer, is not a private action. The issue isn't whether Kennedy's prayer was private; the issue is whether praying on the fifty-yard line following a football game is private, since attendees would still be in the stands and students and staff would still be on or near the field.[278] Also, the fifty-yard line is not a place just anyone can go following a football game. Since access to the field is normally restricted by the school to students and staff, Kennedy's access to the field was based on being a coach employed by the school.[279] Additionally, the football field and the fifty-yard line, in particular, are places the school uses to draw attention to football games or other performances it might be hosting.[280] Consequently, Kennedy performing a prayer on the fifty-yard line right after a game could very easily be understood as an approved action by the school district. In fact, it is likely to be perceived that way given who would likely observe it were either students or outside attendees. As such, Bremerton School District was quite correct in believing it was obligated under the Establishment Clause, as any governmental institution would be, not to engage in acts that would likely signal to those around an establishment of religion.[281] The fact that Coach Kennedy continued to offer a prayer on the fifty-yard line after having been told of the school's policy, clearly shows his disrespect for the school's obligation to remain neutral with respect to religion. Under these circumstances, the school was quite right to consider how Kennedy's action might appear as an endorsement by the School District to the public and to discipline him with a suspension. The Court, in concluding that Kennedy's action should have been allowed, unjustifiably abandoned both the *Lemon* test and the endorsements test in favor of some kind

[277] 142 S. Ct. 2407, 2415 (2022).
[278] The Court admitted that the matter cannot be settled simply by the fact Mr. Kennedy's prayer was private. *See id.* at 2425.
[279] *See id.* at 2420.
[280] *See id.*
[281] *Id.* at 2419.

of unclear use of "historical practices and understandings."[282] Again, the Court's discard of these two intermediate principles was not because of their inability to resolve the case but the result of its own failure to make clear what the two Clauses stand for in a complementary way.

## VII. MORALITY: A COMMENT

In this section, I will focus on a presentation that was part of an online workshop entitled *Religion and the Equal Protection Clause*, by Steven Calabresi and Abe Salander, at Northwestern Law School.[283] In that presentation, the authors argue for affording greater credibility to voucher programs that favor religious education.[284] Note that above I did not have a problem with voucher programs that allow parents to select private educational institutions, even if they were religious, so long as state education qualifications were met. This was because such programs may support making available to parents the kinds of quality education the state has undertaken to create. The problem with the authors' claim is that it starts out disavowing moral values religious people might object to that are often part of a secular education. I believe this is wrong. Even religious education, especially if it is funded by the government, should include secular moral values as well. This represents a form of neutrality in which all people gain some understanding of their place in a pluralistic society. The way the authors criticize public school education, especially in regard to the teaching of morality, implies that the secular view of morality taught in the public schools should not be presented to students coming from varying religious traditions. The authors write:

> Public schools discriminate on the basis of religion. Even though the education laws do not explicitly ban religious individuals from attending public schools, religious students are effectively excluded by the character of the public school curriculum, moral teachings in public schools, and general atmosphere at public schools. Public education is generally advertised as being secular, neutral, and open to all students. Yet neutrality in education is probably impossible because

[282] *Id.* at 2428.
[283] Calabresi & Salander, *supra* note 205.
[284] *Id.* at 187.

> conveying values to children is an inherent aspect of education. Secularism and popular culture are incompatible with many religious belief systems, and public schools are simply incapable of teaching the religious values and doctrine that religious families often need. Indeed public education in America is neither neutral nor welcoming to all students, as public schools regularly promote political and social agendas at odds with religious views.
>
> In modern society, it is impossible to create a "neutral" educational environment.
> Religious and secular educators advance polar opposite approaches on such controversial topics as sex education, homosexuality, abortion, and standards of dress and decency. For instance, California recently enacted the California Fair Education Act which mandates that educators, textbooks, and instructional materials positively promote "lesbian, gay, bisexual, and transgender Americans" as role models. Needless to say, this produced a strong backlash from religious groups opposed to these lifestyles. Balancing religion and science has also never been simple. The debate over creationism versus evolution is long-lived and impassioned. Which books should be read, or not read, as well as how to teach history are also regularly debated. And clashes between religious and secular factions frequently end up being litigated in court.[285]

As can be seen from these two paragraphs, "neutral" in the context of public education is treated by these authors as if it is in opposition to private religious moral teaching. But that is not its purpose. It is not meant to be in opposition to religious values as such but rather to focus on what holds a pluralistic society together, i.e., one where many different value systems are likely to operate. As the authors' own references to "creationism versus evolution" should make clear, they are inclined to disallow forms of secular education religious people object to.

[285] *Id.* at 163–64 (footnotes omitted).

And since no one form of even religious education would meet the requirements of all religions, the only conclusion one can draw is that moral education should not be part of secular education.

At this point, I am tempted to ask, should governmental licensing bodies do the same thing with regard to who may serve as medical practitioners, lawyers, or in other professional roles? Should persons trained only in Sharia or Canon law be allowed to represent clients in civil courts? Must public supported hospitals employ Christian Scientist healing practitioners to operate alongside or even in place of medical doctors? How far should the society go in deciding which kinds of educations ought to count and by how much? In effect, what is being suggested by this working paper is that secular moral education (regardless of whether one may also have a religious moral education) be set pretty much out-of-bounds as a general governmental requirement. But this implies that secular education cannot be neutral, at least with regard to religious believers. And that is simply not correct. Nor is it correct that any other form of sectarian moral education would be any more neutral.

Public schools can provide and government can require a secular moral education to be part of the curriculum. This is because such education is necessary to allow a pluralistic society to operate. That does not mean that a religious school, provided it included in its educational curriculum relevant secular notions of morality, couldn't also include more particularized notions appropriate to its own belief system. Nor does it prevent public school children from asking questions that arise out of their own religious traditions. It does require that public school students be instructed in what seems to hold people together in a pluralistic society. Alternative points of view that might be raised by students should not be disdained and can be discussed; the only limitation under the Establishment Clause is that school authorities do not promote these alternative points of view as universally correct when they are founded upon metaphysical notions that cannot be verified. Nor should sectarian perspectives be encouraged to replace reasoned secular perspectives that encourage liberty and equality. All this can be done without disrespecting either the secular position or various religious positions. At a higher educational level, one might investigate whether any such set of societal moral principles can be established universally, but as that would most likely go

beyond what can reasonably be expected to take place in a secondary, and especially in a primary, educational environment, it need not concern us here.[286]

Our concern needs to be that secular morality represents a form of public reason capable of helping the student achieve the ideal of democratic citizenship. Such an ideal comes about, as the philosopher John Rawls explains, when

> our exercise of political power . . . is exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in light of principles and ideals acceptable to them as reasonable and rational. This is the liberal principle of legitimacy. And since the exercise of political power itself must be legitimate, the ideal of citizenship imposes a moral, not a legal duty—the duty of civility—to be able to explain to one another on those fundamental questions how the principles and policies they advocate and vote for can be supported by the political values of public reason. This duty also involves a willingness to listen to others and a fairmindedness in deciding when accommodations to their views should reasonably be made.[287]

Here, it might be asked, why not also engage in the very disputes that at a higher educational level would be quite common in a philosophical debate? If this could occur at the secondary public-school level, it would be great, provided the discussion fell within the scope of what was earlier described as the pragmatic empirical framework. This raises the further question, why shouldn't discussions extend beyond a secular to discussion that also include religious attitudes?

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[286] I have in mind here such arguments as offered by the philosopher Alan Gewirth to establish a system of universal human rights. *See generally* ALAN GEWIRTH, REASON AND MORALITY (1978); DERCYK BEYLEVELD, THE DIALECTICAL NECESSITY OF MORALITY: AN ANALYSIS AND DEFENSE OF ALAN GEWIRTH'S ARGUMENT TO THE PRINCIPLE OF GENERIC CONSISTENCY (1991).

[287] JOHN RAWLS, POLITICAL LIBERALISM 217 (1993) (citing Amy Gutmann & Dennis Thompson, *Moral Conflict and Political Consensus*, 101 ETHICS 64, 76–86 (October 1990)). *Contra* Robert P. George, *Public Reason and Political Conflict: Abortion and Homosexuality*, 106 YALE L. J. 2475, 2478–79 (June 1997).

Again, it is certainly fine for a student to say that a particular view about morality may not be supported by his or her religious tradition. In this case, the student may wish to think about how they might want to handle that discrepancy in their everyday life, which will inevitably involve interactions with other people. What would not be acceptable would be for the school to waive a particular secular point of view as being solely correct just because it is in vogue or what might generally be believed. Nor would it be right to say that the secular point of view is the only one worthy of attention or necessarily the best one. On the other hand, it is fine for the school to require compliance with social norms, regardless of religious belief, that allow the school to operate efficiently and ensure that all students feel respected, comfortable, and safe. The door can be left open to the possibility of other viewpoints so long as the value of the secular viewpoint in holding society together is not randomly dismissed. Remember, the school should be focusing on a set of norms that can properly serve to hold people with very different moral and religious beliefs together in a pluralistic society. And so, an important question to ask is how best to hold people together in a pluralistic society where very different religious points of view might be present.

Such an approach would include adopting norms that emphasize respect for differences in the way people perceive themselves or live their lives, fairness in how individuals ought to be treated, support for laws that protect overall human dignity and well-being, and acknowledgment that even differences of opinion can often be reconciled by focusing on what we share in common instead of emphasizing our disagreements. These norms support a pluralistic society working together. They may not represent the views of any one religion or of any one social group, but they do provide a place in which society can come together. And they should not be seen to threaten any religion since they are not being offered as the sole or even necessarily the best way in which society might operate. As such, they are certainly proper norms for a secular classroom to operate within. Indeed, claims that such norms need not be the basis for a required secular education because they undermine the free exercise of religion are simply not tenable.

It will be recalled from what was said above that government has obligations under the Constitution to "promote the general Welfare, and secure the Blessings of Liberty to

ourselves and our Posterity . . . . "[288] Certainly, government establishing a required form of secular education, including the teaching of secular morality, fits within these obligations. Similarly, the right of parents to seek a religious moral education for their children above and beyond whatever secular education they receive fits under the Free Exercise Clause. What is not abided is for the latter protection to undermine or replace the former. Free exercise does not permit public sector education to undermine participation in a pluralistic society in which members come together and work toward common goals out of mutual respect for their rights as citizens. In that instance, the state has a compelling reason to protect the public from such a tragedy, and so long as the means chosen don't prevent a separate religious education to also be included, it is sufficiently narrow to operate as part of the state's educational requirement. I am reminded of a point made by Brian Barry in his book, *Culture & Equality*, where he criticizes the Supreme Court decision in *Wisconsin v. Yoder*.[289] In effect, what Barry said and Justice Douglas' dissent implied was that Amish children, who may come to decide that the austere life they were taught as children but later determined was not for them, would have no way to exit their society because they would have been deprived of the necessary education to gain meaningful employment elsewhere.[290] Such a limit to obtaining alternative forms of education, including moral education, is not something the Court should be promoting.

## VIII. CONCLUSION

The First Amendment Establishment and Free Exercise Clauses were created to guarantee religious freedom in the United States. Initially, this was done by limiting instances where an individual could be assailed from engaging in his or her religious beliefs or practices because the federal government was prohibited from establishing a religion for the whole country. Following adoption of the Fourteenth Amendment, this limitation on the federal government would eventually be applied to the states. Additionally, neither the federal nor the state governments were to promote activities that discriminated

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[288] U.S. CONST. pmbl.
[289] BRIAN BARRY, CULTURE & EQUALITY: AN EGALITARIAN CRITIQUE OF MULTICULTURALISM (2001).
[290] *Id.* at 242–44.

against any religion so as not to undermine the Free Exercise Clause.

On the surface, these limitations seemed perfectly complementary. However, as the two levels of government became more involved in what the Constitution's Preamble had proclaimed to be the federal government's duty—to "promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity"[291]—situations began to arise where the government's attempt to fulfill its obligations would conflict with various religious traditions, often by the government having set out various rules (civil and criminal) and regulations (involving labor and individual rights) that regulated seemingly private activity. Initially, the Supreme Court attempted to resolve these conflicts by adopting a set of intermediate criteria (entanglement, endorsement, general applicability, and neutrality) designed to restrict those governmental actions that might be seen as an intrusion on religious liberty. However, eventually the factors themselves became the problem. It became less clear exactly how they were to operate to prevent intrusions on the free exercise of religion in part because the Court had not said very much about how that clause was to balance with the Establishment Clause. Indeed, in recent years, the Court seemed to be paying little attention to the Establishment Clause, providing almost complete deference to the Free Exercise Clause.

In this Article, I have attempted to address the problem of how the two Clauses might work together by adding a private versus public set of criteria to the meaning of the two Clauses. In so doing, I hope I have set out a way for how the two Clauses could oversee the intermediate factors the Court had previously made use of in deciding cases. One such goal was to bring back into attention some intermediate factors that arguably the Court has mistakenly disavowed or downplayed like entanglement and endorsement and possibly general applicability, while still providing great support for other factors like neutrality. Doing this should not only help the Court in making clear its understanding of the two Clauses going forward; it should also assist the lower courts, who have recently found it difficult to know which factors they should be following, when deciding free exercise cases. Finally, the approach laid out here should also add to the Court's legitimacy by reducing the appearance that

[291] U.S. CONST. pmbl.

religious decisions are determined more by which group of justices is in the majority: justices who appear more religiously conservative seem to want to support free exercise concerns; liberals seem more to favor establishment concerns.[292]

In the United States, it is common to think that church and state are and ought to be separate, and this has been a long-standing position of the Court. However, to make this continue as a practical reality going forward that isn't biased in favor of one or the other positions of the justices, it is important that it be well supported intellectually. Part of the problem is the practical reality that courts deal with cases that pose specific factual controversies which need to be settled. Another problem is making clear the courts' understanding of the principles they will rely on to resolve the issues before them. I hope this Article helps resolve the challenges posed by our two religion clauses and provides some direction where the Court should be going in the future.

[292] *See generally* LINDA GREENHOUSE, JUSTICE ON THE BRINK 202–31 (2021).