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The Remains of the Establishment Clause

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In March 2001, we delivered a lecture entitled "The Distinctive Place of Religious Entities in Our Constitutional Order" at Villanova Law School.[2] Using close examination of particular cases, we sketched a theory of that distinctiveness. Government must abstain from involvement in ecclesiastical matters and not promote or sponsor religion. Under the Constitution, the enterprise of religion belongs exclusively to the People, speaking through themselves and non-governmental entities.

We continue to believe that our overarching approach is historically grounded, constitutionally precise, and intellectually subtle.[3] Through the First Amendment's Religion Clauses, the Constitution places ultimate, transcendent concerns beyond the reach of government. Accordingly, the state should refrain from promoting such concerns, and it should neither subsidize nor regulate the work of religious communities in their worship, religious instruction, or proselytizing. A pluralist, liberal democracy requires separation of civil government from these distinctively religious activities.

In contrast, the state has complete jurisdiction with respect to material and temporal concerns, regardless of whatever religious significance believers might attach to them. For constitutional purposes, religion cannot encompass all religiously motivated activities. If it did, virtually any government support for a conventionally secular enterprise might be seen as establishing religion, and virtually any

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[2] We eventually turned that experience (presented as the Donald A. Giannella Memorial Lecture) into an article. Ira C. Lupu & Robert W. Tuttle, The Distinctive Place of Religious Entities in Our Constitutional Order, 47 Vill. L. Rev. 37 (2002).

[3] We elaborate on our approach in Ira C. Lupu & Robert W. Tuttle, Secular Government, Religious People (Eerdmans, 2014) (hereafter cited as Lupu & Tuttle, *Secular Government*).

regulation of private activity might be seen as a burden on the free exercise of religion. Consider the example of health policy, where government subsidizes many institutions that deliver health care and regulates many details of how it is delivered. It would be crippling to government to be obliged to treat health care as religion just because some people believe that God is concerned about our physical well-being. With respect to temporal activities, the state is free to treat religiously motivated people and institutions as indistinguishable from their secular counterparts.

We have not changed our fundamental approach to the relationship between religion and the state. What has changed, in some ways quite radically, is the set of governing norms adopted by the Supreme Court. In the last decade, the Supreme Court has significantly revised its approach to what is distinctive about religion in constitutional law.[4] Notably, this process has unfolded with little engagement with, and occasional disdain for, the reasoning that underlay longstanding principles. The transformation includes an abrupt and deeply ahistorical turn away from a widespread corpus of state constitutional law. By erasing Establishment Clause–based norms of religious distinctiveness, the Court has ignored history, uprooted precedent, and disregarded deep concerns of federalism.

The Court's has accomplished this radical undoing of Establishment Clause concerns in large part by dramatically expanding Free Exercise interests. These moves sometimes involve an assertion that religious entities are not distinct from their secular counterparts and therefore deserve equal treatment. In a Court that frequently pretends to adhere to originalism, this aspect of the new Free Exercise is strikingly non-originalist. In other contexts, however, some Justices

[4] The major decisions in this period include Town of Greece v. Galloway, 572 U.S. 565 ((2014); Trinity Lutheran Church v. Comer, 582 U.S. ___, 137 S. Ct. 2012 (2017); Masterpiece Cakeshop v. Colorado Civ. Rts. Comm., 584 U.S. ___, 138 S. Ct. 1719 (2018); American Legion v. American Humanist Ass'n, 588 U.S. ___ , 139 S. Ct. 2067 (2019); Our Lady of Guadalupe v. Morrissey-Berru, 591 U.S. ___ , 140 S. Ct. 2049 (2020); Espinoza v. Montana Department of Revenue, 591 U.S. ___, 140 S. Ct. 2246 (2020); Fulton v. City of Philadelphia, 593 U.S. ___, 141 S. Ct. 1868 (2021); Carson v. Makin, 596 U.S. ___ , 142 S. Ct. 1987 (2022); Kennedy v. Bremerton Sch. Dist. 597 U.S. ___, 142 S. Ct. 2407 (2022).

have deployed a pseudo-originalist conception of religious privilege.[5] Equality lifts religious entities up, and then privilege lifts them up further still.

In what follows, we trace and analyze these developments. Part I provides a conceptual overview and defense of the constitutional idea of religious distinctiveness. The key insight of this Part is that the Establishment Clause should be understood as structural, pertaining to the character of government, and not rights-focused.

Part II tracks the three major areas of Establishment Clause adjudication in which distinctiveness norms have withered. Part II.A. focuses on government financial support of religious entities with particular emphasis on the recent trilogy about state discretion in such matters, concluding in *Carson v. Makin*.[6] Part II.B. turns to the collapsing law about state sponsorship of religious exercises and displays. Part II.C. confronts the stunning decision in *Kennedy v. Bremerton School District*,[7] which threatens a sixty-year-old enterprise of prohibiting official prayer in public schools. In all three of these contexts, no constitutional constraints remain beyond concerns about coercion and non-discrimination. Neither rests on the Establishment Clause.

Part III turns briefly to the newly declared supremacy of the Free Exercise Clause. We show how a Free Exercise–based conception of religious distinctiveness generates significant privileges for religious individuals and institutions while simultaneously insulating them from state control.

I. Is Religion Constitutionally Distinctive?

[5] See Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1894- (2021) (Alito, J., concurring in the judgment) (arguing that the Free Exercise Clause was originally intended to include all religiously motivated conduct within its protection). But see Ira C. Lupu & Robert W. Tuttle, The Radical Uncertainty of Free Exercise Principles: A Comment on Fulton v. City of Philadelphia, American Constitution Society, Sup. Ct. Rev., 5th ed. 221, 233-244 (2021) (refuting Justice Alito's reading of the text and history of the Free Exercise Clause) (hereafter cited as Lupu & Tuttle, Radical Uncertainty).

[6] 596 U.S. ___, 142 S. Ct. 1987 (2022).

[7] 597 U.S. ___, 142 S. Ct. 2407 (2022).

What, if anything, marks religion as constitutionally distinctive? If we start with a focus on the Constitution's guarantees of rights, we are drawn to the First Amendment's list of protected activities, which include religious exercise, speech, press, assembly, and petition.[8] Gathering for worship is a conventional form of religious exercise, but it can also be viewed as an aggregation of speech, press, and assembly. Add the constitutional concern for discrimination against vulnerable groups, and religion seems quite well protected by a set of rights that are not religion-specific at all.[9] Religious believers are constitutionally protected in the same way as members of political parties or other secular associations.

Thus far, this analysis has skipped over the First Amendment's initial ten words: "Congress shall make no law respecting an establishment of religion . . . ." Unlike the list of rights that immediately follows, the non-establishment guarantee does not extend to any other activities. Congress may make laws, including those involving taxation and expenditure, respecting the establishment of any branch of science, sports, music, or other aspect of culture.[10]

We take the text of the First Amendment seriously. Why is religion singled out for a prohibition on laws respecting establishment?[11] There are various simple answers rooted in English and European history. Writing in the late eighteenth century, the Framers were well aware that governmental establishments of religion had led to violence, oppression, and religious wars.[12] Keeping the new Republic out of that dangerous business seemed prudent, to say the least.

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[8] U.S. Const., Amend. I: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

[9] See Lupu & Tuttle, Secular Government, note 3 supra, at 183-190.

[10] The Constitution delegates to Congress the power to tax and spend "for the common Defense and general Welfare of the United States." U.S. Const., Art. I, sec. 8, cl. 1. The Establishment Clause is a religion-specific limitation on that power.

[11] Other commentators have challenged the idea that religion is constitutionally special. See. e.g., Brian Leiter, Why Tolerate Religion (Princeton Univ. 2012); Micah Schwartzman, What if Religion is Not Special, 79 U.Chi.L.Rev 1351 (2012).

[12] Writing for the majority in Everson v. Bd. of Educ., 330 U.S. 1 (1947), Justice Black briefly reviews this history. Id. at 8-10. See also James Hutson, Church and State in

Between the Founding Era and the Civil War, however, additional concerns appeared. Nearly all communities established common schools, which educated students in a "nonsectarian," religiously pluralistic curriculum. The term nonsectarian originally indicated that the schools would not adopt the creed of any particular Protestant denomination.[13] To advance this project, many states included in their own constitutions a prohibition on public funding of schools controlled by religious denominations. When the architects of the Fourteenth Amendment set out to revise the relationship between states and their own citizens, freedom from state supported religious indoctrination was among their concerns.[14]

As we explained in *Secular Government, Religious People*,[15] the concerns of 1791 and 1868 can be understood in deeper terms. The non-establishment norm is about the character of the government.[16] Establishment of religion presents the hazard of government claiming for itself power over the transcendent. When the state makes such claims, it frequently makes itself the object of worship, sometimes in mystical terms. Whether the claim is the Divine Right of monarchs or the totalitarian efforts from left or right to eliminate rival sources of loyalty and power, the danger is evident.[17]

America: The First Two Centuries 135-137 (discussing the political significance of those who resisted church funding provisions out of concern for civil peace).

[13] For a recent and excellent account of the nineteenth century controversies over public support for religious education, see Steven K. Green, Separating Church and State: A History (Cornell Univ. Press, 2022), at 124 - 136. (hereafter cited as Green, Separating Church and State).

[14] The concern extended to religious sectarianism in public schools, id. at 124-136. We return to this theme in Part II.C., infra.

[15] Lupu & Tuttle, *Secular Government*, note 3 supra.

[16] Id. at 20-29 (explaining what makes religion special for Establishment Clause purposes).

[17] For a very recent example, note the theocratic oppression of women in Afghanistan, see Christina Goldbaum and Najim Rahim, Taliban Bar Women from College Classes, in a Start Reversal of Rights, NY Times, 12/20/2022, available here: https://www.nytimes.com/2022/12/20/world/asia/afghanistan-taliban-women-education.html. For another illustration of the dangers of church-state alliances, note that Vladimir Putin has enlisted the support of the Russian Orthodox Church for Russia's invasion of Ukraine. See, e.g., Andrew E. Kramer, Clergymen or Spies? Churches Become Tools of War in Ukraine, N.Y. Times, Dec. 31, 2022, available here:

The American constitutional strategy for managing this danger is power separation. Just as the Constitution separates legislative, executive, and judicial authority to prevent any branch from accumulating too much power, it also separates religion from the state. Put simply, religion as contemplated by the Founding Generation makes claims on souls; in stark contrast, the state is responsible for national security, civil peace, and prosperity. Keeping these domains in separate hands is (or was) a time-tested constitutional design.

Precisely what counts as an "establishment" is of course always open to debate. Not every government action that touches religion qualifies. But the First and Fourteenth Amendments mandate a watch only on religion—not any of its secular counterparts—with respect to its connection to the state.

A majority of Supreme Court Justices once understood all of this, and only lately has a majority forgotten or ignored these lessons. On the Free Exercise side, religious liberty has frequently and effectively been protected as a subset of broader liberties. The best examples are *Pierce v. Society of Sisters*[18] and *West Virginia Board of Education v. Barnette*,[19] both of which protect religious freedom by protecting more general rights that include religious choices.[20]

When claims for religion-exclusive exemption from generally applicable laws appear at the Supreme Court, they almost always lose. This dynamic famously began with *Reynolds v. United States*,[21] and has yet to be fully repudiated. Even *Wisconsin v. Yoder*,[22] the only religion-specific exemption from generally applicable law that the Court has ever required under the Free Exercise Clause,[23] does not foreclose the

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https://www.nytimes.com/2022/12/31/world/europe/orthodox-church-ukraine-russia.html.

[18] 268 U.S. 510 (1925).

[19] 319 U.S. 624 (1943).

[20] For further explanation, see Lupu & Tuttle, *Secular Government,* note 3 supra, at 183-190.

[21] 98 U.S. 145 (1878).

[22] 406 U.S. 205 (1972).

[23] This assertion is explained and defended in detail in Ira C. Lupu, *Hobby Lobby* and the Dubious Enterprise of Religious Exemptions, 38 Harv. J. L. & Gender 35, 48-53

possibility that non-religious parents could claim a right under the Due Process Clause to educate their children exclusively at home. Moreover, the current law of Free Exercise continues to follow *Employment Division v. Smith*,[24] which rejects an across-the-board doctrine of religious exemptions to generally applicable laws.

In contrast to the law of Free Exercise, in which the notion of distinctive rights of religious exemption has never truly taken firm hold, the law of the Establishment Clause has had quite the opposite character. From its inception in *Everson v. Board of Education*[25] until some point in the new millennium, religious distinctiveness was at the core of Establishment Clause adjudication. Rights guarantees overlap with one another, but the promise of non-establishment is unique.

Everson remains the best place to start examining the modern tradition of non-establishment. We leave for Part II.A. the precise details of the scheme upheld (5–4) in *Everson* for reimbursement of bus fares spent on travel to school to parents of school children. Our focus here is the far broader proposition that government spending in direct support of religious education violates the Establishment Clause. On that, the vote in *Everson* was 9–0.[26]

(2015).

[24] 494 U.S. 872 (1990). Laws and practices that discriminate against religion, and hence are not generally applicable, stand on a different footing. Masterpiece Cakeshop v. Colorado Civ. Rts. Comm'n, 584 U.S. ___ , 138 S. Ct. 1719 (2018); Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993). What does not qualify as "generally applicable" law has migrated considerably. See. e.g., Fulton v. City of Philadelphia, 593 U.S. ___ , 141 S. Ct. 1868 (2021). See generally Lupu & Tuttle, Radical Uncertainty, supra note 5, at 251-256 (2021). The ministerial exception, discussed in Part III infra, rests on the combined concerns of non-Establishment and Free Exercise. Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, 565 U.S. 171, 182-183 (2012).

[25] 330 U.S. 1 (1947). For an astute account of *Everson*, including the progress of the litigation, deliberation and opinion-drafting by the Justices, and public reaction to the decision, see Green, Separating Church & State, note 15 supra, at 153-158.

[26] Justice Black's opinion for the Court was joined by Justices Douglas, Murphy, Reed, and Vinson. Id. at 3-18. Justices Burton, Frankfurter, and Jackson joined Justice Rutledge's dissent, which agreed with the majority on the basic no-aid principle but argued that it covered the bus fare reimbursement in the case. Id. at 28-63.

All nine Justices also agreed that the Establishment Clause applies in full force to the states by incorporation through the Fourteenth Amendment.[27] Writing at a time when originalism was hardly the dominant constitutional methodology, the Justices drew in varying degrees of detail on the history of religious establishments in Europe, the conflict over disestablishment in Virginia in the 1780s, and the role that James Madison and Thomas Jefferson played in the Virginia story. Established churches had always relied on state support of both worship and religious indoctrination as essential means for maintaining their grip on the population. In light of that historical pattern, all nine Justices agreed that the Clause, as an original and ongoing matter, forbids state support of these specifically religious activities.

On the facts of *Everson*, no Justice doubted that the Catholic schools included in the Ewing Township scheme for reimbursing bus fares were engaged in religious indoctrination.[28] What then explains the Court's 5–4 split? The dispositive question in the case was how to characterize aid to families for transporting their children to religious schools. Is such assistance inseparable from the enterprise of religious training? Or is the aid akin to the provision of police and fire protection services, to which everyone in the community is equally entitled?

Over a vigorous dissent, the *Everson* majority concluded that the bus fare reimbursement fell into the second category and did not represent aid to the religious mission of the schools. But no Justice believed that religious schools had a claim of equal entitlement to the state's financial support for education. On the contrary, and despite full recognition of parental rights to choose a religious school to satisfy compulsory education laws,[29] every Justice agreed that the religious

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[27] 330 U.S. at 14 (majority opinion); id. at 29 (Rutledge dissent). Remarkably, Justices Black and Frankfurter agreed on this in the 1946–47 Term when they were strenuously disagreeing about whether the Bill of Rights generally applied to the states. Ira C. Lupu & Robert W. Tuttle, Federalism and Faith, 55 Emory L. Rev. 19, 40-41 (2006)(discussing Black-Frankfurter feud in Adamson v. California, 332 U.S. 46 (1947)).

[28] Justice Jackson's dissent, joined by Justice Frankfurter, emphasized the highly sectarian and indoctrinating qualities of Catholic education. 330 U.S. at 18-28.

[29] *Id*. at 18, citing Pierce v. Society of Sisters 268 U.S. 510 (1925).

character of a school constitutionally foreclosed the state from aiding its educational mission.

A year later, the Court reaffirmed the sharply distinctive character of religious activities. In *McCollum v. Board of Education*,[30] eight Justices agreed that a program of religious instruction on public school premises was unconstitutional.[31] Under the program, a coordinated group of religious communities sought permission to send their ministers or teachers into the public school.[32] School officials had authority to approve or disapprove the religious teachers who would provide religious instruction at specified days and times in the public schools. Students whose parents had consented to instruction in particular faiths would participate in the classes; other students would go elsewhere in the school for secular studies of some kind.

Justice Black's relatively brief Court opinion relied heavily on *Everson* in concluding that this joint venture between public officials and religious communities violated the Establishment Clause:

> "[T]he state's tax supported public school buildings [are being] used for the dissemination of religious doctrines. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the state's compulsory public school machinery. This is not separation of Church and State."[33]

The Court's later decision in *Zorach v. Clauson*,[34] upholding a released time program because the religious instruction occurred outside the public-school buildings, has tended to obscure the significance of *McCollum*. For our purposes, several features of *McCollum* deserve emphasis. First, the Court opinion explicitly rejected

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[30] 333 U.S. 203 (1948).
[31] Justice Black's opinion for the Court was joined by Justices Vinson, Douglas, Murphy, Rutledge, and Burton. Id. at 206. Justice Frankfurter wrote a lengthy, historically focused concurring opinion, joined by Justices Burton, Jackson, and Rutledge. Id. at 212-232. Only Justice Reed dissented. Id. at 238.
[32] The program was coordinated by the Champaign Council on Religious Education, which included Jewish, Roman Catholic, and a few Protestant groups. Id. at 207-09.
[33] Id. at 212.
[34] 343 U.S. 306 (1952).

the proposition that the First Amendment "was intended to forbid only government preference of one religion over another, not an impartial governmental assistance of all religions."[35]

Second, a concurring opinion by Justice Frankfurter offered a detailed historical narrative of church-state separation with respect to public schools in nineteenth century America.[36] Both before and after the ratification of the Fourteenth Amendment, many states adopted constitutional principles that excluded sectarian religious education from the public schools and that forbade public financial support of religious schools.[37]

Thus, at the inception of modern Establishment Clause adjudication, the Supreme Court was laser-focused on the distinctiveness of religious training as an object of state support. It would have made no difference in *McCollum* if the public schools had a program of music or art education, taught by outside instructors, alongside the challenged religious instruction. Nor would it have mattered to the *Everson* dissenters whether children at secular schools, private or public, had been included along with children in the Catholic schools in the bus fare reimbursements. All the Justices understood that equal treatment of religion and its secular counterparts was not the focus of the Establishment Clause.

In the mid-1980s, an alternative history about non-establishment emerged at the fringes of the Supreme Court. Dissenting in *Wallace v. Jaffree*,[38] Justice Rehnquist argued that the Court's embrace of separation of church and state was based on an inaccurate conflation of

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[35] 333 U.S. at 211.

[36] Id. at 212-232.

[37] Id. We will have more to say about this history in Part II.A.2 below, where we analyze the stunning indifference of the Roberts Court majority to this extensive history.

[38] 472 U.S. 38 (1985) (invalidating an Alabama statute calling for a moment of silence in public schools for meditation or prayer). This alternative history draws on earlier dissenting opinions of Justice Reed in McCollum, 333 U.S. 203, 238 (1948). Justice Stewart in Abington Township v. Schempp, 374 U.S. 203, 308 (1963), and, most importantly, the Court's opinion in Marsh v. Chambers, 463 U.S. 783 (1985) (rejecting an Establishment Clause-based challenge to Nebraska's paid legislative chaplain),

Virginia history with the national project of drafting the Religion Clauses of the First Amendment.[39] Justice Rehnquist argued that the Framers never intended to separate religion and state. Instead, the drafting history and subsequent history of the Establishment Clause demonstrated that its purposes were to "prohibit the establishment of a national religion, and perhaps to prevent discrimination among [religious] sects."[40]

From this starting premise, Justice Rehnquist extended his reasoning to the entire corpus of modern Establishment Clause decisions, from *Everson* through *Lemon v. Kurtzman*. Because all of these decisions were based on an erroneous history, he reasoned, they were all wrong and should be fully reconsidered. The Establishment Clause required state neutrality among religious denominations but did not require state neutrality between religion and non-religion. Citing George Washington and other Founders, Rehnquist asserted that religion could be a source of moral teaching and therefore an appropriate instrument of statecraft.[41]

In Part II below, we will have more to say about the *Everson-McCollum* version of Establishment Clause history. In the mid-1980s, on the eve of Antonin Scalia's promotion to the Supreme Court, Rehnquist's voice was an outlier. Rehnquist's version of Establishment Clause history depended heavily on individual statements, including Thanksgiving Proclamations and speeches by public officials and other leading figures during the early years of the Republic.[42] This set of occasional statements, even when recorded, does not represent governmental commitments to an institutional relationship between church and state.[43] Rehnquist's account otherwise rests on a highly

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[39] Id. at 91-114. No other Justice joined the Rehnquist dissent, though Justice White wrote that he "appreciates Justice Rehnquist's explication of the history of the Religion Clauses of the First Amendment." Id. at 91 (White, J. dissenting).

[40] Id. at 98; see also id. at 113 (Rehnquist, J., dissenting). For criticism of this view, see Douglas Laycock, "Nonpreferential" Aid to Religion: A False Claim About Original Intent, 27 Wm. & Mary L. Rev. 875 (1986).

[41] 472 U.S. at 101-103.

[42] Id.

[43] James Hutson characterizes such statements as government's "friendly aids" to religion, and ultimately concludes that the statements negate any idea of church-state separation. At the same time, however, he acknowledges that the aids did not

tendentious account of the drafting history of the Religion Clauses,[44] and the very thin reed of congressional grants to sectarian schools for American Indians in the nineteenth century.[45]

Moreover, his account of original meaning entirely ignored the possibility that nineteenth century developments in the field of public education had crystallized into a strong conception of church-state separation.[46] As some prominent originalists argue, application of the Bill of Rights to the states should consider the public meaning of the Bill's provisions at the time of ratification of the Fourteenth Amendment in 1868, rather than their public meaning in 1791.[47]

As the law of the Establishment Clause developed over the remainder of the twentieth century, the themes identified in this Part remained dominant. Religion-based rights frequently overlapped with concerns for free speech or equal treatment. When that overlap occurred, religious freedom was lifted up through those umbrella concerns.[48] In sharp contrast, the focus of Establishment Clause

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extend to highly controversial questions of church funding. The two forms of aid – general statements about the public value of religion on one hand, and compulsory support (or attendance) on the other -- are categorically different. In public statements, government officials may be sincere or attempting to assure a politically influential portion of the electorate. But the statements do not empower the state to act in ways that advance the asserted benefits of religion. See Hutson, supra note 14, at 132-136.

[44] 472 U.S. at 93-100. For a more nuanced and through review of the drafting history of the various Religion Clauses in the Constitution, see Green, Separating Church & State, supra note 15, at 65-75.

[45] 472 U.S. at 103-04 (citing, inter alia, Robert Cord, *Separation of Church & State*).

[46] McCollum, 333 U.S. at 212-232 (Frankfurter, J. concurring). See generally Green, Separating Church and State, note 15 supra, at 124-136.

[47] In New York State Pistol & Rifle Ass'n v. Bruen, 142 S.Ct. 2111, at 2138 (2022), the Court opinion "acknowledge[d] that there is an ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868 when defining its scope . . . ." (citing A. Amar, The Bill of Rights: Creation and Reconstruction xiv, 223, 243 (1998)). For a sophisticated comment on the problem of whether the 1791 or the 1868 meaning should be controlling for an originalist, see Michael Dorf, http://www.dorfonlaw.org/2022/07/1791-or-1868-question-itself-reveals.html#more.

[48] See, e.g., Good News Club v. Milford Central School, 533 U.S. 98 (2001);

litigation remained fixed on the reasons why the state should not support religious experience, even as it was free to support comparable secular activity. For example, school sponsored prayers are constitutionally forbidden, while school sponsored patriotic exercises are permitted, though opt-outs are required. Nothing in the pre-2000 law of the Religion Clauses supported the idea that non-establishment makes sense without a principled focus on the distinctiveness of religious experience, and the many reasons to keep government away from that experience.

II. Establishment Clause Distinctiveness and its Disappearance

As Part I explained, the Court built the foundation of Establishment Clause adjudication on a bedrock of religious distinctiveness. Over the past seventy-five years, the pillars of Establishment Clause law have grown up in three primary contexts: (1) government financial support for religious institutions, schools in particular; (2) government sponsorship of religious displays and exercises outside of the context of public schools; and (3) government sponsorship of religious displays and exercises within public schools.

In all three contexts, the idea of religious distinctiveness dominated court decisions for sixty years. In the last decade, however, a paradigm of nondiscrimination has replaced the idea of religious distinctiveness. This change creates an irreconcilable conflict with respect to the most basic principles of the Establishment Clause. The Establishment Clause requires distinctive treatment of religion; a norm of nondiscrimination forbids distinctive treatment of religion. These principles cannot coexist.

A. Government funding of religious experience

From inception of the modern law in 1947 to date, questions about government financial support for religious experience have been prominent and persistent. Two distinctions – between religious status

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Rosenberger v. Univ. of Virginia, 515 U.S. 819 (1995); Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384 (1993); Widmar v. Vincent, 454 U.S. 263 (1981).

and religious use, and between direct and indirect support for religious experience -- run through all of the Court's work.

Status Versus use. The distinction between religious status and religious use resides at the heart of Establishment Clause concern. There has never been a per se constitutional norm against government providing general welfare benefits, or even financial subsidies, to entities identified by religious status or affiliation. *Bradfield v. Roberts* ,[49] the very first Establishment Clause decision in the Supreme Court, upheld a federal grant to Providence Hospital, a facility operated in the District of Columbia by a Roman Catholic Order. The grant paid for the construction of a new wing to house District residents with infectious diseases. In rejecting an Establishment Clause attack on the grant, the Court found that patients in the new wing would receive standard medical care, not religious indoctrination. The Court concluded that the challenged grant was not to a sectarian corporation, and that its purpose was maintaining a hospital for care of the sick.[50]

Fifty years later, when the Court confronted the issues in *Everson*, its focus similarly was on the relationship between a bus fare reimbursement program and the sectarian character of the schools. For the majority, the character of the aid as reimbursement to families for transportation costs, rather than direct funding of the students' education, drove the outcome.[51]

Another twenty years later in *Lemon v. Kurtzman*,[52] the "pervasively sectarian" character of the schools rendered all aid to their educational program inseparable from aid to the schools' religious mission.[53] *Lemon* turned on the issue of funding for religious instruction, not the question of aid to an entity that happened to have a

[49] 175 U.S. 291 (1899).
[50] Id. at 299-300.
[51] 330 U.S. at 16-18.
[52] 403 U.S. 602 (1971).
[53] The label of "pervasively sectarian" for thickly religious schools first appeared in Hunt v. McNair, 413 U.S. 734 (1973). The Court wrote: "Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission." Id. at 743.

religious affiliation. This is precisely why, in *Tilton v. Richardson*,[54] the Supreme Court upheld the provisions of the federal law that permitted grants for construction at colleges and universities, including religiously affiliated ones. The statute "authorize[d] grants and loans only for academic facilities that will be used for defined secular purposes and expressly prohibit[ed] their use for religious instruction, training, or worship."[55] Accordingly, the authority to make such grants did not violate the Establishment Clause.

The distinction between status and use has always been crucial but has for too long been obscured by the stream of particular cases that involve aid to pervasively religious schools.[56] As discussed in Part II.A.2, below, recent decisions have lifted up the distinction, but only for the purposes of rejecting it. It is vital to clarify that the Constitution does not forbid government support of entities (or people) marked by religious status. They are equal in status to their secular counterparts, and thus incur obligations and possess rights identical to those counterparts. The Establishment Clause, however, does forbid government support of religious activity, such as worship, proselytizing, and religious indoctrination. The status-use distinction is essential to a coherent understanding of the Establishment Clause.

Direct Versus Indirect Support. The difference between direct and indirect funding of religion is a second recurring theme in Establishment Clause adjudication. Indirect support is marked by the free choice of program beneficiaries among a variety of authorized service providers, some of which may be pervasively religious and therefore constitutionally ineligible for direct aid. A school voucher program provides the best example.[57] Genuine private choice among

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[54] 403 U.S. 672 (1971). The Court decided both *Lemon* and *Tilton* in the October 1970 Term.
[55] Id. at 679-680.
[56] See, e.g., Zelman v. Simmons-Harris, 536 U.S. 639 (2002); Mitchell v. Helms, 530 U.S. 793 (2000), *overruling* Meek v. Pittenger, 421 U.S. 349 (1975) *and* Wolman v. Walter, 433 U.S. 229 (1977); Agostini v. Felton, 521 U.S. 203 (1997), *overruling* Aguilar v. Felton, 473 U.S. 402 (1985); Committee for Public Education v. Nyquist, 413 U.S. 756 (1973).
[57] Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

schools separates the government from responsibility for any ultimate religious use of the funds.[58]

At the least, we can say with confidence that *direct* government financial support for religious *experience* is the most obviously unconstitutional pairing.[59] Similarly, though we leave this for Part III, direct government regulation of that same religious experience is likewise unconstitutional.

1. From *Everson* (1947) to the Eve of *Trinity Lutheran Church v. Comer* (2017).

We cannot canvass every decision in this seventy-year period, but the prevailing themes, including the distinctions between status and use and between direct and indirect support, are constant. *Everson* did not involve a split on fundamental principles or the significance of history. Instead, what divided the Court was the distinctions we are highlighting; the majority saw the program as indirect support, running through parents of schoolchildren, that benefitted all covered schools by facilitating safe and timely arrival at schools.[60] The dissent focused on the bottom-line benefit to Catholic schools engaged in deeply sectarian education.[61]

Fast forward to 1968 and the decision in *Board of Education v. Allen*.[62] New York State required local school boards to loan books used or approved for use in the public schools to the parents of children in

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[58] We unpack the question of state responsibility for religious experience in Ira C. Lupu & Robert W. Tuttle, Zelman's Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles, 78 Notre Dame Law Review 917 (2003); and Ira C. Lupu & Robert W. Tuttle, Sites of Redemption: A Wide-Angle Look at Government Vouchers and Sectarian Service Providers, 18 J. L. & Politics 537 (2002).

[59] Compare Freedom from Religion Foundation v. McCallum, 324 F. 3d 880 (7th Cir. 2003) (indirect financing of faith-based substance abuse program does not violate the Establishment Clause) with Freedom from Religion Foundation v. McCallum, 179 F. Supp. 2nd 950 (W.D. Wisc, 2002) (direct financing of the same program violates the Establishment Clause).

[60] 330 U.S. at 17-18.

[61] Id. at 56-58 (Rutledge, J., dissenting).

[62] 392 U.S. 236 (1968).

private schools, including religious schools.[63] The six-Justice majority relied on the distinction between direct and indirect support to frame the aid as running to families and not schools.[64] It likewise relied on the requirement that the books be "used or approved for use" in secular public schools to justify a conclusion that the aid was allocated only to secular instruction in religious schools.[65]

Justice Black, the author of *Everson*, was not buying it. If bus fare reimbursement went to the verge of constitutional power, the loaning of books used in daily instruction went far beyond that edge.[66] Moreover, as Justice Douglas argued, the option of showing that the books had been "approved for use" (even if not actually used) in public schools invited lobbying of public school officials by parochial school leaders with respect to books that might be most compatible with religious education.[67]

Allen set the stage for the Court's 1971 decision in *Lemon v. Kurtzman*.[68] In the hands of sloppy scholars, lawyers, and jurists, the context and facts of *Lemon* are usually ignored. In *Lemon*, and its companion case *Earley v. DiCenso*, the plaintiffs challenged programs from Pennsylvania and Rhode Island that respectively included salary supplements and other educational support to nonpublic schools. The design of both programs, though framed with slight differences, involved a restriction of the payments to secular subjects and secular materials.[69]

The premise that ran through these programs is easy to spot. They were designed to help religious schools while avoiding subsidy of religious instruction — particularly courses in religion or courses that were likely to contain religious content, such as Latin, Greek, or Western

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[63] Id. at 239.
[64] Id. at 243-44. The aid in *Allen* was thus comparable to the reimbursement of bus fares upheld in *Everson*.
[65] Id. at 244-45.
[66] Id. at 252-54 (Black, J. dissenting).
[67] Id. at 265 (Douglas, J. dissenting).
[68] 403 U.S. 602 (1971).
[69] Id. at 607 (RI program); id at 609-10 (PA program). In Pennsylvania, the program was explicitly limited to courses in mathematics, modern foreign languages, physical sciences, and physical education. Id. at 610.

Civilization. The flaw in the design, as the Court saw it, was that the aided schools were pervasively sectarian, meaning that religious teaching was likely to infuse all courses. Subsidy to the school would inevitably be subsidy to teaching of the faith.[70]

Could anything be done to avoid this unconstitutional arrangement? The states had not seriously tried. The Court speculated that monitoring every subsidized teacher and subsidized course would lead to constant intrusion into the content of instruction, thus producing a constitutional problem of state surveillance of those teachers and classes.[71] Hence the catch-22 of direct school aid programs: they either unconstitutionally support religious experience, or they unconstitutionally intrude on teaching to ensure avoidance of that support. To put it simply, aid to pervasively religious schools inevitably financed religious use. Internal separation was impossible.

The Court could have reached that conclusion without any embrace of a comprehensive test. Alas, Chief Justice Burger did not resist the temptation of unnecessary synthesis. In that moment of judicial hubris, the three-part test of *Lemon* was born:

> "Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years . . . . First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; [third], . . . , the statute must not foster 'an excessive government entanglement with religion.'"[72]

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[70] Justice Alito makes essentially the same argument in his opinion for the Court in Our Lady of Guadelupe v. Morrissey-Berru, 591 U.S. ___, 140 S. Ct. 2049 (2020) (holding that teachers in a religious elementary school are expected to infuse faith in all their instruction and therefore are "ministers" for constitutional purpose).

[71] "[W[e conclude that the cumulative impact of the entire relationship arising under the statutes in each State involves excessive entanglement between government and religion." Id, at 614. The analysis of each state's program followed this conclusion. Id. at 615-620 (RI program); Id. at 620-622 (PA program).

[72] 403 U.S. at 612-13 (citations omitted). *Lemon*'s three-part test, usually divorced from the context of the decision, has been the centerpiece of Establishment Clause conversation for a half century. The purpose and effect prongs originated in Abington Township v. Schemmp, 374 U.S. 203 (1963), a school prayer case in which the test was unnecessary. The entanglement prong originated in Walz v. Tax

In *Kennedy v. Bremerton Sch. Dist.*,[73] discussed in Part II.C. below, the Court announced that it had "long ago abandoned [the] *Lemon* [test]."[74] The repudiation of the *Lemon* test, however, does not necessarily constitute an overruling of that decision on its facts. *Lemon* turned on the Court's appraisal of the thickly sectarian character of the aided parochial schools in Pennsylvania and Rhode Island.[75] With or without three-part tests, financial aid to schools of that character implicates the state as a sponsor and editor in the project of religious education.

For the thirty years following *Lemon*, everything that happened in the law of government funding of religious entities can be traced to the distinctions between status and use and between direct and indirect funding. This is easiest to see in the cases involving indirect funding, in which individual beneficiaries of aid are empowered to designate either religious or secular entities as the ultimate recipients. Over a period of twenty years, the Court upheld aid schemes of this character, even when the beneficiaries ultimately used the aid for tuition payments at pervasively religious schools.[76]

Direct aid cases produced a more tortured line of decisions, but the underlying themes were identical to those in *Lemon*. The question in all these cases involved whether the state was subsidizing the religious mission of the school. Accordingly, the decisions required close inquiry into the form of the aid, including maps, test preparation, public health

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Commission, 397 U.S. 664 (1970), a decision upholding the exemption from taxation of real property held by charities, including religious ones.

[73] 597 U.S. ___, 142 S. Ct. 2407 (2022).

[74] Id. at 2427.We .

[75] The record, at least in the Rhode Island case which had involved thorough fact-finding, amply supported this description. 403 U.S. at 615-620.

[76] *Mueller v. Allen*, 463 U.S. 388 (1983); *Witters v. Washington Department of Services for the Blind,* 474 U.S. 481 (1986); *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993).; *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) ((upholding the Cleveland school voucher program). We expressed doubts about the Cleveland case, not because it aided religious schools, but rather because it steered children into religious experience. Ira C. Lupu & Robert W. Tuttle, Zelman's Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles, 78 Notre Dame Law Review 917 (2003).

concerns, and remedial instruction taught by outside teachers.[77] The Court struggled to distinguish acceptable forms of aid to the schools' secular functions from unacceptable assistance to their religious instruction.

These difficult cases produced a set of results not easily explained or reconciled. They culminated in the Court's last serious encounter, twenty years ago, with a large program of direct aid to elementary and secondary schools. In *Mitchell v. Helms*,[78] the Court considered a federal expenditure program that supported the distribution of education materials and equipment, including computers.[79] Public schools and private schools, including those that were religiously affiliated, were eligible for the aid.[80]

The opinions are quite long and trace over many complex strands of disputed doctrine. We believe, however, that the through lines are clean and simple, and all involve the question of whether the aid can be readily diverted to religious instruction. The plurality opinion by Justice Thomas emphasizes the non-preferential design of the aid program.[81] All elementary and secondary schools, including religiously affiliated ones, are eligible. The content of the aid is not religious. Under these circumstances, the plurality argues, it is constitutionally irrelevant whether the aid can be diverted to religious use.[82]

Justice Souter's dissent argues that the program was fatally flawed because the aid might be diverted to religious use.[83] Many of the recipient schools were pervasively religious, so such diversion would impermissibly implicate the state in religious indoctrination and

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[77] Meek v. Pittenger, 421 U.S. 349 (1975), *overruled*, Mitchell v. Helms, 530 U.S. 793 (2000); Wolman v. Walter, 433 U.S. 229 (1977), *overruled*, Mitchell v. Helms, 530 U.S. 793 (2000); Aguilar v. Felton, 473 U.S. 402 (1985), *overruled*, Agostini v. Felton, 521 U.S. 203 (1997). The overruling of all three of these decisions turned on the subsequent judicial findings that the programs did not aid religious instruction.
[78] 530 U.S. 793 (2000).
[79] Id. at 801-802.
[80] In Jefferson Parish, Louisiana, where the case arose, thirty percent of the funds went to private schools, mostly Catholic. Id. at 803.
[81] Id. at 809-810.
[82] Id. at 820-829.
[83] Id. at 868, 890-895 (Souter, J., joined by Ginsburg and Stevens, JJ, dissenting).

monitoring would be impossible without excessive entanglement. This is pure *Lemon* reasoning. Accordingly, a prophylactic ruling, barring the aid from religious schools, is constitutionally necessary.

Justice O'Connor, joined by Justice Breyer, wrote the concurring opinion.[84] Because there is no majority opinion in *Mitchell*, the concurrence is the controlling law.[85] The concurrence emphasized that the program required that the aid be limited to "secular, neutral, and non-ideological [use]."[86] This condition was enforced, not by intrusive monitoring, but rather by requirements that schools monitor and attest to compliance.[87] Trusting the good faith of the schools, Justice O'Connor concluded that the program included the constitutionally necessary safeguards against diversion to religious instruction.[88]

Mitchell is the most recent Establishment Clause decision about direct financial support to religious schools. Its lesson, as reflected in the concurring opinion, is exactly as we prescribed at the beginning of this section. State financial support of religious institutions is not constitutionally prohibited *per se*. Rather, the prohibition attaches to religious uses of state financial support.

Our view of this is not a matter of wishful thinking or academic speculation. Ever since the onset of President George W. Bush's Faith-Based and Community Initiative in 2001, the regulatory policies that govern federal partnerships with charitable organizations in the delivery of social services have hewed to the precise lines we have described.[89] Faith-based entities may receive direct grants to deliver social services. Those grants, however, may not support "specifically religious activities," defined in federal regulations as worship,

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[84] Id. at 836 (O'Connor, J., joined by Breyer, J, concurring).
[85] Marks v. United States, 430 U.S. 188 (1977) (when there is no majority opinion, the narrowest opinion in support of the result is the source of controlling law).
[86] 530 U.S. at 861 (O'Connor, J., joined by Breyer, J, concurring).
[87] Id, at 861-863.
[88] Id. .at 863-866..
[89] For extended discussion of direct and indirect state financing of religious social service organizations, see Ira C. Lupu & Robert W. Tuttle, The Faith-Based Initiative and the Constitution, 55 DePaul L. Rev. 1, 57-102 (2005).

proselytizing, or religious education.[90] If grantees wish to engage in such religious activities, they must do so at times and places separate from their government-funded work.[91] With respect to programs of indirect aid, such as vouchers to be used in a drug rehabilitation program, religious entities may use the aid without limitation as to the religious content of the activity.[92]

As reflected in these longstanding policies, the *Mitchell* concurrence and the *Zelman* opinion represent the current law on Establishment Clause limitations on state financial support of religious entities. The Roberts Court has not yet been confronted with an attempt to modify any of this.

Nevertheless, as our analysis in the next Subpart explains, state aid to religious entities has taken on entirely new dimensions as a subject of distinct constitutional concern.

2. The *Trinity Lutheran-Espinoza-Carson* Trilogy

In a remarkably short period of time (2017-2022), the Court has effectively erased the idea of religious distinctiveness that dominated constitutional adjudication about government funding of religious entities. The Court has done this in the name of free exercise of religion, rather than by explicitly uprooting Establishment Clause norms. But the trend of constitutional thought in the *Trinity Lutheran-Espinoza-Carson* Trilogy (hereafter "the Trilogy") is unmistakably contrary to the jurisprudential history of the Religion Clauses. These revolutionary moves have all occurred while the Court has remained silent about the norms of religion-state separation and federalism that it has upended.

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[90] For example, the current regulation in the U.S. Department of Education can be found at 2 CFR 3474(d)(1) (20xx). The constitutional provenance of this limitation includes Justice Rehnquist's opinion for the Court in Bowen v. Kendrick, 487 U.S. 589 (1988), at 618-622 (aid may not flow "to pervasively sectarian institutions or to activities that promote explicitly religious content or that are designed to inculcate the views of a particular religious faith.") Id. at 621.

[91] See, e,g,, 2 CFR 3474(d)(1) (20xx).

[92] See, e.g., id. at 3474(d)(2), *referring to* 34 CFR 75.52(c)(3) & 76.52(c)(3).

Chief Justice Roberts wrote all three opinions in the Trilogy, which adopts a highly selective and at times hostile reaction to the long history of state constitutional restrictions on financial support of religion.[93] A careful and honest study of state policies on funding religious institutions leads to conclusions very different from those found in the Trilogy..

The *Everson* opinions rely on the Virginia story of disestablishment. That narrative, involving Madison and Jefferson, is powerful and important. As Professor Steven Green shows in his recent and persuasive study of disestablishment history,[94] however, Virginia's model was neither unique nor even the one most influential for other new states. Green argues that Pennsylvania, which had a long history of religious liberty, prohibited any establishment in its 1776 Constitution.[95] Using essentially the same language as Jefferson's Virginia Statute for Religious Liberty, which Virginia did not adopt until a decade later, the Pennsylvania Constitution provided that "[N]o man ought or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against, his own free will and consent. . . ."[96] New Jersey included a similar clause in its 1776 Constitution, and Delaware added a prohibition on compelled support of religion to its 1792 Constitution.[97]

Other states initially adopted either contradictory language about aid to religion or permitted "non-preferential" aid to religious ministries. But Green shows that by the end of the eighteenth century, in all but the New England states, any initial uncertainty about aid to religion was resolved decidedly against the practice of compelled support.[98] New states that joined the union in the early years of the

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[93] As long ago as 1948, Justice Frankfurter's concurrence in *McCollum*, 330 U.S. 212-232, thoroughly canvassed this history.
[94] Green, *supra* note 15, at 50-64.
[95] Id. at 55. Green notes that the Pennsylvania Constitution of 1790 adopted even clearer language to prohibit state funding of religious ministries, removing any possible argument that Pennsylvania's 1776 Constitution permitted non-discriminatory funding of religion. See id.
[96] PA 1776 Const. Declaration of Rights, ii. See Green, supra note 15, at 55 (discussing Pennsylvania Const. of 1776).
[97] Id. at 50.
[98] Id. at 51-54.

republic followed the same pattern of prohibiting compelled support for religion.

Despite the insinuation in the Trilogy, discussed below, that no-funding provisions were systematically designed to target Roman Catholic schools, the history tells a different and complex story. It is simply implausible to assert that the basis for the prohibition on compelled support for religion is the result of anti-Catholic bias. Proponents of common schools rejected state compelled support for "sectarian" education well before the start of significant Roman Catholic immigration to the United States. These provisions represent an important aspect of the effort by the Founding Generation and their successors to break from the English structure of church and state.[99]

Opposition to funding of Roman Catholic schools certainly played a major role in political disputes throughout the mid- to late nineteenth century.[100] Moreover, some of that opposition is attributable to Nativist hostility to non-Protestant immigrants. All of this must be understood, however, against the historical backdrop of longstanding concern over funding ministries, including sectarian schools.[101] Even before significant Roman Catholic immigration to the United States, leaders of the common schools movement blocked state efforts to fund Episcopalian and Presbyterian schools.

As our prior research into the state constitutional landscape reveals,[102] some of the earliest versions of no-aid clauses resemble the Virginia Bill for Religious Liberty's prohibition on compelled support of religious ministry or places of worship.[103] In other states, no-aid clauses took different forms. Ten states have a "no establishment of religion"

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[99] Id. at 64.
[100] Id. at 128-131.
[101] For example, the New England states eliminated their schemes for funding of religion because of fights between Congregationalists, Unitarians, and various religious dissenters – with no reference to Roman Catholicism. See id. at 90-97.
[102] Ira C. Lupu & Robert W. Tuttle, Government Partnerships with Faith-Based Service Providers: The State of the Law," The Roundtable on Religion and Social Welfare Policy, Nelson A. Rockefeller Institute of Government, SUNY (Dec., 2002), at 35-38 & App. A, 77-129 (survey of state constitutional restrictions)
[103] Id. at 36.

clause in their constitutions.[104] As non-sectarian common schools expanded through the nineteenth century, state constitutions began to be more targeted. Thirty-seven states adopted some form of prohibition on state financing of religious ministries.[105] Twenty-nine states have constitutional restrictions on state financing of schools under sectarian control.[106] Ten of these states explicitly extend the prohibitions to direct or indirect financing.[107]

The history and tradition of church-state policy in the American states thus involves distinctive treatment, for funding purposes, of religious institutions and religious schools. This pattern is widespread and quite independent of Establishment Clause constraint. After *Everson*, limits on direct funding of religious education became mandatory under the First Amendment. But the broader and more explicit limits under state constitutional law precede *Everson* by many decades.

In *Locke v. Davey*,[108] decided in 2004, the Supreme Court confronted the Free Exercise implications of the gap between what state constitutional law prohibits and the more lenient restrictions of the federal Establishment Clause. Washington State operated the Promise Scholarship Program, which covered higher education costs of Washington high school graduates who attend in-state colleges. In light of the Washington Constitution's prohibition on payments in support of "religious worship, exercise, or instruction,"[109] the state denied a scholarship to Joshua Davey because he was pursuing a major in devotional theology, which would prepare him for ministry.[110]

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[104] Id. at 37.
[105] Id.
[106] Id.
[107] Id.
[108] 540 U.S. 712 (2004).

[109] Wash. Const. Art. I, sec. 11, provides in part "No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment."

[110] 540 U.S. at 717.

Davey challenged the denial under the Free Exercise Clause of the First Amendment. He argued that the denial discriminated against devotional religious studies and was therefore constitutionally suspect. In an opinion by Chief Justice Rehnquist, the Court rejected the challenge 7–2.[111] The situation presented a classic case of what then was called "the play in the joints" between the Free Exercise Clause and the Establishment Clause. Because the scholarship program involved independent choice by beneficiaries about schools and courses of study, it did not run afoul of the Establishment Clause. But the Free Exercise Clause presumption against religious discrimination did not apply in a case where the state was acting on its own legitimate policies of religion-state separation. In particular, the Court emphasized, state policies designed to keep government apart from preparation for ministry—a quintessential religious use—have a substantial historical pedigree, reflect no animus toward religion, and deserve judicial respect.[112]

Locke v. Davey demonstrated unsurprising deference to state discretion in matters of religion-state separation. States have long had such policies, broader than the First Amendment requires. Thus, respect for federalism combined with the nuances of church-state relations called for exactly that kind of deference.

Beginning in 2017 with *Trinity Lutheran Church v. Comer*,[113] the Trilogy thus produced seismic upheaval in Religion Clause law.[114] Missouri had refused to consider an application for a playground

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[111] Id. at 725.
[112] Id. at 721-723.
[113] 582 U.S. ___ ; 137 S. Ct. 2012 (2017);.
[114] Our earlier reactions to each of the three decisions in the Trilogy can be found here: Ira C. Lupu & Robert W. Tuttle, Trinity Lutheran Church v. Comer: Paradigm Lost?, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3012274; Ira C. Lupu & Robert W. Tuttle, Espinoza v, Montana Department of Revenue: Requiem for the Establishment Clause, https://takecareblog.com/blog/espinoza-v-montana-department-of-revenue-requiem-for-the-establishment-clause; Ira C. Lupu & Robert W. Tuttle, Carson v. Makin and the Dwindling Twilight of the Establishment Clause, https://www.acslaw.org/expertforum/carson-v-makin-and-the-dwindling-twilight-of-the-establishment-clause. In the pages that follow, we have drawn material from these earlier works, whose titles show our accumulating dismay as the trilogy unfolded.

resurfacing grant to a church that operated a pre-school and day care center. The state did not defend its policy on federal Establishment Clause grounds,[115] though such a defense was plausible because the grant involved direct funding of a religious institution. Without restrictive safeguards, such as those in *Mitchell v. Helms*, the school might have used the improved playground as an "outdoor classroom," available for worship or religious instruction. Instead, the state's blanket refusal was premised only on the Missouri Constitution, which provided "that no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion . . . ."[116]

The lower courts had concluded that *Locke v. Davey* controlled the outcome in *Trinity Lutheran*.[117] The state was not denying the church its right to practice religion or punishing its exercise. Rather, the state was not subsidizing the church pursuant to the state's constitutional policy of separation.

In *Trinity Lutheran*, the Court refused to follow this line of argument. The Court reasoned that the state's refusal to pay for a particular use of public funds in *Locke* is distinct from a complete denial of eligibility to compete for funds based on the applicant's status as a church. Status discrimination against churches represents discrimination presumptively forbidden by the Free Exercise Clause. To the state's proffered justification that its constitutional policy of separation supported its treatment of Trinity Lutheran Church, the Court had only this to say: "[T]he Department offers nothing more than Missouri's policy preference for skating as far as possible from religious establishment concerns. . . . In the face of the clear infringement on free exercise before us, that interest cannot qualify as compelling."[118]

Policy preference? As Justice Sotomayor, joined by Justice Ginsburg, argued at length in dissent,[119] the *Trinity Lutheran* opinion

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[115] 137 S. Ct. at 2019 (mentioning party agreement that the Establishment Clause does not prevent Missouri from including the church in the grant program).
[116] Missouri Constitution, Art. I, section 7.
[117] 137 S. Ct. at 2018-19.
[118] Id. at 2024.
[119] Id. at 2027-2041.

ignores entirely both the historical and conceptual background of religious separation in state funding matters. As noted above, almost forty states have constitutional restrictions on such funding, and federal Establishment Clause law had wrestled with related questions for seventy years. By aggressively narrowing the relevant state discretion recognized in *Locke v. Davey*, the Court in *Trinity Lutheran* replaced this body of state constitutional law with an *ipse dixit* that the Free Exercise Clause requires equal treatment of religious and secular entities.

A footnote in *Trinity Lutheran* offered a faint hope that the opinion was less radical than it seemed. Footnote three, joined by only four Justices, reads in full: "This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination."[120] On its surface, the footnote did no more than restate the context of the case. But it at least suggested that public funding of education at religious schools, the far more typical context for cases about church-state financial relations, might invite a different analysis.

That suggestion vanished three years later, in *Espinoza v. Montana Department of Revenue*.[121] The Montana program at issue in *Espinoza* involved the use of tax credits for donations to organizations that financed scholarships at private elementary and secondary schools.[122] The Montana Department of Revenue ruled that the state constitution, which barred aid to any school "controlled in whole or in part by any church, sect, or denomination,"[123] precluded use of these scholarships at religiously affiliated schools.[124]

In a challenge from several Montana parents, the Montana Supreme Court ruled that the Department of Revenue was correct in its

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[120] Id. at 2024, n. 3. Chief Justice Roberts, and Justices Kennedy, Breyer, and Kagan joined the footnote. Two years later, the Chief Justice did not hesitate to extend *Trinity Lutheran* to schools. Espinoza v. Montana Dept. of Revenue, 591 U.S. __, 140 S. Ct. 2246, 2254-2257 ((2019).

[121] 591 U.S. ___, 140 S. Ct. 2246 (2020).

[122] Id. at 2251.

[123] Montana Const., Art. X, §6(1), cited at 140 S. Ct. 2252.

[124] Id. The Department left the program intact with respect to secular private schools, a result that did not survive litigation in the state courts. Id. at 2253.

application of the state constitution.[125] The court went beyond that, however, and held the entire scholarship program void, because state law did not allow the program to be cut down and applied to secular private schools only.[126] Thus, as the case arrived at the U.S. Supreme Court, the state's policy did not favor secular private school students over those in religious private schools.

Nevertheless, the *Espinoza* opinion concluded that the state constitution's no-aid clause itself violated the Free Exercise Clause of the First Amendment, because the provision discriminated on the basis of the religious status of the recipient institution.[127] The Court rejected the idea that states should be free to maintain their longstanding constitutional traditions of not funding religious schools.

In doing so, the Court dramatically expanded its ruling in *Trinity Lutheran*, which involved grants for playgrounds, not school tuition benefits, and correspondingly confined the reach of *Locke v. Davey*.[128] After *Espinoza*, *Locke* seems limited to the denial of state-funded scholarships for students pursuing a degree in ministry. Chief Justice Roberts also rejected the argument that the widespread enactment in the nineteenth century of no-aid clauses in state constitutions should influence the contemporary meaning of the Free Exercise Clause.[129] In an astonishingly cavalier passage, Roberts asserted that the enactment of these provisions was heavily influenced by anti-Catholic views and, therefore, did not deserve the Court's respect.[130]

Unlike *Trinity Lutheran*, which involved direct grants, *Espinoza* involved indirect financial support of religious experience. And *Espinoza* repeated the *Trinity Lutheran*'s emphasis on the status-based character of the exclusion. But *Espinoza* jumped far beyond *Trinity Lutheran* by moving the relevant Free Exercise law into the context of aid to

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[125] Id.
[126] Id.
[127] Id. at 2255-2257.
[128] Id. at 2254-2258,
[129] Id. at 2257-59.
[130] Id. at 2259 (citing the *Mitchell v. Helms* plurality for the proposition that "[I]t was an open secret [in the 1870's] that 'sectarian' was code for 'Catholic.' ")

education, and by casting deep doubt on the power of states to proscribe assistance to education in religious schools.

On the flimsiest, most tendentious analysis, *Espinoza* repudiated the sharp lessons of eighteenth and nineteenth century history concerning religion-state separation,[131] and implicitly rejected the collective wisdom of Justices Black, Frankfurter, Jackson and their contemporaries in the late 1940s. The Court reframed the distinctive demands of non-establishment in school aid cases as invidious discrimination in violation of the Free Exercise Clause. It dramatically narrowed the "play in the joints" within which states might pursue their own religion-state policies. Moreover, the Court did all of this without the slightest attention to whether the text or the original public meaning of the Free Exercise Clause (in either 1791 or 1868) supported these moves.[132]

The Trilogy concludes with the 2022 decision in *Carson v. Makin*.[133] In *Carson*, the Supreme Court held that Maine violated the Free Exercise Clause by excluding certain religious schools from a program that allowed parents to direct state funds to non-public schools. The program applied to rural school districts without a public high school. The statute did not categorically bar religious schools from eligibility for these funds, but it required participating schools to have a "nonsectarian" curriculum.[134] In yet another opinion by Chief Justice Roberts, the Court held that the exclusion of schools with a sectarian curriculum violates the Free Exercise Clause.[135]

After describing the Maine program, the Court concluded that "[t]he unremarkable principles applied in *Trinity Lutheran* and *Espinoza*

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[131] See generally Green, Separating Church and State, note 15 supra, at Chapters 2-4.
[132] As others have noted, the Court's turn to originalism has been notoriously selective. See, e.g., Richard Fallon, Selective Originalism and Judicial Role Morality, http://ssrn.com/abstract=4347334. Only in the Trilogy, however, has the Court managed to achieve a trifecta -- radically change the law, totally ignore the original public meaning of the text, and repudiate the relevant constitutional history.
[133] 596 U.S. ___ , 142 S. Ct. 1987 (2022).
[134] The facts in *Carson* are summarized at 142 S. Ct. 1993-1994.
[135] Id. at 2002. Justice Breyer wrote a dissent, id. at 2002-2012, as did Justice Sotomayor, id. at 2012-2015.

suffice to resolve this case."[136] T*rinity Lutheran* and *Espinoza* indeed rested on the principle that categorical discrimination against a person or entity because of religious identity presumptively violates the Free Exercise Clause.[137] Both decisions, however, involved religious status and not the specifically religious use of government funds. Government funding of those uses, such as worship or religious instruction, is the locus of longstanding Establishment Clause jurisprudence, fully described in Part II.A.1. above.

The *Carson* decision, however, blatantly ignores that jurisprudence:

> In *Trinity Lutheran* and *Espinoza*, we held that the Free Exercise Clause forbids discrimination on the basis of religious status. But those decisions never suggested that use-based discrimination is any less offensive to the Free Exercise Clause. . . . [T]he prohibition on status-based discrimination under the Free Exercise Clause is not a permission to engage in use-based discrimination.[138]

The program in *Carson* involved indirect, voucher-like support of education. So, at least in theory, the constitutional prohibition on direct government financial support of religious uses remains in place. But there is not a syllable in the trilogy that gives rise to any reasonable hope for survival of that prohibition. Any limit, driven by the Establishment Clause, on direct support of religious uses would be "discrimination," because the Clause discriminates.

The emphasis in all three decisions on Free Exercise concerns for equal treatment of religion, the apparent contempt in all three for

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[136] Id. at 1997.

[137] The second "unremarkable" principle that Chief Justice Roberts articulates is that Maine has no independent interest in religion-state separation. Id. at 1997-98 (citing *Trinity Lutheran* and *Espinoza*). As noted above, this claim belies over 200 years of state constitutional history.

[138] Id. at 2001.That paragraph turns the longstanding entanglement concern on its head. In *Lemon*, the Court had relied on the status condition of pervasively sectarian schools as a justification to enforce the Establishment Clause concern about religious use of funds. In *Carson*, the Court protects religious uses of funds as a way of enforcing the concern about status discrimination against religious schools.

religion-state separation as a government policy, and the revisionist history in *Espinoza* about state support of religious education all point in the same direction. In the name of Free Exercise, the Trilogy thus rejects the unanimous appraisal of the Justices in *Everson* on the meaning of non-establishment. And the Trilogy accomplishes this without any originalist analysis of either Religion Clause, or direct confrontation with the jurisprudence being replaced. Justice Sotomayor, writing in dissent in *Carson*, saw it exactly this way:

> What a difference five years makes. In 2017, I feared that the Court was 'lead[ing] us . . . to a place where separation of church and state is a constitutional slogan, not a constitutional commitment.' . . . Today, the Court leads us to a place where separation of church and state becomes a constitutional violation.[139]

One view of the Trilogy emphasizes its conditional quality. States need not fund private schools at all but must include comparable religious schools if secular private schools receive any funding.[140] But what of charter schools? In light of the Trilogy, does the Free Exercise Clause now require funding of charter schools with a religious identity if a state authorizes the creation of secular charter schools? If the state funds religious charter schools, does the Establishment Clause permit those schools to include regular worship practices and religious education?

These are no longer academic questions. In December 2022, the Oklahoma Attorney General published a formal opinion declaring that a state statute excluding "sectarian" schools and those affiliated with a religious institution from charter status violates the Free Exercise Clause as construed in the Trilogy.[141] Such schools are private, the opinion concluded, and the exclusion of such schools from state financial support involves discrimination based on religious status, religious use, or both.[142]

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[139] Id. at 2014 (Sotomayor, J., joined by Kagan and Breyer).
[140] See, e,g., Aaron Tang, Who's Afraid of Carson v. Makin, https://www.yalelawjournal.org/forum/whos-afraid-of-carson-v-makin (2022).
[141] Okla. AG Opinion # 2022-7, December 1, 2022, https://www.oag.ok.gov/sites/g/files/gmc766/f/documents/opinions/2022/attorney_general_opinion_2022-7_stamped.pdf, at 6-11.
[142] Id.

In mid-February, 2023, the Archdiocese of Oklahoma City and the Diocese of Tulsa submitted an application to the Statewide Virtual Charter School Board for approval of an online school that would have a Catholic curriculum, including religious components.[143] Within days, the newly elected Attorney General of Oklahoma withdrew the 2022 opinion of his predecessor.[144] The letter of withdrawal, addressed to the Board, explained that the Trilogy involved private schools.[145] Disagreeing with his predecessor, the new Attorney General concluded that charter schools are public, not private.[146] Charter schools are therefore state actors, not covered by the Trilogy, and the Oklahoma Constitution forbids them from having a religious character.[147]

While the Virtual Charter School Board evaluates the application, the controversy in Oklahoma continues, We expect litigation to follow no matter which way the Board rules. If the Board approves the application, Oklahoma taxpayers are likely to bring suit under the state charter school statute, the no-funding clause in the state constitution,

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[143] Jennifer Palmer, Education Watch: Catholic Leaders' Public School Proposal to Test Legal Boundaries, Oklahoma Watch, February 16, 2023, available at: https://oklahomawatch.org/newsletter/education-watch-catholic-leaders-public-school-proposal-to-test-legal-boundaries/ (describing application on behalf of the St. Isidore of Seville Catholic Virtual Charter School).

[144]https://www.oag.ok.gov/sites/g/files/gmc766/f/documents/2023/rebecca_wilkinson_ag_opinion_2022-7_virtual_charter_schools.pdf

[145] Id.

[146] Id. For reasons related to funding and the particulars of regulation, we think that charter schools qualify as public schools as well as state actors. See Peltier v. Charter Day School, Inc., 37 F.4th 104 (4th Cir. 2022) (en banc), cert petition filed, U.S. Sup. Ct. No. 22-238, ____. For analysis of the status of charter schools as public or private, see Justin Driver, Three Hail Marys: *Carson*, *Kennedy*, and the Fractured Détente Over Religion and Education, 136 Harv. L. Rev. 208, 228-233 (2022); Nicole Stelle Garnett, Sector Agnosticism and the Coming Transformation of Education Law, 70 Vand. L. Rev. 1 (2017).

[147] Id. The relevant constitutional provision is Oklahoma Const., Art. I, sec. 5 (requiring Oklahoma public schools to be "open to all children and free of sectarian control.") The withdrawal letter concluded by suggesting that the approval of a Christian charter school would lead to approval of charter schools sponsored by faiths of which many Oklahomans would disapprove. https://www.oag.ok.gov/sites/g/files/gmc766/f/documents/2023/rebecca_wilkinson_ag_opinion_2022-7_virtual_charter_schools.pdf.
The letter did not specify which faiths those might be.

and the federal Establishment Clause. If the Board disapproves the application, the aggrieved applicants are likely to bring suit, invoking the Free Exercise Clause as construed in the Trilogy.

Officials and educators in other states will be watching closely. Funding questions aside, states that approve religious charter schools will have to face the question whether such schools may offer religious instruction or daily prayer, and how such schools should deal with students who do not share that faith. One approach to this inquiry would turn on whether the schools should be viewed as private schools, as the Oklahoma Attorney General initially argued,[148] or as public schools and state actors, as his successor concluded. If they are properly deemed to be private schools, a requirement to exclude religious experience from the curriculum would discriminate against religious use, likely in violation of the principles announced in the Trilogy.[149]

If the Justices are indeed ready to uphold direct state funding of religious experience in private schools, the question will remain about the provision of such experience in public schools, charter or otherwise. A year ago, this question would have seemed off the boards entirely. The decision in *Kennedy v. Bremerton School District*, however, has put the question back in play. *Carson* and *Kennedy*, taken together, have shifted the constitutional inquiry away from the permissibility of state funding or promotion of distinctly religious experience. Instead, all that remains are questions of voluntarism and coercion. We return to these questions in our discussion of *Kennedy* in Part II.C., below.

To summarize, the Court in five short years has used the Trilogy to turn the law of the Religion Clauses upside down, without any analysis of text, history, or precedent. The charter school discussion vividly illustrates that inversion. As the rest of this Essay explains, other developments have added to the momentum of this constitutional revolution.

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[148] Okla. AG Opinion # 2022-7, December 1, 2022, https://www.oag.ok.gov/sites/g/files/gmc766/f/documents/opinions/2022/attorney_general_opinion_2022-7_stamped.pdf, at 11-14.

[149] Id. at 6-11. The withdrawn Oklahoma AG opinion relied unnecessarily on a strained notion of parental choice of charter schools as a device that renders charter school financing in Oklahoma indirect, rather than direct. Id. at 8.

B. Government-Sponsored Religious Displays

Government, acting through its agents, speaks about many subjects. The Free Speech Clause imposes no restriction on government speech.[150] The Establishment Clause is the only provision that imposes such a limit.[151] Once more, the Establishment Clause renders religion constitutionally distinctive.

Noticing the distinctiveness of religious speech by government, however, does not produce any particular guidance on the constitutional boundary. For analytical reasons, we think it is better to first address government sponsored religious displays and messages outside of public schools. In public schools, the audience of students is captive and impressionable, and concerns about coercion are heightened. Away from schools, the constitutional concern is exclusively about government promotion of religious truths and experience. Moreover, the period of Supreme Court engagement with such communications away from schools began later and has been marked throughout by intense division within the Court.

In addition, the competing interests in the government display cases do not involve claims of individual rights. Rather, they are typically framed as an expression of the political community's interest in having shared religious experiences through displays and messages.[152]

The overarching concern in controversies about religious displays is the extent to which a secular government of, by, and for its people may acknowledge the religious beliefs and practices of those people. A

[150] Pleasant Grove City v. Summum, 555 U.S. 460, 467-468 (2009) ("The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech.") Scholars have occasionally suggested that the Free Speech Clause should limit some kinds of government speech. See, e.g., Catherine J. Ross, A Right to Lie? Presidents, Other Liars, and the First Amendment (2021); Caroline Mala Corbin, The Unconstitutionality of Government Propaganda, 81 Ohio St. L.J. 815 (2020).

[151] Pleasant Grove City v. Summum, 555 U.S. 460, 468 (2009) (government speech "must comport with the Establishment Clause.").

[152] See, e.g., Lee v Weisman, 505 U.S. 577, 645-646 (1992) (Scalia, J., dissenting)

recurring set of questions appears in the attempts by courts to draw lines about these matters. First, should the lines be drawn according to general and abstract standards, or should they be drawn in ways that conform with historical practice, however messy that may be? Second, historical practice aside, how much should factual context matter in the appraisal of particular cases? For instance, are passive displays (such as monuments) different from active religious exercises (such as spoken prayer)? Are occasional remarks by public officials, such as Presidential Proclamations of Thanksgiving, different from more permanent displays in or on government buildings, such as the permanent carving of "In God We Trust" on the Capitol Visitor Center? Are religious holidays a special case, inviting occasion-specific government acknowledgments of customs and practices of many, though never all, of its people?

The Court's first foray into Establishment Clause controversies about government religious displays outside of schools[153] arrived in *Marsh v. Chambers*,[154] in which a six Justice majority upheld the practice of prayer in the Nebraska legislature against Establishment Clause attack. The state paid the chaplain who led the prayer, and the same person, a Presbyterian minister, had served as chaplain for over two decades.[155]

Historical practice, rather than the application of general Establishment Clause standards regarding secular purpose and primary secular effect, controlled the outcome. In 1789, the First Congress of the United States authorized the appointment of a legislative chaplain.[156] Accordingly, the practice held a substantial constitutional pedigree. As the dissent pointed out, asking whether the practice had a "secular purpose" or "primary secular effect" would demolish it.[157]

For two decades after *Marsh*, every Supreme Court decision on religious messages in settings other than schools would be decided by a

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[153] The first school prayer cases were Abington Sch. Dist. v. Schemmp, 374 U.S. 203 (1963); and Engel v. Vitale, 370 U.S. 421 (1962).
[154] 463 U.S. 783 (1983).
[155] Id. at 784-785.
[156] Id. at 787-788.
[157] Id. at 795-801 (Brennan, J., joined by Marshall, J. dissenting) (legislative prayer cannot survive tests of secular purpose and primary secular effect).

vote of 5–4. A year later, in *Lynch v. Donnelly*,[158] Chief Justice Burger wrote for the Court in an opinion that upheld the display by a municipality of a Christmas Nativity Scene. Recognizing that application of the test in *Lemon* (also authored by Burger) would lead to invalidation of the display, the majority refused to be bound by any set of general standards.[159] Instead, it emphasized the history and tradition of public acknowledgments of the Christmas holiday, and the context of the display, which included many non-religious elements.[160] The principal dissent took the opposite tack, arguing that rigorous application of Establishment Clause norms inexorably led to the conclusion that government sponsorship of the Nativity scene was unconstitutional.[161]

Famously, the fifth and deciding vote to uphold the crèche display came from Justice O'Connor, whose concurring opinion first announced the Establishment Clause test of "no endorsement." That test was a gloss on both the purpose and effects prongs of *Lemon*:

> The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community. Government can run afoul of that prohibition . . . [by] endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message."[162]

Our own view, published years later, is that this move rested on a fundamental mistake.[163] The Establishment Clause is primarily

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[158] 465 U.S. 668 (1984). Professors Lupu and Destro, who participated on this Symposium panel, were scholarly *amici* on opposing sides in the District Court proceedings in *Lynch*. Donnelly v. Lynch, 525 F. Supp 1150 (Dist. Rhode Island, 1981), at 1153 *.

[159] 465 U.S. at 678-79.

[160] Id. at 679-686.

[161] Id. at 694-726 (Brennan, J., joined by Blackmun, Marshall, and Stevens, JJ., dissenting).

[162] Id. at 690 (O'Connor, J., concurring).

[163] See Lupu & Tuttle, *Secular* Government, note 3 supra, at 145-168.

concerned with structural matters, in particular the secular character of government. By translating this concern into a rights-oriented inquiry into the social meaning of messages, Justice O'Connor offered an intuitively appealing test. But the endorsement standard is conceptually misplaced and nearly impossible to apply in a consistent way.[164] Moreover, the standard diverts attention from the distinctiveness of religious government speech , because many government messages can be perceived as creating insider and outsider status. For example, a government-sponsored anti-smoking message creates classes of insiders and outsiders, but such a message raises no constitutional problems.

In 1989, the "no endorsement" test hit its high-water mark in *County of Allegheny v. ACLU*.[165] The case involved a challenge to a stand-alone Nativity scene displayed on the Grand Staircase in the Allegheny County Courthouse, and an eighteen-foot-tall Chanukah menorah displayed outdoors by the County adjacent to a Christmas tree. Justice Blackmun's opinion for five Justices agreed that the endorsement test was an appropriate gloss on the purpose and effects prongs of *Lemon*.[166] All five likewise agreed that the Nativity scene display constituted a forbidden endorsement of the religious significance of Christmas and was therefore unconstitutional.[167]

Justice Kennedy's opinion for all four dissenters bitterly objected to the Court's embrace of the endorsement test.[168] It was, they claimed, hostile to people of faith, inconsistent with historical practice, and impossible to apply in a principled way.

The endorsement approach, intensely contested in the Supreme Court, nevertheless took firm hold in the lower federal courts. Unlike

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[164] Id. See also Steven D. Smith, Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test, 86 Mich. L. Rev. 266 (1987).
[165] 492 U.S. 573. (1989).
[166] Id. at 592-94.
[167] Id. at 597-602. Only three would have so held with respect to the Chanukah menorah. Id. at 637-646 ((Brennan, J., joined by Marshall and Stevens, JJ., dissenting in part)..
[168] Id. at 654-679 (Kennedy, J., joined by Scalia, White, JJ., and Rehnquist, CJ, dissenting).

attention to historical practice, which tended to favor popular faiths and depended on highly uncertain concepts of history and tradition, the endorsement test channeled inquiry into what seemed like a reasoned process. Moreover, it appeared to provide guidance to government decisionmakers planning communicative activities. All things considered, the endorsement test had staying power and seemed fair to many.[169]

By the time the next two cases about religious displays, both concerning the Ten Commandments, reached the Supreme Court in 2005, Justice O'Connor was in her final Term. *McCreary County v. ACLU*[170] involved a contemporary display in a Kentucky county courthouse. *Van Orden v. Perry*[171] presented the case of a forty-five-year-old display on the Texas state house grounds. The decision was split 5–4 in each case, with Justice Breyer the only Member of the Court who believed that the cases should be resolved differently. Concurring in *Van Orden*, Breyer explained that the age and history of the Texas display rendered it more secular and less divisive than the Kentucky county display, even though the contents were identical.[172]

The methodologies that divided the Court in the *Ten Commandments Cases* were precisely those that had split the Court in *Marsh*, *Lynch*, and *Allegheny County*. One faction of the Court remained committed to general standards of Establishment Clause adjudication—purpose, effect, and entanglement.[173] The other, this time led by Justice Scalia, emphasized historical practice and the sweeping notion that political communities in America are free to use the government to acknowledge widespread belief in the monotheism of Christianity, Islam, and Judaism.[174]

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[169] See, e.g., Jesse H. Choper, The Endorsement Test: Its Status and Desirability, 18 J.L. & Pol. 499 (2002).
[170] 545 U.S. 844 (2005).
[171] 545 U.S. 677 (2005).
[172] Id. at ___698-706 (Breyer, J. concurring in the judgment). Dissenting in *Zelman*, Justice Breyer had earlier emphasized the theme of divisiveness. 536 U.S. at 717-729.
[173] McCreary County, 545 U.S. at 850-891 (Souter, J., joined by Stevens, O'Connor, Ginsburg, and Breyer).
[174] Id. at 885-912 (Scalia, J. joined by Thomas, J., Rehnquist, CJ, and in part by Kennedy, J., dissenting). The dissent emphasized that Christianity, Islam, and

As illustrated by the decisions about displays of religious holiday symbols and the Ten Commandments, those approaches are completely irreconcilable. Six months after the latter decisions, Justice O'Connor retired. Samuel Alito replaced her on the Court. Although it would take almost a decade for the Court to reengage with religious displays, that personnel change marked the effective end of the endorsement standard at the Supreme Court, though it lived on in the lower courts.[175]

The appointment of Justice Alito led directly to the ultimate triumph of a Justice Scalia-inspired emphasis on tradition as a basis for decision. Nine years later, the Court's new majority used this approach to decide *Town of Greece v. Galloway*.[176] The case involved a challenge by local residents to the longstanding practice of opening Town Council meetings with a prayer from local clergy, selected from congregations listed in a local directory. Almost all the invitees had been Christians, and many of the prayers were explicitly Christian. The challengers asserted that the practice preferred and endorsed Christianity in violation of the Establishment Clause, and the Second Circuit ruled in their favor.[177]

In an opinion by Justice Kennedy, the Supreme Court reversed.[178] Its analysis extended the reasoning of *Marsh v. Chambers*, which had involved state legislative prayer. Kennedy asserted that history supported the practice, and the predominantly sectarian character of the prayers did not undermine that conclusion. According to *Town of Greece*, courts should not police the content of prayer in the name of non-sectarianism, non-endorsement, or non-Establishment, provided that "there is no indication that the prayer opportunity has been

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Judaism all "believe that the Ten Commandments were given by God to Moses, and are divine prescriptions for a virtuous life." Id. at 894.

[175] For a vivid illustration, see American Humanist Ass'n v. Maryland-Nat'l Capital Park & Planning Commission, 874 F. 3rd 195, 206-211 (4th Cir. 2019) (to a reasonable observer, governmental display of Latin Cross as a war memorial endorses Christianity), *rev'd sub nom*. American Legion v. American Humanist Ass'n, 139 S. Ct. 2067 (2019).

[176] 572 U.S. 565 (2014).

[177] 681 F.3d 20 (2nd Cir. 2012).

[178] 572 U.S. at 569-592.

exploited to proselytize or advance any one, or to disparage any other, faith or belief."[179]

From the perspective of the four dissenters[180] (and the authors of this Essay),[181] the Court's opinion ignored whether the Town of Greece's practices of legislative prayer represent an official embrace of a particular faith tradition.[182] This was the key constitutional issue in the case. Justice Kagan's dissent closely scrutinized the Town's practices and concluded that they did not share the specific features of the Nebraska legislative prayer practice key to the outcome in *Marsh*. In *Town of Greece*, the chaplains directed the prayers toward citizens attending to petition the Council for specific causes and invited them to participate in a reverential act. Thus, the Town's prayer practices effectively aligned the body with Christianity as the official faith of the Town.[183]

All nine Justices in *Town of Greece* ignored the endorsement test, rather than confronting or embracing it head on. The second and more direct blow to the test appeared in *American Legion v. American Humanist Association*.[184] That case involved a challenge to the use of a large Latin Cross, on public land in Bladensburg, Maryland, as a memorial to soldiers from Prince George's County who had died in World War I.

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[179] Id. at 581 (citing *Marsh v. Chambers*). Monitoring prayers for denigration or proselytizing has the potential for excessive entanglement between clergy and government officials. And the practice of inviting local clergy may itself lead to selective approval of state-approved religion. See generally Christopher C. Lund, Legislative Prayer and the Secret Costs of Religious Endorsements, 94 Minn. L. Rev. 972 (2010).

[180] 572 U.S. at 615-638. (Kagan, J., joined by Breyer, Ginsburg, and Sotomayor, JJ, dissenting). The dissent argued forcefully that the Town's practice favored Christianity and therefore violated norms of religious equality. Id. at 616. The dissent did not even mention the endorsement test. Justice O'Connor had left the Court, and the test likewise had vanished from the analysis.

[181] We analyze *Town of Greece* closely in an Appendix to Lupu & Tuttle, *Secular Government*, note 3 supra, at 263-66. Parts of the paragraph in text are drawn from that Appendix.

[182] Id. at 264.

[183] 572 U.S. at 628-636.

[184] 588 U.S. ___, 139 S. Ct. 2067 (2019).

Prior to this decision, the lower federal courts that had confronted the use of a Latin Cross on public land as a generic war memorial had repeatedly invalidated the practice as a forbidden endorsement of Christianity.[185] Justice Alito's opinion for the Court in *American Legion* upended both the approach and the results of that line of cases. Emphasizing the age of the Bladensburg Cross, the opinion argued that the Cross had over time become imbued with secular meaning as a generic monument to the war dead:[186]

> Not only did the Bladensburg Cross begin with this meaning, but with the passage of time, it has acquired historical importance. It reminds the people of Bladensburg and surrounding areas of the deeds of their predecessors and of the sacrifices they made in a war fought in the name of democracy. As long as it is retained in its original place and form, it speaks as well of the community that erected the monument nearly a century ago and has maintained it ever since. The memorial represents what the relatives, friends, and neighbors of the fallen soldiers felt at the time and how they chose to express their sentiments. And the monument has acquired additional layers of historical meaning in subsequent years. The Cross now stands among memorials to veterans of later wars. It has become part of the community.

Alito's account replaced the reasonable observer's perception of religious endorsement with the Court's attribution of "community meaning." That attribution represents a completely unsuccessful attempt to erase the most obvious social meaning of the Latin Cross as the predominant symbol of Christianity. Like *Town of Greece*, *American Legion* fools no one in its effort to hide the Christianizing of the State.

Beyond this unpersuasive account of secular community meaning, Alito argued that longstanding practices deserve presumptive

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[185] The leading decisions are collected and analyzed in American Humanist Ass'n v. Maryland-Nat'l Capital Park & Planning Commission, 874 F. 3rd 195, 206-210 (4th Cir. 2019), *rev'd sub nom*. American Legion v. American Humanist Ass'n, 139 S. Ct. 2067 (2019).

[186] 139 S. Ct. at 2089.

constitutional respect, and that ordering removal of the Cross would appear hostile to religion.[187] Both arguments are transparent devices for protecting Christian domination of the government-operated public square.

In portions of the opinion joined only by Breyer, Roberts, and Kavanaugh, Justice Alito brushed aside the *Lemon* test as a grand unified approach to non-establishment, and once again highlighted historical practice as a substitute.[188] Separate concurring opinions by Justices Thomas[189] and Gorsuch[190] made evident they, too, rejected the endorsement approach to government displays.

Only Justices Ginsburg and Sotomayor dissented in *American Legion*,[191] thus emphatically ending the pattern of 5–4 splits in display cases. The replacement of Justice Ginsburg by Justice Barrett the following year solidified that change. As Part II.C. explains, the Court's later opinion in *Kennedy v. Bremerton School District* claims that *Town of Greece* and *American Legion*, taken together, buried *Lemon* and its non-endorsement corollary. This is not quite true to those earlier opinions but has to be taken as an accurate appraisal of the current law. Despite its popular, three decade long run in the lower federal courts, the endorsement test is dead.

Is there anything remaining of the law that controls religious displays by government away from schools? Is religion still constitutionally distinctive for these purposes, so that government religious speech should be evaluated by constitutional standards different from those applied to speech on other subjects? The decisions provide hints of boundaries that remain, but we doubt that this Court would be willing to enforce them. For example, *American Legion*

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[187] Id. at 2082-2085.
[188] Id. at 2079-2081; 2087-2089.
[189] Id. 2094-98. Justice Thomas' main points were that, in his view, the Establishment Clause does not apply to the states through the 14th Amendment; and that, even if the Clause does apply, it prohibits only coercive religious exercises.
[190] Id. at 2098-2103. Justice Gorsuch's central argument was that observers of government displays lacked Article III standing to challenge them.
[191] Id. at 2103-2113.

suggests a difference between old and new monuments,[192] but itis hard to imagine a court blocking the erection of a Latin Cross as a new war memorial in a government-operated cemetery. Indeed, we doubt that any passive displays, however sectarian they may be, will be subject to constitutional invalidation.

Perhaps notions of religious distinctiveness no longer apply to government speech. The state may openly endorse racial equality, patriotism, and other secular ideals. It seems obvious that the Court would uphold a display that endorses monotheism and highly likely that it would uphold a permanent display that embraces a particular faith.

Going forward, the only remaining limit on government promotion of religious speech is coercion, understood as a command backed by punishment for disobedience. But coerced religious activity, in that strong form, would violate the Free Exercise Clause and the Free Speech Clause.[193] With respect to the Pledge of Allegiance and any other compelled ideological speech, opt-out rights would end the compulsion and entirely solve the constitutional problem. If this is the point the law has reached, the Establishment Clause has become entirely redundant.

C. Government-Sponsored Religious Experience in Public Schools

The practice of school-sponsored prayer and Bible reading became an integral part of the common schools movement that developed in nineteenth century America.[194] Leaders, especially Horace Mann, of the common school movement strongly believed that Bible reading was necessary to instruct students in their moral duties as citizens. They did not consider such Bible reading to involve controversies over religious doctrine. Leaders believed that this material could be made acceptable to nearly all Protestants by prohibiting teacher comment on the selected passages. That left interpretation of contested questions of salvation and other theological

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"Coercion with some form of punishment likely remains the only limit on religious government speech."

[192] Id. at 2081-2085. Justice Alito wrote that "retaining established, religiously expressive monuments, symbols, and practices is quite different from erecting or adopting new ones. The passage of time gives rise to a strong presumption of constitutionality." Id. at 2085.
[193] West Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).
[194] Green, *supra* note 15, at 124-128.

themes to discussions among students, their families, and religious teachers.[195]

The schools' exercises were designed to be non-sectarian, a phrase that once meant accessible to all who believe that God's directions for humanity are revealed in the Bible.[196] Even before the Supreme Court's decisions in the 1940s to apply the Religion Clauses of the First Amendment to the States,[197] these practices frequently aroused controversy, some of which were resolved under state law.[198]

As described in Part I, the Supreme Court's contribution to the separationist project began in 1947 in *Everson v. Ewing Township*,[199] in which all nine Justices agreed that the Establishment Clause applied to state and local government. In 1948, *McCollum* furthered this enterprise by insisting on removal of sectarian religious education from public school.[200] Separating religion and the state within public schools represented a marked departure from the understanding that informed the common schools movement in the 19th century.

By the early 1960's, the Court recognized that America's religious diversity was incompatible with the non-sectarian Protestant establishment created by the common schools. *Engel v. Vitale*[201] and *Abington Township v. Schemmp*,[202] known together as the *School Prayer Cases*, combined with *Everson* and *McCollum* to establish the foundation of religion-state separation in the field of education. *Engel* struck down

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[195] Id. at 126-127.
[196] Of course, no one today would assign that Protestant-centered meaning to the word "nonsectarian."
[197] Cantwell v. Connecticut, 310 U.S. 296 (1940) (Free Exercise Clause applies to the states); Everson v. Bd. of Educ., 330 U.S. 1 (1947) (Establishment Clause applies to the states).
[198] For detailed discussion, see Joan DelFattore, The Fourth R: Conflicts over Religion in America's Public Schools 12-60 (Yale Univ. Press, 2004); Rosemary Salamone, Visions of Schooling: Conscience, Community, and Common Education 10-41 (Yale Univ. Press, 2000).
[199] 330 U.S. 1 (1947).
[200] McCollum v. Bd. of Educ., 333 U.S. 203 (1948). See the discussion of *McCollum* in Part I, infra.
[201] 370 U.S. 421 (1962).
[202] 374 U.S. 203 (1963).

the practice of daily recitation of the New York State Regents Prayer, an ecumenical exercise. *Abington* invalidated the Pennsylvania practice of daily recitation of The Lord's Prayer and selected Bible verses. *McCollum*, coupled with the *School Prayer Cases*, effectively barred all school sponsored devotional religious exercises in public schools.

Together with the earlier decision in *Pierce v. Society of Sisters*,[203] these decisions formed a hard triangle around educational choices. First, parents have the right to select private or public schools for their children. Second, the State will not subsidize private, religious education. Third, for those who choose or are compelled to attend the public schools, the state will not engage in religious indoctrination of students. Religious training will be left to families and religious institutions.

Despite the common misunderstanding to the contrary, *Engel* and *Abington* do not rest entirely on the idea that school sponsored prayer is coercive. Indeed, both decisions disclaimed any requirement of coercion.[204] Although both recognized the implicit coercive effect of school-sponsored prayer, the *School Prayer Cases* emphasized that the constitutional violation arose from state authorship in *Engel* and sponsorship of the religious exercises in both decisions. *Barnette* was already on the books, and it protected students against the compulsion to speak. The right to opt out, however, does not save school-sponsored prayer, in which official state embrace of a particular religious character and mode of worship is the vice. Consent of parents, children, or school staff cannot cure this constitutional violation.

Over the course of sixty years, the Court built upon and expanded the principles of the *School Prayer Cases* in the contexts of school sponsored silent prayer,[205] Ten Commandments displays in school,[206] school sponsored prayer at public school graduations,[207] and public

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[203] 268 U.S. 510 (1925).
[204] *Engel*, 370 U.S. at 430 (Free Exercise rights depend on showing of coercion, while Establishment Clause violations cannot be cured by voluntary character of prayer); *Abington*, 374 U.S. at 221 (citing *Engel*).
[205] Wallace v. Jaffree, 472 U.S. 38 (1985).
[206] Stone v. Graham, 449 U.S. 39 (1980).
[207] Lee v. Weisman, 505 U.S. 577 (1992).

school sporting events.[208] Taken together, these cases wove a tapestry with a vivid display -- public schools should not be the author or instigator of the religious experience of students. Nothing in modern Establishment Clause law appeared more settled than this line of decisions, which referenced but went far beyond a concern for coercion.

The Court's stunning decision in *Kennedy v. Bremerton School District*[209] ripped apart that settlement. *Kennedy* involved a public high school football coach who insisted on praying immediately after games, on the fifty-yard line, in full sight of his players.[210] This practice had grown out of Coach Kennedy's earlier behavior, interdicted by his employer, of praying with and giving religious motivational speeches to his players. In the wake of requests from the School District to cease these religious activities with his team, Kennedy was defiant. He reached out for publicity and moved his post-game prayers to mid-field, while both teams mingled on the field.

The District then suspended Kennedy, and his lawsuit followed. No inter-circuit conflict existed, and a few years ago, it would have been unimaginable that the Supreme Court would grant *certiorari* in a case of this sort.

Prior to the Court's opinion, the District, like every school district in the United States, had ample authority to police religious communication between a coach or teacher and those under their charge. That authority rested firmly on the *School Prayer Cases* and their progeny. School employees, on school premises and within school hours, are agents of the state. The school directs the performance of their duties. Students rightly perceive the communication of teachers as reflecting the values and concerns of the school. Unless the teacher's expression is unmistakably separate from official duties, students will assume that such expression is attributable to the school. With the school's imprimatur presumptively behind it, prayer from coaches or teachers signals school sponsorship and implicitly coerces cooperation.

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[208] Santa Fe Ind. Sch. Dist. v. Doe, 530 U.S. 290 (2000).
[209] 597 U.S. ___ ; 142 S. Ct. 2407 (2022).
[210] Justice Sotomayor's dissent, joined by Justices Breyer and Kagan, provides a much more complete account of the facts than the Court opinion. Id. at 2434 et seq.

Justice Gorsuch's opinion for the Court in *Kennedy* does not give the slightest attention to these foundational concerns and obvious problems. Rather than confronting the task of explaining why coaches or teachers should be free to pray in ways that would inevitably implicate the School District, the opinion focuses almost all of its energy on the Free Exercise and Free Speech rights of Coach Kennedy.[211]

In rejecting the School District's justification, based on Establishment Clause concerns, for restricting Kennedy's prayer practice, the opinion attacked two strands of more general Establishment Clause doctrine. The first was the three-part test of *Lemon v. Kurtzman*, which focuses on religious purpose, religious effect, and entanglement of government and religion. The second target was the endorsement principle, an outgrowth of *Lemon*.

The Court in *Kennedy* did not claim to overrule these doctrines. Rather, it asserted that various prior decisions, including *Town of Greece* and *American Legion*, had already overruled them.[212] Even if that were true, Justice Gorsuch's opinion remarkably ignored the overarching authority of the *School Prayer Cases*.

Having blinded itself to the last sixty years of non-establishment law, what did the Court put in its place? Without elaboration, the opinion tells us that "the Establishment Clause must be interpreted by 'reference to historical practices and understandings.' '[T]he line' that courts and governments 'must draw between the permissible and the impermissible' has to 'accor[d] with history and faithfully reflec[t] the understanding of the Founding Fathers.'"[213]

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[211] Id. at 2421-2425.

[212] Id. at 2427-2428.

[213] Id. at 2428. The lower courts have begun responding to the new mandate of dropping the *Lemon* test and looking to history and tradition. See, e.g., Firewalker-Fields v. Lee, 2023 U.S. App. LEXIS 982, *26-*28 (4th Cir. Jan. 17, 2023) (remanding Establishment Clause challenge to a weekly prison broadcast of a Christian themed video for reconsideration under the test of historical practice and noting many unanswered questions about the relevant methodology). The panel added that "the plaintiff has the burden of proving a set of facts that would have historically been understood as an establishment of religion." Id. at *8, n. 7. The court contrasted this with a Second Amendment claim, in which the government defendant would

What would those practices and understandings be? They would most certainly not include the teachings of the *School Prayer Cases* and their progeny, which time after time require the exclusion of religious experience from public school practices. On the contrary, public schools may be thoroughly Protestant in their orientation if the relevant history and practice is that of 1868, when the Fourteenth Amendment was added to the Constitution and imposed the Establishment Clause on the states.[214] Teachers may lead Christian prayer and readings from the Bible.

The *School Prayer Cases* found that modern conditions of religious pluralism rendered thoroughly inapposite the understandings of 1868 about what constituted non-sectarian exercises. The *Kennedy* opinion puts all that in doubt without ever confronting the precedents head on. Like the Trilogy, *Kennedy* threatens to displace settled law by slithering around it.

The School District also argued that Coach Kennedy's prayer practices tended to coerce participation by players under his supervision. The Court agreed that coercion of students would present a constitutional problem, but it asserted that no evidence presented by the District supported the idea that any players felt coerced by Kennedy's practices.[215] Because the opinion stipulated that Kennedy prayed separate and apart from the team gatherings, it dismissed the coercion concern as speculative. Even worse, it covered the coercion danger with the seemingly attractive notion that public schools are a place where everyone should learn to tolerate the religious expression of others as part of living in a pluralist society.[216]

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have the burden of showing that the challenged regulation was a historically approved exception. Id.

[214] It will be very difficult to find the relevant historical analogies from 1791, when the Establishment Clause was ratified, because compulsory education and common schools did not exist at that time.

[215] 142 S. Ct. at 2428-2432. For a thorough analysis of the coercive context of high school athletics, see Justin Driver, Three Hail Marys: *Carson*, *Kennedy*, and the Fractured Détente Over Religion and Education, 136 Harv. L. Rev. 208, 242-247 (2022); see also Erin B. Edwards, College Athletics, Coercion, and the Establishment Clause, 106 Va. L. Rev. 1533 (2020).

[216] 142 S. Ct. at 2431 (citing *Lee v. Weisman*, 505 U.S. at 590).

With respect to the relationships of students with other students, this is no doubt appropriate. That is why federal statutory law recognizes the permissibility of voluntary religious expression by students in public schools.[217] With respect to teachers and coaches with authority over students, however, the *Kennedy* opinion simply does not engage the teachings of *Engel* and *Abington*. Those decisions did not depend upon coercion, and they both presumed the likelihood of coercion without the necessity of proof by individuals. Nothing in the *Kennedy* decision recognizes or supports either approach.

In the hands of the *Kennedy* majority, coercion will take on a new and much narrower meaning. First, they are likely to follow the lead of Justice Scalia, dissenting in *Lee v. Weisman*,[218] to the effect that coercion must involve punishment,[219] not just feelings of pressure. Second, even under a looser, pressure-oriented version of coercion, individuals must come forward to assert it. As we know from the experience of those who complained about the prayer at football games in the Santa Fe Independent School District,[220] many students and their families will fear retaliation if they publicly complain.

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[217] See Westside Community Bd. of Ed. v. Mergens, 495 U.S. 226 (1990) (federal Equal Access Act protects rights of student religious club in public school). The relevant guidelines from the U.S. Department of Education focus on rights of students, not staff. U.S. Dept. of Educ., Guidance on Constitutionally Protected Prayer and Religious Expression in Public Elementary and Secondary Schools, Jan. 16, 2020, available at https://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html. As we wrote immediately after the *Kennedy* decision, "Of course, teachers need not abandon any sign of their religious affiliation while on the job. The teacher who wears religious garb, or a teacher who says grace quietly in the lunchroom, does not threaten a school district's interest in protecting a constitutionally appropriate atmosphere in the school, where the school remains religiously neutral and no one is pressured by authorities to accept a religious experience. Coach Kennedy was never inconspicuous or inner-directed, and never tried to be either." Ira C. Lupu & Robert W. Tuttle, Kennedy v. Bremerton School District: A Sledgehammer to the Bedrock of Nonestablishment, https://www.gwlr.org/kennedy-v-bremerton-school-district-a-sledgehammer-to-the-bedrock-of-nonestablishment/. Other parts of our discussion of *Kennedy* above have also been drawn from our earlier post about the decision.

[218] Lee v. Weisman, 505 U.S. 577, 631-646 (1992) (Scalia, J. dissenting).

[219] Id. at 640-643.

[220] Santa Fe Ind. Sch. Dist v. Doe, 530 U.S. 290, 294, n.1 (2000).

We unhappily predict that the *School Prayer Cases* will collapse into no more than an offshoot of *West Virginia Board of Education v. Barnette*,[221] which prohibits making compulsory the recitation of The Pledge of Allegiance. Schools may prescribe the Pledge, so long as they allow students to opt out. Prayer in schools may soon have the same character, requiring the provision of opt out rights to avoid compelled speech but no limitations on what schools may sponsor. If the new constitutional limit on prayer turns on voluntariness and coercion, narrowly defined, then religious speech in schools is no longer distinctive for Establishment Clause purposes.

Even if the schools themselves do not sponsor prayers, *Kennedy* will embolden teachers and coaches to do so, claiming that the prayers are personal or private. They might do so immediately before a class, a team practice, or a game. They might step away from the group of students but remain within earshot and vision. They will not demand participation, but they will not discourage it, and their conduct will invite it. Many public school districts will welcome this behavior, as some parents request and commend it. In school districts, like Bremerton, that try to protect students against religious pressure, officials will be extremely wary of disciplining teachers and coaches for their in-school religious behaviors. Out of concern for the expense and outcome of lawsuits like Coach Kennedy's, school officials will be highly unwilling to litigate against teachers and coaches who challenge them.

Kennedy v. Bremerton School District is the most recent in a lengthy string of decisions that elevate the free exercise of religion over all competing interests, constitutional and otherwise. *Carson v. Makin*, discussed above, similarly subordinated longstanding church-state separationist norms to free exercise interests. *Carson* ignores historical practices and policies about government funding of religious schools, because those practices do not support the Court's preferred outcome. *Kennedy*, in contrast, claims historical practices as a touchstone, most likely because the Justices believe that pre-*Engel* practices in public schools were religion-friendly. This is blatant cherry picking, not originalism as a methodology.

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[221] 319 U.S. 624 (1943).

The decision in *Kennedy*, combined with the Trilogy, invites the strong possibility that religious communities will seek to develop their own charter schools, thick with religious experience. If courts view charter schools as public schools,[222] as they should, the permissibility of including religious experience in the curriculum of a public charter school will depend on the continuing validity of the *School Prayer Cases*. Before *Kennedy*, there was no reason to doubt the continued authority and force of those decisions. With *Kennedy* in the mix, and the law of religion and the state on a wholly new trajectory, the matter looks very different.

For the Supreme Court, what remains of the restriction on prayer in public schools seems to be entirely related to government coercion—not sponsorship. So long as the school district offers a wide variety of charter schools, both secular and religious, no student will be forced to attend a religiously oriented charter school.[223] All attendance at such a school will be voluntary on the part of families, and religious experience at the school will therefore be deemed non-coercive.

If this analysis is correct, religious organizations' Free Exercise Clause arguments against a state law restriction on religious activity in a charter school that is fully funded by the government look very strong indeed. The Establishment Clause arguments look correspondingly weak. Without ever confronting the question directly, the Trilogy plus *Kennedy* may have worked a constitutional revolution with respect to state-promoted religious experience in public schools.

III. The Triumph of Free Exercise

As Parts I and II demonstrate, the Supreme Court for many years treated religion as distinctive in constitutional law. This distinctiveness was manifest in a variety of interconnected principles. The government may not directly finance the provision of religious experience; may not

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[222] We think this is the better view. See discussion and notes in Part II. A. 2 (analyzing charter school questions in the wake of Carson v. Makin).

[223] Not every faith tradition will have the population or resources to sponsor its own charter school, so *de facto* discrimination among faiths under such a scheme seems inevitable.

adopt a particular religious confession as its own; and may not promote religious experience in its public schools. All those principles limited the power of government to use religion as an instrument of policy. All are rooted in the core meaning of the Establishment Clause, and all are now in considerable doubt.

Religion has now become distinctive in constitutional law only with respect to protecting religious entities against regulation, and perhaps with protecting religious speakers against interference. *Lemon v. Kurtzman*, one might remember, referred to policies that advance *or* inhibit religion.[224] In the name of equal treatment, the Court has abandoned any concern for advancement of religion, while it has dramatically elevated the concern about inhibition of religion.

Start with the Court's embrace of the ministerial exception to employment laws. This doctrine insulates religious organizations from liability under nondiscrimination laws with respect to employees whose assigned mission is to teach the faith. Initially, in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*,[225] a unanimous Court placed the exception on the joint grounds of free exercise and non-establishment. The Establishment Clause, the opinion asserted, bars the government from directing the appointment of clergy in religious communities,[226] and the Free Exercise Clause protects those communities' choices of clergy.[227]

Consistent with this approach, the best reading of *Hosanna-Tabor* is that the Religion Clauses, taken together, exclude the government from answering "exclusively ecclesiastical" questions.[228] Whether a particular person is fit for ministry is precisely such a question. On the facts in *Hosanna-Tabor*, the First Amendment insulated the school from

[224] 403 U.S. 602, 612 (1971).
[225] 565 U.S. 171 (2012).
[226] Id. at 184.
[227] Id.
[228] We develop the argument for this interpretation in Ira C. Lupu & Robert W. Tuttle, The Mystery of Unanimity in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 20 Lewis & Clark L. Rev. 1265 (2017).

liability for the dismissal of a fourth-grade teacher who was "called" to ministry and who occasionally led religious exercises.[229]

More recently, however, the Court has re-centered the grounds for the ministerial exception and has widened the ambit of who qualifies as a minister for purposes of the exception. In *Our Lady of Guadalupe School v. Morrissey-Berru*,[230] Justice Alito's opinion for the Court shifted the emphasis heavily toward the Free Exercise Clause and repeatedly described the relevant doctrine as one of "church autonomy."[231] This move suggests that the constitutionally distinctive category is not limited to "exclusively ecclesiastical questions." Instead, the theory seems increasingly to be that religious institutions more generally are constitutionally distinctive. That is a claim about religious status, and it operates to deliver special benefits to religious organizations as compared with their secular counterparts.[232] In *Our Lady of Guadalupe*, the result left outside of non-discrimination laws virtually all elementary school teachers in a pervasively religious school.

This notion of constitutional privilege, driven by the Free Exercise Clause,[233] for religious organizations has expanded to cases outside of the employment relationship. Since the Court's 1990 decision in *Employment Division v. Smith*,[234] the general rule of Free Exercise has been that religiously motivated conduct is entitled to no exemption from generally applicable legal rules. In the past few years, however, in cases involving the interests of religious institutions, the Court has significantly narrowed the idea of general applicability.

Commented [EB4]: Could be rephrased: Driven by the Free Exercise Clause, this expansion of constitutional privilege for religious organizations mirrors cases outside of the employment relationship.

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[229] 565 U.S. at 190-194.
[230] 591 U.S. ___, 140 S. Ct. 2049 (2020).
[231] Id. at 2060.
[232] For discussion of whether the ministerial exception should be extended to all faculty positions in colleges that assert a religious identity, see Peter Smith & Robert W. Tuttle, *Gordon College* and the Future of the Ministerial Exception, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4194988.
[233] The expansion has also been driven by highly religion-friendly interpretations of the federal Religious Freedom Restoration Act. See, e.g., Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014). For criticism of these developments, see Ira C. Lupu, *Hobby Lobby* and the Dubious Enterprise of Religious Exemptions, 38 Harv. J. L. & Gender 35 (2015); William P. Marshall, Bad Statutes Make Bad Law, Hobby Lobby v. Burwell, 2014 Sup. Ct. Rev. 71.
[234] 494 U.S. 872 (1990).

In *Tandon v. Newsom*,[235] a case on the emergency docket, a majority held that California had to permit gatherings for worship services during COVID-19 because the state had permitted gatherings for other secular purposes, including shopping. The existence of secular exceptions gave rise to an inference of forbidden discrimination against religious uses, thereby putting the case outside the scope of the *Smith* rule. It was no defense in *Tandon* that the State had treated the most analogous secular uses, such as gathering in theaters, identically with religious gatherings.

The same impulse to confine the notion of general applicability in the interests of benefitting religious entities appeared even stronger in *Fulton v. City of Philadelphia*.[236] In the context of contracting for service with evaluators of prospective foster parents, the City imposed a generally applicable condition of non-discrimination against same sex marriages. Catholic Social Services wanted to keep its contract with the City, but was unwilling to comply with the condition and challenged it on Free Exercise grounds.

The Court avoided deciding *Fulton*'s specified *certiorari* question of whether *Smith* should be overruled.[237] Instead, an oddly constituted majority held that the condition was not generally applicable, because the relevant City official had discretion to waive it, although he had never done so.[238] Consequently, the opinion concluded that the condition's impact on a religious organization invited strict scrutiny,

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[235] 141 S. Ct. 1294 (2021). Before Justice Barrett joined the Court in October 2020, houses of worship had not prevailed in the Supreme Court in their fights against pandemic-related restrictions on gathering for worship. See, e.g., South Bay Pentecostal Church v. Newsom, 590 U.S. ___, 140 S. Ct. 1613 (2020).

[236] 593 U.S. ___ , 141 S. Ct. 1868 (2021).

[237] Fulton v. City of Philadelphia, Petition for Writ of Certiorari, available here: https://www.supremecourt.gov/DocketPDF/19/19-123/108931/20190722174037071_Cert%20Petition%20FINAL.pdf ("2. Whether Employment Division v. Smith should be revisited?").

[238] Id. at 1878-1879. We offer a thorough analysis of *Fulton*, and Justice Alito's unsuccessful effort in that case to get the Court to overrule *Smith*, in Ira C. Lupu & Robert W. Tuttle, *Radical Uncertainty*, note 5 supra.

which the City could not satisfy.[239] *Fulton*, like *Tandon* a few months earlier, thus found a way to relieve a religious organization of a regulatory restriction that analogous secular entities were obliged to follow.

Where might this doctrine of privilege for religious entities be headed? In the wake of *Carson v. Makin*, States obliged to provide equal funding for religious organizations may still insist on funding conditions, such as a prohibition on invidious discrimination in admissions and employment.[240] Although the Court resolved *Fulton* on seemingly narrow grounds, the impetus from *Carson* and *Our Lady of Guadalupe* may unfortunately give *Fulton* a broader and firmer foundation.

A condition on receipt of government funds that bars certain religion-based policies, such as refusal to hire openly LGBT persons, will effectively exclude some religious entities. Some will refuse the funds, but others, inspired by the success of Catholic Social Services in Philadelphia, may fight to keep the funds while rejecting the conditions. They might argue, for example, that the State may not condition government funds on an employer waiver of the ministerial exception, especially with respect to employment positions not funded by government support. By elevating Free Exercise concerns over non-establishment, federalism, and a variety of strong policy goals, the effect of recent decisions may be to privilege the interests of religious organizations even if *Smith* is not overturned.

Kennedy v. Bremerton School District[241] provides a final example of the sudden and dizzying elevation of free exercise interests over all other constitutional values. To the best of our knowledge, the Supreme

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[239] 141 S. Ct. at 1881-1882. A finding of non-general applicability is almost always fatal, though the Court occasionally has shown its ability to manipulate those findings and the relevant review standard. See Andrew Koppelman, The Increasingly Dangerous Variants of the "Most Favored Nation" Theory of Religious Liberty, ___ Iowa L. Rev. ___ (forthcoming 2023).

[240] Maine has done just that. Aaron Tang, There's a Way to Outmaneuver the Supreme Court, and Maine Has Found it, NY Times, June 23, 2002, https://www.nytimes.com/2022/06/23/opinion/supreme-court-guns-religion.html.

[241] 597 U.S. ___ , 142 S. Ct. 2407 (2022).

Court has *never* before upheld the claim of an elementary or secondary school teacher to a First Amendment right to speak, on school premises and during working hours, contrary to the expressed wishes of her public employer.[242] Even the well-known decisions about the teaching of evolution[243] did not turn on a concept of teacher rights. Instead, those cases rested on Establishment Clause determinations that legislative interference with the teaching of Darwinian theories lacked a secular purpose.[244]

In *Kennedy*, the opinion finesses the question of whether the Free Exercise Clause or the Free Speech Clause is doing the necessary work. The Court asserts that the District's restriction on Kennedy's speech is not generally applicable, and thus strict scrutiny applies under the Free Exercise Clause.[245] The opinion also acknowledges, however, that under the Free Speech Clause, a public employer's effort to suppress an employee's private speech on a matter of public concern is subject to a different test, one that requires "delicate balancing of the competing interests surrounding the speech and its consequences."[246]

Nevertheless, the Court concludes that the District loses regardless of the choice of constitutional standard. The District had relied on the potential Establishment Clause violation flowing from Kennedy's prayers on the field. Under the Court's analysis, the District's Establishment Clause concerns are constitutionally unjustified,[247] and the District therefore has no legitimate interests in suppressing Kennedy's speech.[248]

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[242] Pickering v. Board of Education, 391 U.S. 563 (1968), the earliest in a line of decisions about the speech rights of public employees, involved a letter by a teacher to a newspaper, rather than on the job communication by the teacher.
[243] Edwards v. Aguillard, 482 U.S. 578 (1987); Epperson v. Arkansas, 393 U.S. 97 (1968).
[244] *Edwards*, 482 U.S. at 585-594 ; *Epperson*, 393 U.S. at 107-108.
[245] 142 S. Ct. at 2421-2422.
[246] Id. at 2423-2424 (citing Garcetti v. Ceballos, 547 U.S. 410, 423 (2006)). In *Kennedy*, it was undisputed that Kennedy's speech was private and of public concern.
[247] Id. at 2426-2432.
[248] Id. at 2432.

This discounting of the District's interests to zero is a sleight of hand. Throughout its time of conflict with Coach Kennedy, the District had legitimate interests in protecting student-athletes from potential coercion, and in avoiding Establishment Clause litigation. A "delicate balancing" test would not demand a showing of an actual constitutional violation for the District to prevail. If it did have to bear such a burden, it would be endlessly on a knife's edge of violating a staff member's speech rights or violating its own Establishment Clause duties. A sensitive balancing of interests requires some level of discretion between those competing norms.[249]

If strict scrutiny under the Free Exercise Clause is indeed the governing standard, the analysis changes. Under that standard, the District would have to demonstrate that suppression was necessary to achieve the compelling interest in avoiding an actual Establishment Clause violation. But if that approach controls this case—a question that the Court expressly claims that it did not decide[250]—then private religious speech by school staff will be systematically privileged over private non-religious speech. Only non-religious speech would lose when balanced against the District's varied interests, unrelated to religion.

This constitutional preference for religious speech over its secular counterparts is deeply troubling.[251] To see vividly the game the Court is playing, imagine a case that involves a "Coach Kaepernick,"[252] who moves twenty feet away from his team's bench and kneels during the playing of the Star-Spangled Banner. Is this "private speech," like Coach

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[249] The Court opinion tries to make this tension disappear. Id. at 2426.
[250] Id. at 2425, note 2: "Because our analysis and the parties' concessions lead to the conclusion that Mr. Kennedy's prayer constituted private speech on a matter of public concern, we do not decide whether the Free Exercise Clause may sometimes demand a different analysis at the first step of the *Pickering-Garcetti* framework."
[251] See generally William P. Marshall, What is the Matter with Equality? An Assessment of the Equal Treatment of Religion and Nonreligion in First Amendment Jurisprudence, 75 Ind. L. J.193 (2000); Vik Amar & Alan Brownstein, Locating Free Exercise Most-Favored-Nation-Status Reasoning in Constitutional Context, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4050063.
[252] Kaepernick was an NFL quarterback whose career ended in the wake of his kneeling protests when the National Anthem was played prior to games. https://www.britannica.com/biography/Colin-Kaepernick.

Kennedy's? Would a school district have legitimate interests in suppressing this move, which might cause division among team members and a furor in the stands? Or consider "High School Teacher Kimberle Crenshaw,"[253] barred by law in Florida[254] from sharing in class her view of American slavery and its aftermath, but who discusses those topics at a lunch table in the cafeteria, where students are free to join her? We very much doubt that the Supreme Court, applying a "delicate balancing" test, would protect such teachers' on-the-job defiance of their employers' norms.[255]

Though the *Kennedy* opinion refuses to admit to this move, it has apparently privileged religious speech by school staff while erasing the longstanding distinctiveness of such speech under the Establishment Clause. This inversion is especially dramatic in the context of public schools, long believed to be the most secure bastion of separation of state power and religious exercises.

Conclusion

Over the past ten years, the place of religion in constitutional law has been radically inverted. Establishment Clause norms have withered while Free Exercise concerns have blossomed. The Court, never obliged to step back and defend a broad perspective, has done this case by case— with little or no acknowledgment of the amount or rate of change.

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[253] Professor Crenshaw is among the leaders of the Critical Race Theory movement. https://www.law.columbia.edu/faculty/kimberle-w-crenshaw (describing Professor Crenshaw as "a pioneering scholar on civil rights, critical race theory, [and] Black feminist legal theory.")

[254] Florida Individual Freedom Act, a/k/a Stop-WOKE Act, sec. 1000.05(4)(c((1)-(8), Fla. Stat. 2022. A federal court has preliminarily enjoined the enforcement of the portions of the Act that apply to teachers in state universities. Pernell v. Florida Bd. of Governors of State University System, 2022 U.S. Dist. LEXIS 208374 (ND Fla., 11/17/22). High school teachers are far less likely to prevail in a Free Speech challenge.

[255] Two brief concurring opinions in *Kennedy* appear to be setting the groundwork for a distinction between religious speech by teachers, protected by both the Free Speech Clause and the Free Exercise Clause, and all other on the job speech by teachers, protected only by the Free Speech Clause. 142 S. Ct. at 2433 (Thomas, J., joined by Alito, J., concurring); id. at 2433-34 (Alito, J., concurring).

Our understanding of the proper relationship between the First Amendment's Religion Clauses reflects a basic principle of symmetry. The government should not sponsor or finance activities that it may not regulate, and should be barred from regulating what it cannot sponsor or advance. In particular, government should neither regulate nor subsidize exclusively ecclesiastical activities, such as the choice of who ministers to the faithful.[256] Government should not pay to build houses of worship or specify the design of their ecclesiastical features.[257] Government should not adopt terms of public worship or proscribe the content of worship for faith communities.

We are now a long way from a constitutional world in which religious distinctiveness is symmetrical on the terms we describe. Over time, asymmetrical constitutional arrangements – those that guarantee equal or special benefits to religion while relieving religion from equal obligations -- will badly strain the bonds of a religiously pluralistic society. Religious distinctiveness as a core focus of non-establishment is central to a historically sound and normatively correct account of the Religion Clauses, but the contemporary Court has strayed very far from that narrative. Instead, driving recklessly and at full speed, the Court seems headed in the wrong direction.

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[256] Even in the context of military chaplains, justified by the need to minister to those in the armed forces, the government does not decide who is qualified for ministry. Private faith groups must endorse chaplains before the military commissions them as officers with responsibilities in ministry. See Ira C. Lupu & Robert W. Tuttle, Instruments of Accommodation: The Military Chaplaincy and the Constitution, 110 W. Va. L. Rev 89, 117 (2007).

[257] We explore this idea in detail in Ira C. Lupu & Robert W. Tuttle, Historic Preservation Grants to Houses of Worship: A Case Study in the Survival of Separationism, 43 Boston College Law Review 1139 (2002). Many of the earliest state constitutional protections of religious liberty singled out support of ministry and building of houses of worship as activities for which the state could not compel support. See, e.g., Virginia Bill for Religious Liberty, cited in *Everson*, 330 U.S. 1, 12 (1947).