Framers' Fidelity and Thicket Theory in Educational Establishment Clause Jurisprudence

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The groves and thickets of smaller trees are full of blooming evergreen vines. These vines are not arranged in separate groups, or in delicate wreaths, but in bossy walls and heavy, mound-like heaps and banks. Am made to feel that I am now in a strange land.

John Muir[1]

I. INTRODUCTION

Big Thicket National Preserve in eastern Texas became one of America's first national preserves in 1974.[2] In a House subcommittee meeting to establish national protection for this area, a former U.S. Senator from Texas stated that the Big Thicket was "for people's lives to be enriched by the wildness and beauty, and the closeness to God and nature."[3] Home to thousands of plant and animal species, this national preserve is one of the world's most biologically diverse habitats.[4] Given this expansive biodiversity, the Big Thicket is often referred to as "an 'American ark.'"[5]

1. JOHN MUIR, A THOUSAND-MILE WALK TO THE GULF 58 (William Frederic Badé ed., 1916).

2. *See* 16 U.S.C. § 698 (2018) (establishing the Big Thicket National Preserve); *The Biological Crossroads of North America*, NAT'L PARK SERV. (July 13, 2020), https://www.nps.gov/bith/learn/nature/index.htm [https://perma.cc/PT9S-LASC] (noting how Big Thicket was one of the first designated national preserves).

3. *Big Thicket National Park, Tex.: Hearing on H.R. 12034 Before the H. Subcomm. on Nat'l Parks & Recreation of the H. Comm. on Interior & Insular Affairs*, 92nd Cong. 15 (1972) (statement of Ralph W. Yarborough, former U.S. Sen.).

4. *See The Biological Crossroads of North America*, *supra* note 2.

5. *Id.*

References, like these, to God and the Bible are not uncommon in Texas.[6] Christianity has long played a prominent role in many institutions within the state—from the state legislature to the state's public schools.[7] Texas was centerstage in *Van Orden v. Perry*, where the Supreme Court found that a Ten Commandments inscription on a monument on the Texas State Capitol grounds was not a violation of the Establishment Clause.[8] Yet, the Court has not always found religious speech in Texas to be within permissible constitutional bounds. In its seminal case on school prayer, the Court held that a Texas public school district's policy that permitted "'student-led, student-initiated prayer at football games'" was violative of the First Amendment's Establishment Clause.[9]

Despite the First Amendment Religion Clauses' original purposes to protect religious liberty and to prevent division based on religion,[10] these two examples arising from the interplay of religion and government in Texas demonstrate how the Establishment Clause has been at the center

6. *See* TEX. GOV'T CODE ANN. § 3101.005 (West 2019) (quoting the state song with its refrain "God bless you Texas! And keep you brave and strong, [¶] That you may grow in power and worth, [¶] Thro'out the ages long."); TEX. EDUC. CODE ANN. § 28.011 (West 2019) (providing for Bible elective courses in state public schools).

7. *See, e.g.*, Alexa Ura & Darla Cameron, *In Increasingly Diverse Texas, the Legislature Remains Mostly White and Male*, TEX. TRIB. (Jan. 10, 2019), https://apps.texastribune.org/features/2019/texas-lawmakers-legislature-demographics/ [https://perma.cc/PT9S-LASC] (noting that most Texas state legislators practice Christianity); Steven K. Green, *Religion Clause Federalism: State Flexibility Over Religious Matters and the "One-Way Ratchet,"* 56 EMORY L.J. 107, 117 (2006) (providing a personal account of "official school-sponsored prayer and Bible reading [in Texas public schools] ten years after the Court's decisions striking such practices" (citing Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962))).

8. Van Orden v. Perry, 545 U.S. 677, 681 (2005).

9. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 301 (2000).

10. *See Schempp*, 374 U.S. at 305 (Goldberg, J., concurring) ("The basic purpose of the religion clause of the First Amendment is to promote and assure the fullest possible scope of religious liberty and tolerance for all and to nurture the conditions which secure the best hope of attainment of that end."); *Van Orden*, 545 U.S. at 698 (Breyer, J., concurring) (stating that the Religion Clauses of the First Amendment "seek to avoid that divisiveness based upon religion that promotes social conflict, sapping the strength of government and religion alike" (citing Zelman v. Simmons-Harris, 536 U.S. 639, 717–29 (2002) (Breyer, J., dissenting))); Lemon v. Kurtzman, 403 U.S. 602, 622 (1971) ("[P]olitical division along religious lines was one of the principal evils against which the First Amendment was intended to protect." (citing Paul A. Freund, Comment, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1692 (1969))).

of some of the Court's most contentious constitutional litigation.[11] These acute constitutional controversies also reflect fracturing over the nature of establishment jurisprudence.[12] Because this area of constitutional law is one of endemic complexity,[13] some scholars and jurists have labeled it incoherent.[14] Some scholars have advanced this argument to the point where they claim that this jurisprudence has absolutely no theory.[15] Others have deemed it to simply be a mess.[16] As a corollary to these labels of mess theory, Establishment Clause jurisprudence has also been pejoratively labeled a thicket.[17]

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11. *See* Erwin Chemerinsky, *Why Justice Breyer Was Wrong in* Van Orden v. Perry, 14 WM. & MARY BILL RTS. J. 1, 3–4 (2005) (discussing how the issue of school prayer is enormously divisive); Christopher C. Lund, *Legislative Prayer and the Secret Costs of Religious Endorsements*, 94 MINN. L. REV. 972, 1038 (2010) (discussing continued division over *Van Orden*).

12. *See* Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 32 (1998) (discussing the fractious and divisive nature of Establishment Clause litigation).

13. *See* Comm. for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 662 (1980) ("Establishment Clause cases are not easy."); H. Jefferson Powell, *Professor Greenawalt's Unfashionable Idea*, 115 COLUM. L. REV. 790, 793 (2015) (deeming modern Establishment Clause doctrine complicated and depressing).

14. *See, e.g.*, Samuel D. Brunson, *Dear IRS, It Is Time to Enforce the Campaigning Prohibition. Even Against Churches*, 87 U. COLO. L. REV. 143, 189 (2016) (calling this jurisprudence "largely incoherent" (citing Richard C. Schragger, *The Relative Irrelevance of the Establishment Clause*, 89 TEX. L. REV. 583, 628 (2011); Steven G. Gey, *Vestiges of the Establishment Clause*, 5 FIRST AMEND. L. REV. 1, 4 (2006))); Frederick Mark Gedicks, *Incorporation of the Establishment Clause Against the States: A Logical, Textual, and Historical Account*, 88 IND. L.J. 669, 672–73, 678 (2013) (discussing scholarly arguments that assert the "logical incoherence of Establishment Clause incorporation").

15. *See* STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION 109 (1993) ("The embarrassing truth is that the Establishment Clause has no theory . . . ."); Christopher L. Eisgruber & Lawrence G. Sager, *Unthinking Religious Freedom*, 74 TEX. L. REV. 577, 578 (1996) (reviewing JESSE H. CHOPER, SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES (1995) & STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM (1995)) (deeming the Court's religious liberty jurisprudence "relatively theory-free").

16. *See* Utah Highway Patrol Ass'n v. Am. Atheists, Inc., 565 U.S. 994, 1008 (2011) (Thomas, J., dissenting) (calling this case law "our mess"); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 120 (1992) (labeling Establishment Clause jurisprudence "a mess").

17. *See, e.g.*, DeStefano v. Emergency Hous. Grp., Inc., 247 F.3d 397, 402 (2d Cir. 2001) (framing the case as "requiring [the court] to plunge into the thicket of Establishment Clause jurisprudence"); Susan Gellman & Susan Looper-Friedman, *Thou Shalt Use the Equal Protection Clause for Religion Cases (Not Just the Establishment Clause)*, 10 U. PA. J. CONST. L. 665, 706 (2008) (framing Establishment Clause litigation as a fight through a thicket).

Similar pejorative allusions to Establishment Clause jurisprudence have resonated in courts and in scholarly dialogues in the school law context.[18] This is likely because the Court's educational case approaches, like its other establishment opinions, have appeared to lack uniformity,[19] despite the singular importance of the First Amendment within the K-12 educational setting.[20] As a result, there has been "widespread judicial recognition of the law in this area as [being] 'the thorniest of constitutional thickets.'"[21]

Because the issue of religion in schools is, has always been, and likely will long be intensely controversial,[22] these school law Establishment Clause cases are difficult ones.[23] Courts have struggled to decode the complex issues that arise at the intersection of religion and schools,[24] especially when the Supreme Court's jurisprudence in this area seems opaque and incomprehensible.[25] Contrary to this perception, though, this Article

18. *See* Workman v. Greenwood Cmty. Sch. Corp., No. 1:10-CV-0293-SEB-TAB, 2010 WL 1780043, at *4 (S.D. Ind. Apr. 30, 2010) ("The issues implicated by the Establishment Clause of the First Amendment often constitute themselves as an analytical thicket, waiting to ensnare federal courts . . . in significant, if touchy, ideological issues . . . ." (citing McCreary County v. ACLU of Ky., 545 U.S. 844, 890 (2005) (Scalia, J., dissenting))); James A. Davids, *Putting Faith in Prison Programs, and Its Constitutionality Under Thomas Jefferson's Faith-Based Initiative*, 6 AVE MARIA L. REV. 341, 387 n. 229 (2008) (characterizing circuit courts as "shudder[ing] upon entry into the Establishment Clause thicket" with school law cases).

19. *See* Comm. for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 662 (1980) (highlighting the lack of a "litmus-paper test" in the Court's educational Establishment Clause cases).

20. *See* Edwards v. Aguillard, 482 U.S. 578, 583 (1987) (noting the particular vigilance of the Court in deciding educational Establishment Clause cases given the special context of K-12 schools); Epperson v. Arkansas, 393 U.S. 97, 104–05 (1968) (discussing the importance of the Court's Establishment Clause K-12 school law jurisprudence).

21. Morgan v. Swanson, 659 F.3d 359, 380 (5th Cir. 2011) (quoting Peck *ex rel.* Peck v. Baldwinsville Cent. Sch. Dist., 426 F.3d 617, 620 (2d Cir. 2005)).

22. *See* Mark W. Cordes, *Prayer in Public Schools After* Santa Fe Independent School District, 90 KY. L.J. 1, 1 (2002) (discussing the enduring controversy of religion in public schools).

23. *See* Lee v. Weisman, 505 U.S. 577, 584 (1992) (acknowledging the difficulty of school law Establishment Clause analysis); Eric J. Segall, *Parochial School Aid Revisited: The* Lemon *Test, the Endorsement Test and Religious Liberty*, 28 SAN DIEGO L. REV. 263, 264 (1991) (discussing the difficulty of school law Establishment Clause cases).

24. *See* Tobias G. Fenton, Note, *The Need to Revive the Role of Legislative Purpose in Establishment Clause Cases*, 83 B.U. L. REV. 647, 658 (2003) (discussing lower courts' confusion in interpreting the Court's Establishment Clause case law).

25. *See* R. Randall Rainey, *Law and Religion: Is Reconciliation Still Possible?*, 27 LOY. L.A. L. REV. 147, 177–78 (1993) (arguing that the Court has been inconsistent in its

asserts that a certain subset of this jurisprudence—the Court's precedent on religious activities within public schools—is not an incoherent morass of a mess or an impenetrable, incomprehensible thicket.[26] By sorting through this "irreducibly intricate," but comprehensible, case law,[27] this Article instead argues that it is unified by its fidelity to Framer James Madison's conception of neutrality, which was first articulated in *Everson v. Board of Education*, the school law case that began the Court's modern Establishment Clause doctrine.[28] Given Madison's preeminence in framing and ensuring passage of the Bill of Rights,[29] the Court's fidelity to Madisonian neutrality properly embodies the original purposes of the Establishment Clause to protect religious minorities against religious coercion, to secure conscientious liberties of the people, and to preserve the sanctity of the spheres of church and state.[30]

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school law Establishment Clause cases and has produced unreconcilable case law in doing so); Mark Strasser, *Death by a Thousand Cuts: The Illusory Safeguards Against Funding Pervasively Sectarian Institutions of Higher Learning*, 56 BUFF. L. REV. 353, 353 (2008) (discussing how the Court's seemingly unreconcilable school law Establishment Clause jurisprudence provides "no coherent guidance" to lower courts).

26. *Contra* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1264 (2d ed. 1988) ("[I]t seems impossible to divine a coherent set of principles to explain [Establishment Clause cases.]"); Bauchman *ex rel.* Bauchman v. W. High Sch., 132 F.3d 542, 561 (10th Cir. 1997) (discussing the "morass of inconsistent Establishment Clause decisions").

27. Nelson Tebbe, *Eclecticism*, 25 CONST. COMMENT. 317, 317 (2008) (citing KENT GREENAWALT, RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS (2006); KENT GREENAWALT, RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS (2008)).

28. *See* Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947) (discussing this neutrality requirement); David E. Steinberg, *The Myth of Church-State Separation*, 59 CLEV. ST. L. REV. 623, 638 (2011) (stating that the Court "laid the foundation of modern Establishment Clause doctrine" in *Everson*).

29. *The Founding Fathers: Virginia*, NAT'L ARCHIVES, https://www.archives.gov/founding-docs/founding-fathers-virginia#madison [https://perma.cc/LXR3-RHEH] (discussing Madison's preeminent role in the creation and passage of the Bill of Rights).

30. *See* Caroline Mala Corbin, *Ceremonial Deism and the Reasonable Religious Outsider*, 57 UCLA L. REV. 1545, 1574 (2010) (identifying "religious liberty and equality for all" as "the goals of the Establishment Clause"); Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 351 (2002) ("Liberty of conscience, then, was . . . the purpose that underlay the Establishment Clause when it was enacted."); Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233, 322 (1989) (arguing that the Establishment Clause ensured that "[g]overnment intrusion may not corrupt religious groups, but neither may religious groups wield excessive power over societal policy" (citing Larkin v. Grendel's Den, Inc., 459 U.S. 116, 123, 127 (1982); Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 212 (1948); *Everson*, 330 U.S. at 15–16; Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1058 (1978))).

Through the identification of this fidelity within this subset of school law, this Article reclaims the thicket theory pejoration as a constitutionally correct and significantly beneficial theory that embodies the original purposes of the Framers in their adoption of the First Amendment.[31] In doing so, this Article demonstrates that the Court's educational Establishment Clause jurisprudence has formed a protective thicket around American schoolchildren—a political minority that merits special constitutional shielding from the divisive forces of state-established religion.[32] It is a positive thicket that safeguards the freedom of conscience of all American schoolchildren, no matter their beliefs, while balancing respect for their autonomy to engage in constitutionally protected religious practices. Finally, it is an instructional thicket that upholds democratic principles by preserving respect for both government and religion. These educative results align with the Court's recognized importance of the public school as the preparatory situs for children's participation in our constitutional democracy.[33] Consequently, the Court should continue to employ this consistent approach to preserve the civics lessons regarding the Establishment Clause that should be imparted daily inside and outside America's public schools.

II. AN OVERVIEW OF EDUCATION LAW ESTABLISHMENT CLAUSE JURISPRUDENCE

The Establishment Clause of the First Amendment of the Federal Constitution provides that "Congress shall make no law respecting an establishment of religion[.]"[34] Although it is only comprised of these "few words,"[35] this

31. *See* Amanda Harmon Cooley, *Justiciability and Judicial Fiat in Establishment Clause Cases Involving Religious Speech of Students*, 22 U. PA. J. CONST. L. 911, 915 (2020) (discussing the pejorative references to Establishment Clause jurisprudence as being thicket theory).

32. *See* Epperson v. Arkansas, 393 U.S. 97, 98, 104–05 (1968) (noting that vigilant protection of schoolchildren is required in school law Establishment Clause cases); Bill W. Sanford, Jr., *Separation v. Patriotism: Expelling the Pledge from School*, 34 ST. MARY'S L.J. 461, 494 (2003) ("The Court maintains vigilant guard over schoolchildren regarding state-sponsored religious activity.").

33. *See* Ambach v. Norwick, 441 U.S. 68, 76 (1979) ("The importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, long has been recognized by our decisions . . . .").

34. U.S. CONST. amend. I.

35. Mueller v. Allen, 463 U.S. 388, 392 (1983).

clause governs a broad spectrum of activity.[36] The Establishment Clause applies to all federal and state governmental action.[37] This includes legislation, speech, and all other official conduct.[38]

Establishment Clause jurisprudence is complex and often divisive.[39] There is concentrated dissension about the original intent of the Founders regarding the central meaning of this First Amendment Clause.[40] Because this area of constitutional litigation has arisen in a multitude of different cases,[41] the Court has utilized a variety of divergent analyses.[42] The Supreme Court has acknowledged the inherent tension of this jurisprudence by situating it in a Janusian positionality, wherein the one side that recognizes the past of America's religious heritage must be balanced by the other side that calls for a Jeffersonian "separation between church and state."[43] In a sense, the labyrinthine collection of Establishment Clause cases is an appropriate reflection of America's "modern, complex society, whose

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36. *See* Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 486 (1991) (discussing the Court's broad determination as to the scope of the Establishment Clause).

37. *See* Everson v. Bd. of Educ., 330 U.S. 1, 8 (1947) (incorporating the Establishment Clause against the states via the Fourteenth Amendment's Due Process Clause); Abington Sch. Dist. v. Schempp, 374 U.S. 203, 215 (1963) (reaffirming Establishment Clause incorporation); Richard C. Mason, *School Choice and the Establishment Clause: Theories of "Constitutional Legal Cause*," 96 DICK. L. REV. 629, 644–46 (1992) (discussing the individual freedoms protected from state action by the Establishment Clause's incorporation).

38. *See* Pleasant Grove City v. Summum, 555 U.S. 460, 468 (2009) ("[G]overnment speech must comport with the Establishment Clause."); Lynch v. Donnelly, 465 U.S. 668, 678 (1984) (stating the Establishment Clause applies to "challenged legislation or official [government] conduct").

39. *See* Nicholas P. Cafardi, *The Future of the Establishment Clause in Context: Neutrality, Religion, or Avoidance?*, 87 CHI.-KENT L. REV. 707, 711 (2012) (discussing the complexity of Establishment Clause analysis); *see also* Chemerinsky, *supra* note 11, at 3–4 (discussing the deep societal division driven by "the role of religion in government").

40. *See* Stephanie H. Barclay, Brady Earley & Annika Boone, *Original Meaning and the Establishment Clause: A Corpus Linguistics Analysis*, 61 ARIZ. L. REV. 505, 518–21 (2019) (discussing the scholarly divide over the Establishment Clause's meaning).

41. *See* Frank S. Ravitch, *A Funny Thing Happened on the Way to Neutrality: Broad Principles, Formalism, and the Establishment Clause*, 38 GA. L. REV. 489, 490 (2004) (explaining that the Court has applied the Establishment Clause to a "myriad of factual contexts").

42. *See* Thomas B. Colby, *A Constitutional Hierarchy of Religions? Justice Scalia, the Ten Commandments, and the Future of the Establishment Clause*, 100 NW. U.L. REV. 1097, 1097 (2006) (discussing the "divergent interpretations of the Establishment Clause"); William M. Janssen, *Led Blindly: One Circuit's Struggle to Faithfully Apply the U.S. Supreme Court's Religious Symbols Constitutional Analysis*, 116 W. VA. L. REV. 33, 47–50 (2013) (cataloguing the Court's establishment tests).

43. Van Orden v. Perry, 545 U.S. 677, 683 (2005).

traditions and constitutional underpinnings rest on and encourage diversity and pluralism in all areas."[44]

School law has been an area of key importance in the evolution of the Court's Establishment Clause jurisprudence.[45] The core values of the clause are vital in public schools, given state compulsory attendance laws and the impressionability of schoolchildren.[46] In 1947, the Court provided its first extended substantive examination of the Establishment Clause in an education law case,[47] *Everson v. Board of Education*.[48] The Court's first invalidation of a state practice under that clause took place only one year later, in another education law case, *Illinois ex rel. McCollum v. Board of Education*.[49] Although these cases both employed the Jeffersonian wall of separation principle and a neutrality approach,[50] uniformity in the Court's initial Establishment Clause methodology was seemingly abandoned with the introduction of a variety of tests to gauge the constitutionality of religious practices within the schoolhouse gate.[51]

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44. Lynch v. Donnelly, 465 U.S. 668, 678 (1984).

45. *See* Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 772 (1973) (noting how most of the Court's "Establishment Clause questions have involved the relationship between religion and education").

46. *See* Nadine Strossen, *How Much God in the Schools? A Discussion of Religion's Role in the Classroom*, 4 WM. & MARY BILL RTS. J. 607, 634 (1995) (arguing the special importance of Establishment Clause values in public schools due to "compulsory education laws and the students' relative immaturity").

47. *See* David E. Steinberg, *Thomas Jefferson's Establishment Clause Federalism*, 40 HASTINGS CONST. L.Q. 277, 309 (2013) (labeling *Everson* "the foundation of modern Establishment Clause doctrine").

48. Everson v. Bd. of Educ., 330 U.S. 1, 15–16 (1947) (incorporating the Establishment Clause against the states).

49. Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 231 (1948).

50. *Everson*, 330 U.S. at 16 ("[T]he clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'" (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878))); *McCollum*, 333 U.S. at 211 (finding an Establishment Clause violation based on the state action not complying with the "wall of separation between Church and State" (quoting *Everson*, 330 U.S. at 16)).

51. *See* Cynthia V. Ward, *Coercion and Choice Under the Establishment Clause*, 39 U.C. DAVIS L. REV. 1621, 1627–30, 1632 (2006) (highlighting the Court's multiple educational Establishment Clause tests).

In addition to the maligned *Lemon v. Kurtzman* purpose, primary effect, and entanglement test,[52] and its precursor purpose and primary effect test,[53] the Court has used neutrality analyses,[54] a coercion analysis,[55] a historical approach and a rejected historical approach,[56] a viewpoint equality test,[57]

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52. *See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971); *see also* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 314–15 (2000) (applying the *Lemon* test in a school law Establishment Clause case); Agostini v. Felton, 521 U.S. 203, 222–23, 232 (1997) (same); Bd. of Educ. v. Mergens *ex rel.* Mergens, 496 U.S. 226, 247 (1990) (plurality opinion) (same); Edwards v. Aguillard, 482 U.S. 578, 583, 597 (1987) (same); Wallace v. Jaffree, 472 U.S. 38, 55 56 (1985) (same); Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373, 383 (1985) (same), *overruled in part on other grounds by* Agostini v. Felton, 521 U.S. 203 (1997); Aguilar v. Felton, 473 U.S. 402, 409–10 (1985) (same); Mueller v. Allen, 463 U.S. 388, 394 (1983) (same); Stone v. Graham, 449 U.S. 39, 40–41 (1980) (per curiam) (same); Comm. for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 653 (1980) (same); Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 772–73 (1973) (identifying the *Lemon* test as the test required to pass constitutional muster under the Establishment Clause); Sloan v. Lemon, 413 U.S. 825, 829–30 (1973) (applying *Lemon* test); Levitt v. Comm. for Pub. Educ. & Religious Liberty, 413 U.S. 472, 480–81 (1973) (same); Steven K. Green, *The "Irrelevance" of Church-State Separation in the Twenty-First Century*, 69 SYRACUSE L. REV. 27, 53–54 (2019) (discussing judicial criticism of the *Lemon* test); Claudia E. Haupt, *Active Symbols*, 55 B.C. L. REV. 821, 828 n.37 (2014) (same).

53. *See* Abington Sch. Dist. v. Schempp, 374 U.S. 203, 222 (1963) (stating that governmental action violates the Establishment Clause "if either [the purpose or the primary effect of the government action] is the advancement or inhibition of religion"); Bd. of Educ. v. Allen, 392 U.S. 236, 243 (1968) (applying *Schempp* purpose and primary effect test); Epperson v. Arkansas, 393 U.S. 97, 107 (1968) (affirming the purpose and primary effect test).

54. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 652 (2002) (applying a neutrality approach); Mitchell v. Helms, 530 U.S. 793, 829 (2000) (plurality opinion) (same); *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 307, 313 (same); Good News Club v. Milford Cent. Sch., 533 U.S. 98, 114 (2001) (same); Bd. of Educ. v. Grumet, 512 U.S. 687, 704–05 (1994) (same); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 8 (1993) (same); Lee v. Weisman, 505 U.S. 577, 588 (1992) (same); *Wallace*, 472 U.S. at 60 (same); *Epperson*, 393 U.S. at 103–04 (same); *Schempp*, 374 U.S. at 225 (same); Engel v. Vitale, 370 U.S. 421, 430–31 (1962) (same); Zorach v. Clauson, 343 U.S. 306, 314 (1952) (same); *Everson*, 330 U.S. at 18 (same).

55. *See Good News Club*, 533 U.S. at 115 (applying a coercion analysis); *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 310–13 (same); *Lee*, 505 U.S. at 587 (same); *Edwards*, 482 U.S. at 583–84 (emphasizing the coercive environment of public schools); *Engel*, 370 U.S. at 430–31 (emphasizing the coercive pressure of government-supported religious conformity); *Zorach*, 343 U.S. at 311–12 (applying a coercion analysis).

56. *Compare Engel*, 370 U.S. at 425 (finding an Establishment Clause violation for school prayer based on the colonial history of seeking religious freedom in America), *with Edwards*, 482 U.S. at 583 n.4 (rejecting a historical approach for school law Establishment Clause jurisprudence due to the virtual nonexistence of free public schools at the time of the Constitution's adoption).

57. *See Good News Club*, 533 U.S. at 102, 107 (finding that an exclusion of a religious student club from a school was not required by the Establishment Clause, but

a private choice theory,[58] and an endorsement test[59] in its range of school law Establishment Clause cases. It should be no surprise then that scholarly perspectives on this jurisprudence have been conflicted and fractured.[60] This area of law also has been criticized by every part of the Court's ideological spectrum. Justice Rehnquist asserted that this doctrine is "neither principled nor unified."[61] Justice Scalia deemed it a "geometry of crooked lines and wavering shapes."[62] Justice Souter has stated this jurisprudence is in "doctrinal bankruptcy."[63] Justice Stevens described analyzing this area of the law as a "sisyphean task."[64] The net result of all of this division is a goliath of case law, which has been deemed to be a thorny thicket.

III. FIDELITY TO MADISONIAN NEUTRALITY IN EDUCATION LAW ESTABLISHMENT CLAUSE CASES INVOLVING RELIGIOUS ACTIVITIES WITHIN PUBLIC SCHOOLS

School law has been a central focal point of the Court's Establishment Clause jurisprudence.[65] However, the Supreme Court has consistently struggled with this area of its Establishment Clause doctrine.[66] The general

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instead was viewpoint discrimination that violated the free speech clause); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 395 (1993) (rejecting an Establishment Clause defense through a viewpoint equality analysis); *Mergens*, 496 U.S. at 248–49 (applying *Lemon* through a viewpoint equality lens).

58. *See* Agostini v. Felton, 521 U.S. 203, 226 (1997) (applying private choice theory); *Zobrest*, 509 U.S. at 9, 12 (same).

59. *See Good News Club*, 533 U.S. at 118 (using an endorsement test for a school law Establishment Clause case); Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373, 389 (1985) (stating the Establishment Clause is violated by "a message of government endorsement or disapproval of religion"), *overruled on other grounds by Agostini*, 521 U.S. 203.

60. *See* Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development Part II. The Nonestablishment Principle*, 81 HARV. L. REV. 513, 516 (1968) (describing the impossibility of finding unified scholarly agreement on the Establishment Clause's core principles).

61. Wallace v. Jaffree, 472 U.S. 38, 107 (1985) (Rehnquist, J., dissenting).

62. *Lamb's Chapel*, 508 U.S. at 399 (Scalia, J., concurring).

63. Zelman v. Simmons-Harris, 536 U.S. 639, 688 (2002) (Souter, J., dissenting).

64. Comm. for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting).

65. *See* Marion K. McDonald, Note*, Establishment Clause Challenge to Mandatory Religious Accommodation in the Workplace*, 36 HASTINGS L.J. 121, 121 (1984) (discussing how most of the Court's Establishment Clause cases have been school law cases).

66. *See* Mitchell v. Helms, 530 U.S. 793, 807 (2000) (plurality opinion) (noting the Court's consistent struggle in Establishment Clause interpretation).

confusion in this area has been exacerbated by the variety of the Court's religion and education precedents. There are four major categories of these cases: 1) cases involving religious activities within the public schools;[67] 2) cases involving varying forms of governmental assistance to nonpublic sectarian religious schools;[68] 3) equal access cases;[69] and 4) standing and justiciability requirements cases.[70]

A first—or second or tenth—look at these categories altogether reveals an apparently incomprehensible area of case law.[71] The Court explicitly recognized that it has "isolated no single test of constitutional sufficiency" for this area of decision-making.[72] Although uniformity in doctrine is not readily apparent throughout the Court's entire school law Establishment Clause jurisprudence,[73] one of its subcategories has had a consistent application of constitutional analysis—those cases dealing with religious activities within public schools.

The Court has been consistent in analyzing cases dealing with religious activities in public schools, unlike its acknowledged sea changes in its

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67. *See* Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 772 (1973) (identifying this area as one area of the Court's "religion-education precedents").

68. *See id.* (identifying this area as another area of the Court's "religion-education precedents").

69. *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 112 (2001) (evaluating the Establishment Clause in a school law equal access case); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 387, 401 (1993) (same); Bd. of Educ. v. Mergens *ex rel.* Mergens, 496 U.S. 226, 231, 247 (1990) (plurality opinion) (same).

70. *See* Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 130 (2011) (discussing taxpayer standing in a school law Establishment Clause case); Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11–13, 15, 17–18 (2004), (discussing prudential standing in an Establishment Clause school law case), *abrogated by* Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014); Karcher v. May, 484 U.S. 72, 81 (1987) (providing the jurisdictional requirements for an Establishment Clause school law case); Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 534–35, 541–49 (1986) (discussing the standing requirements for an Establishment Clause school law case); Wheeler v. Barrera, 417 U.S. 402, 426 (1974) (discussing the ripeness requirements for a school law Establishment Clause case); Flast v. Cohen, 392 U.S. 83, 91–106 (1968) (providing the requirements for taxpayer standing in a school law Establishment Clause case); Doremus v. Bd. of Educ., 342 U.S. 429, 432–36 (1952) (same).

71. *See* MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY 227 (2008) (describing Establishment Clause jurisprudence as hard to comprehend).

72. Mitchell v. Helms, 530 U.S. 793, 869 (2000) (Souter, J., dissenting).

73. *Compare* Haupt, *supra* note 52, at 828 (noting that *Lemon* remains the constitutional touchstone for Establishment Clause analysis), *with* Martha Minow, *Choice or Commonality: Welfare and Schooling After the End of Welfare as We Knew It*, 49 DUKE L.J. 493, 512 n.57 (1999) (discussing the "Court's tendency to ignore *Lemon*").

analysis of government aid to nonpublic sectarian schools.[74] The Supreme Court's line of cases in this former category has maintained fidelity with *Everson*, the case that established modern Establishment Clause doctrine.[75] Specifically, this unified approach has modeled and applied the Madisonian neutrality at the heart of the Court's decision in *Everson*. In doing so, the Court has incorporated the tenets of the preeminent Framer's conception of neutrality,[76] whereby the state cannot operate to inhibit or aid religion. This fidelity to Madison's articulations of neutrality reflects the original purposes of the Establishment Clause to secure religious and conscientious liberties of all the people and to preserve both sides of the Jeffersonian wall.[77]

In these precedents, the Court has repeatedly upheld "an ideal principle of democratic government,"[78] resulting in almost seventy-five years of appropriate stare decisis in public school and religious activities cases.[79] This fidelity to Madison's intent is the correct constitutional course, as it properly provides the equipoise of neutrality between aiding and inhibiting religion that was intended by the Establishment Clause.[80] Consequently, the balance between religious liberty and freedom of conscience has been positively preserved by the Court's incorporation of *Everson*'s articulation of Madisonian neutrality in this school law Establishment Clause jurisprudence. The remainder of this section will demonstrate the fidelity

74. *See* Agostini v. Felton, 521 U.S. 203, 222–23, 235 (1997) (acknowledging the Court's breaking with stare decisis by its different jurisprudential approaches to school law government assistance Establishment Clause cases).

75. *See* John T. Valauri, *The Concept of Neutrality in Establishment Clause Doctrine*, 48 U. PITT. L. REV. 83, 94 (1986) ("Modern Establishment Clause doctrine" originated with *Everson*.).

76. *See* Caroline Mala Corbin, *Opportunistic Originalism and the Establishment Clause*, 54 WAKE FOREST L. REV. 617, 648 (2019) (noting Madison's preeminent role as a Framer).

77. *See* Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CALIF. L. REV. 673, 673 (2002) (stating that the *Everson* Court "correctly identified protection of religious liberty as the central goal of the [Establishment] Clause").

78. Giannella, *supra* note 60, at 516 (citing Everson v. Bd. of Educ., 330 U.S. 1, 39 (1947) (Rutledge, J., dissenting)) (characterizing the Madisonian interpretation of the Establishment Clause's original objective).

79. *See Everson*, 330 U.S. at 3.

80. *See* Mitchell v. Helms, 530 U.S. 793, 883 (2000) (Souter, J., dissenting) (discussing the required equipoise in the *Everson* notion of neutrality).

at the heart of this theory through a comprehensive chronology of these cases.

A. Everson v. Board of Education

Over 150 years after the Establishment Clause's ratification,[81] the Court conducted its first substantive examination of that clause in *Everson*.[82] As a result, *Everson* is considered the starting point of the Court's modern Establishment Clause jurisprudence.[83] In *Everson*, the Court examined the constitutionality of a township board of education's reimbursement of parents for the transportation costs to bus their children to private Catholic parochial schools.[84] This reimbursement was authorized by a New Jersey statute that allowed "local school districts to make rules and contracts for the transportation of children to and from schools."[85]

At the outset of its analysis, the Court incorporated the Establishment Clause via the Fourteenth Amendment Due Process Clause's protection of personal liberty.[86] This was the first time the Court had expressly incorporated this clause to apply to state and local governments,[87] and this "quiet revolution" incorporation remains firmly rooted in the Court's jurisprudence.[88] In *Everson*, the Court found that the interrelation of the

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81. *See* Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113, 1124 (1988) (noting the lag between the ratification of the Establishment Clause and the Supreme Court's first extended examination of it in *Everson*).

82. *See Everson*, 330 U.S. at 1.

83. *See* Steven K. Green, Locke v. Davey *and the Limits to Neutrality Theory*, 77 TEMP. L. REV. 913, 914 (2004) (deeming *Everson* "the first modern Establishment Clause case"); John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 284 (2001) ("The modern Establishment Clause dates from *Everson* . . . .").

84. *Everson*, 330 U.S. at 3.

85. *Id.*

86. *Id.* at 8 ("The First Amendment, as made applicable to the states by the Fourteenth . . . commands that a state 'shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .'" (citation omitted) (first citing Murdock v. Pennsylvania, 319 U.S. 105 (1943); then quoting U.S. CONST. amend. I)); *see also* Carl H. Esbeck, *Uses and Abuses of Textualism and Originalism in Establishment Clause Interpretation*, 2011 UTAH L. REV. 489, 599 n.457 (discussing *Everson*'s application of "the Establishment Clause through the 'liberty' provision in the Due Process Clause of the Fourteenth Amendment" (quoting *Everson*, 330 U.S. at 14–15)).

87. *See* Esbeck, *supra* note 86, at 530 n.173 (noting the Court's first incorporation of the Establishment Clause as "a restraint on state and local governments" in *Everson*).

88. *See* Wallace v. Jaffree, 472 U.S. 38, 48–49 (1985) (emphasizing "how firmly embedded in our constitutional jurisprudence is the proposition that the several States have no greater power to restrain the individual freedoms protected by the First Amendment

First Amendment Religion Clauses provided "every reason" to extend its previous incorporation of the Free Exercise Clause to the Establishment Clause as well.[89] Consequently, the Court determined that parallel federal and state actions could violate the constitutional prohibition against establishment.[90]

Throughout *Everson*, the Court emphasized and incorporated two of the Framers' conceptions of liberty and neutrality—that of Jefferson and Madison.[91] After first quoting the Establishment Clause, the Court noted that "[t]hese words of the First Amendment reflected in the minds of early Americans a vivid mental picture of conditions and practices which they fervently wished to stamp out in order to preserve liberty for themselves and for their posterity."[92] From there, the Court provided a broad-brush history of the country's first settlers who "came here from Europe to escape the bondage of laws which compelled them to support and attend government-favored churches."[93] The Court emphasized the religious persecution of the old world, as well as the transplantation of some of these practices in the new America.[94] Abhorrence of these practices "found expression in the First Amendment."[95]

The Court specifically recounted Jefferson and Madison's fight against Virginia's attempt in 1785 and 1786 to levy taxes to support a state church.[96] The Court cited to Madison's *Memorial and Remonstrance Against*

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than does the Congress of the United States" in a school law Establishment Clause case); Dan T. Coenen, *Quiet-Revolution Rulings in Constitutional Law*, 99 B.U. L. REV. 2061, 2069–70 (2019) (labeling the incorporation of the Establishment Clause a "quiet revolution").

89. *Everson*, 330 U.S. at 15.

90. *See id.* at 15–16 ("The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*.").

91. *See id.* at 8.

92. *Id.*

93. *Id.*

94. *See id.* at 9.

95. *Id.* at 11.

96. *See id.* at 11–12.

Religious Assessments, stating that Madison "eloquently argued that a true religion did not need the support of law; . . . that the best interest of a society required that the minds of men always be wholly free; and that cruel persecutions were the inevitable result of government-established religions."[97] The Court also quoted the preamble to the Virginia Bill for Religious Liberty that was originally authored by Thomas Jefferson: "'Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness . . . .'"[98]

Consequently, the incorporation analysis relied heavily upon American colonial history and Madison and Jefferson's writings on church and state, with their shared vision of the need "to provide . . . protection against governmental intrusion on religious liberty."[99] The Court emphasized that it was this same objective that was realized in the drafting of the First Amendment.[100] In incorporating this Framers' ideology,[101] the Court cemented its analysis in Jefferson's words that "the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'"[102]

In evaluating the New Jersey statute, the Court found no breach of this "high and impregnable" wall,[103] by balancing the provisions of the Establishment Clause with the Free Exercise Clause.[104] This balance exemplified the Court's properly neutral approach to this school law case. Here, the Court found that a state contribution of "tax-raised funds to the support of an institution which teaches the tenets and faith of any church" violates the Establishment Clause.[105] However, the Court balanced this finding by stating that "other language of the amendment commands that [a state] cannot hamper its citizens in the free exercise of their own religion."[106]

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97. *Id.* at 12.
98. *Id.* at 12–13 (quoting Virginia Bill for Religious Liberty, 12 Henning Statutes of Virginia, 84 (1823)).
99. *Id.* at 11–13.
100. *See id.* at 13.
101. *See* Steven K. Green, *A "Spacious Conception": Separationism as an Idea*, 85 OR. L. REV. 443, 443 (2006) (discussing how Jeffersonian separation became "constitutional canon" with *Everson*).
102. *Everson*, 330 U.S. at 16 (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878)).
103. *Id.* at 18.
104. *See id.* at 16.
105. *Id.*
106. *Id.*

This balancing approach directly implemented Madison's conceptions of neutrality as reflected in his *Memorial and Remonstrance*, his other writings, and his congressional remarks in introducing and debating the passage of the Bill of Rights.[107] This Madisonian principle "requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary."[108] The *Everson* Court implemented the Madisonian approach with this neutrality analysis, stating clearly that "State power is no more to be used so as to [inhibit] religions than it is to favor them."[109] Using these standards, the Court concluded that the Establishment Clause did not bar the state "from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools."[110]

Everson did not analyze the constitutionality of religious activities within public schools.[111] However, it was the first school law Establishment Clause case, the first case to incorporate the Establishment Clause to state action, and the origin of the Court's modern Establishment Clause jurisprudence.[112] Therefore, the Court's implementation of Madisonian neutrality in *Everson* should be the touchstone for all of the Court's school law Establishment Clause cases. That has not proved to be the case for each of the Court's religion-education precedents. However, in every school law Establishment Clause case that has examined the constitutionality of religious practices in public schools after *Everson*, the Court has acted in accordance with this Madisonian conception of neutrality, whereby the state cannot

107. *See id.* at 12–13, 18.
108. *Id.*
109. *Id.*
110. *Id.* at 17.
111. *See* Mark J. Chadsey, *State Aid to Religious Schools: From* Everson *to* Zelman*: A Critical Review*, 44 SANTA CLARA L. REV. 699, 718 (2004) (discussing *Everson* as a state aid to religious schools case); David K. DeWolf, *State Action Under the Religion Clauses: Neutral in Result or Neutral in Treatment?*, 24 U. RICH. L. REV. 253, 279 (1990) (same).
112. *See* Donald L. Beschle, *God Bless the Child?: The Use of Religion as A Factor in Child Custody and Adoption Proceedings*, 58 FORDHAM L. REV. 383, 390 (1989) (characterizing *Everson* "as the starting point" for modern Establishment Clause analysis); Mark Strasser, *Repudiating* Everson*: On Buses, Books, and Teaching Articles of Faith*, 78 MISS. L.J. 567, 570 (2009) ("*Everson* [requires] close attention . . . because it was the first case in modern Establishment Clause jurisprudence . . . ." (citing Tracey L. Meares & Kelsi Brown Corkran, *When 2 or 3 Come Together*, 48 WM. & MARY L. REV. 1315, 1363 (2007))).

constitutionally act to aid or inhibit religion. This fidelity throughout these subsequent cases correctly follows stare decisis; it also provides the foundation for each of these decisions' constitutionally correct holdings that the challenged religious practices in public schools violate the Establishment Clause.

B. Illinois ex rel. McCollum v. Board of Education

One year after *Everson*, the Court invalidated a law under the Establishment Clause for the first time in *McCollum*.[113] Here, the Court used an application of the Jeffersonian separation principle, as well as an acknowledgment of the necessary neutrality demanded by the clause.[114] In this case, the challenged state action was the provision of thirty minutes of weekly religious education in the public schools by religious teachers employed by private religious groups in a state with compulsory education laws.[115] Students who opted out of the religious instruction "were required to leave their classrooms and go to some other place in the school building for pursuit of their secular studies."[116] The parent of one of these students filed the lawsuit, claiming that this was an Establishment Clause violation.[117]

In its decision, the Court found an impermissible intertwinement of the state and religion that breached the "wall of separation" "between Church and State[,]"[118] which was an integral part of the *Everson* analysis.[119] The Court also incorporated the *Everson* Madisonian neutrality principle, with its balancing between the Religion Clauses, into its analysis of the challenged state action:

> To hold that a state cannot consistently with the First and Fourteenth Amendments utilize its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals does not, as counsel urge, manifest a governmental hostility to religion or religious teachings. A manifestation of such hostility would be at war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion. For the First Amendment

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113. Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 209–12 (1948).

114. *See id.* at 211–12; *see also* Stephanie L. Shemin, *The Potential Constitutionality of Intelligent Design?*, 13 GEO. MASON L. REV. 621, 652 (2005) (discussing how *McCollum* made clear that the government must "maintain a neutral stance toward religion").

115. *McCollum*, 333 U.S. at 205.

116. *Id.* at 209.

117. *Id.* at 205.

118. *Id.* at 231.

119. *See* Mark Strasser, *Religion in the Schools: On Prayer, Neutrality, and Sectarian Perspectives*, 42 AKRON L. REV. 185, 204 (2009) (discussing the reliance of both cases on "the impregnable wall between Church and State").

> rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere.[120]

Consequently, the Court held that this public school action violated the Establishment Clause, as incorporated to the states, because it was "beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith."[121] Therefore, the Court properly held this public school religious instruction was a violation of Madisonian neutrality and of the Constitution.

C. Engel v. Vitale

The Court's next case about religious practices in public schools was *Engel v. Vitale* in 1962.[122] In this case, the Court incorporated the *Everson* notions of Jeffersonian separation and Madisonian neutrality into its first examination of the constitutionality of school prayer.[123] Here, students in New York were directed by their school board to recite this prayer in their classrooms to start each school day: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."[124] The prayer was authored and recommended by state officials as part of a "Statement on Moral and Spiritual Training in the Schools."[125]

The parents of ten schoolchildren challenged the constitutionality of the prayer practice, claiming that it was inconsistent with "the beliefs, religions, or religious practices of both themselves and their children" and, therefore, was a violation of the Establishment Clause.[126] In evaluating this challenge, the Court determined that the "program of daily classroom invocation of God's blessings as prescribed in the Regents' prayer is a religious activity [because i]t is a solemn avowal of divine faith and supplication for the

120. *McCollum*, 333 U.S. at 211–12.
121. *Id.* at 210.
122. Engel v. Vitale, 370 U.S. 421 (1962).
123. *See id.* at 431–32 (citing JAMES MADISON, *Memorial and Remonstrance against Religious Assessments*, *in* 2 WRITINGS OF JAMES MADISON 183, 187, 190 (Gaillard Hunt ed., 1901)); *see also* Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2093 (1996) (discussing the primacy of *Engel* as a school prayer case).
124. *Engel*, 370 U.S. at 422.
125. *Id.* at 423.
126. *Id.*

blessings of the Almighty."[127] The Court further found that "the fact that the program . . . does not require all pupils to recite the prayer but permits those who wish to do so to remain silent or be excused from the room, ignores the essential nature of the program's constitutional defects."[128]

The Court then applied the Jeffersonian constitutional standard from *Everson*.[129] In doing so, it determined that the school invocation practice "breache[d] the constitutional wall of separation between Church and State" because the Establishment Clause "must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government."[130] The Court rooted this finding in American colonial history as "this very practice of establishing governmentally composed prayers for religious services was one of the reasons which caused many of our early colonists to leave England and seek religious freedom in America."[131]

The same notions of Madisonian neutrality that had been incorporated in its predecessor cases were also applied in *Engel*,[132] with an articulation of the importance of the Establishment Clause in preserving the sanctity of religion and government.[133] The analysis expanded upon its existing neutrality notions by finding that nonsectarian, nondenominational, or noncompulsory religious practices, like this prayer, do not achieve the constitutional balance required by the Establishment Clause.[134] Continuing its neutrality analysis, the Court rejected any notion that its decision reflected any religious hostility.[135] Instead, citing Madison, the Court emphasized Madison's intent for the Establishment Clause to preserve the separate spheres of religion and government as that clause's "first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion."[136]

Finally, the Court emphasized the coercion inherent in these types of governmental prayer practices, which supplemented the neutrality analysis

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127. *Id.* at 424.
128. *Id.* at 430.
129. *See id.* at 425.
130. *Id.*
131. *Id.*
132. *See id.* at 431–32 (citing MADISON, *supra* note 123, at 187, 190).
133. *See id.* at 430–31.
134. *See id.* at 430 ("Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause . . . .").
135. *See id.* at 433–34.
136. *Id.* at 431–32.

thrust of the decision: "When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."[137] This coercive pressure acted as a final tipping point for the required neutrality balance. Consequently, the Court determined that the school prayer violated the "purposes of the Establishment Clause and . . . the Establishment Clause itself."[138]

D. School District of Abington Township v. Schempp

One year after *Engel*, the Court formalized its adherence to Madisonian neutrality in school religious activities through an express test for this area of Establishment Clause analysis in *School District of Abington Township v. Schempp*.[139] In these companion cases, the Court examined a Pennsylvania statute that required a ten-verse reading from the Bible at the opening of each public school day with a provision that excused children from the reading with parental or guardian written permission.[140] It also evaluated a similar Baltimore rule that required a reading from the Bible or of the Lord's Prayer for opening school exercises in the city's public schools.[141]

In practice, the Pennsylvania schools either 1) would have students read the ten Bible verses over the intercom system, which would be followed by a recitation of the Lord's Prayer, during which students were asked to stand and join in the prayer or 2) would have the homeroom teacher conduct the Bible reading, followed by a standing recitation of the Lord's Prayer by the class.[142] The Pennsylvania statute provided that participation in these exercises was voluntary.[143] However, some parents, including the litigants, did not opt their children out of these exercises, as they believed that their "children's relationships with their teachers and classmates would be adversely affected."[144] Originally, the Baltimore rule did not permit children to be excused from the opening religious exercises at the schools.[145]

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137. *Id.*
138. *Id.* at 433.
139. 374 U.S. 203, 203, 214, 222 (1963).
140. *See id.* at 205.
141. *See id.* at 211.
142. *Id.* at 207–08.
143. *Id.* at 207.
144. *Id.* at 208.
145. *See id.* at 211–10.

However, this rule was amended to allow student nonparticipation after parental requests for such an amendment.[146] Schoolchildren and their parents brought suit, claiming Establishment Clause violations.[147]

In the opinion, after recognizing the vital connections between religion and American history,[148] the Court applied a Madisonian neutrality analysis,[149] with a balance between the Establishment and Free Exercise Clauses.[150] The Court provided explicit connections between each religion clause and the precedent of neutrality that it had applied throughout its school law jurisprudence.[151] On one side of the balance, the Court found that "[t]he wholesome 'neutrality'" of its religion-education precedents reflects the lessons of "history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the . . . Government would be placed behind the tenets of one or of all orthodoxies."[152] The Court determined that the Establishment Clause prohibits this fusion or concerted dependency.[153] On the other side of the balance, the Court found that the Free Exercise Clause provided another reason for the Court's application of Madisonian neutrality: that clause "recognizes the value of religious training, teaching and observance and, more particularly, the right of every person to freely choose his own course with reference thereto, free of any compulsion from the state."[154]

These guiding considerations that justified the Court's past fidelity to Madisonian neutrality, and that affirmed the Court's continued stare decisis with this principle, gave rise to an express test.[155] Here, the Court formalized its neutrality precedent by stating a test that evaluates "the purpose and the primary effect" of the government action.[156] The Court determined that "[i]f either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution."[157] Therefore, to comply with the Establishment Clause, the

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146. *See id.* at 211–12.
147. *Id.* at 206, 211.
148. *See id.* at 212–13.
149. *See id.* at 214 (emphasizing Madison's balance of neutrality that was incorporated into the Constitution).
150. *See id.* at 222.
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*
155. *See id.*
156. *Id.*
157. *Id.*

Court held that "there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[158]

In applying this test to the Pennsylvania and Baltimore required school religious exercises, the Court correctly determined that the Bible reading and recitation of the Lord's Prayer were violations of the Establishment Clause and the First Amendment's requirement "that the Government maintain strict neutrality, neither aiding nor opposing religion."[159] The Court cemented its holding through a further refinement of the nature of constitutional neutrality in school religion cases:

> Finally, we cannot accept that the concept of neutrality, which does not permit a State to require a religious exercise even with the consent of the majority of those affected, collides with the majority's right to free exercise of religion. While the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to *anyone*, it has never meant that a majority could use the machinery of the State to practice its beliefs.[160]

Like *Engel*, the Court incorporated the perils of state coercion and the protection of religion into its neutrality discussion.[161] This Court found that the parental opt-out provisions afforded no more insulation from an Establishment Clause violation than did the noncompulsory nature of the school prayer of *Engel*.[162] Further, the Court expressly cited Madison's *Memorial and Remonstrance* in rejecting any claim that these school religious exercises were "relatively minor encroachments on the First Amendment" and, therefore, were constitutional.[163] The Court cautioned that "[t]he breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, 'it is proper to take alarm at the first experiment on our liberties.'"[164] The Court was intentional in its incorporation of Madisonian neutrality references and deliberately emphasized the incorporation of Madison's views into the

158. *Id.* (citing Everson v. Bd. of Educ., 330 U.S. 1 (1947); McGowan v. Maryland, 366 U.S. 420, 442 (1961)).
159. *Id.* at 225.
160. *Id.* at 225–26.
161. *See supra* text accompanying note 137.
162. *Schempp*, 374 U.S. at 224–25.
163. *Id.* at 225.
164. *Id.* (quoting MADISON, *supra* note 123, at 185).

Constitution.[165] Finally, the Court urged that its finding was not a decision that resulted in "a 'religion of secularism'" or hostility towards religion.[166] Instead, the holding ensured the protection of religion from harmful governmental invasion.[167] To achieve this aim, the Court succinctly reaffirmed its fidelity to this Framer's neutrality, stating: "In the relationship between man and religion, the State is firmly committed to a position of neutrality."[168]

E. Epperson v. Arkansas

The Court continued to apply Madisonian neutrality, through the expressly articulated *Schempp* purpose and primary effect test, in its next religious activities in public schools case. This took place in the 1968 invalidation of an antievolution teaching law under the Establishment Clause in *Epperson v. Arkansas*.[169] Here, the Court found that the Arkansas statute could not "be defended as an act of religious neutrality"[170] and was a plain violation of the Establishment Clause.[171] The Court's legal conclusion was based on the state law's exclusion of evolution from the public school curriculum "for the sole reason that it is deemed to conflict with a particular religious doctrine [and] with a particular interpretation of the Book of Genesis by a particular religious group."[172]

In coming to this conclusion, the Court solidified what it deemed to be fundamental freedom antecedents for Establishment Clause jurisprudence.[173] Its first antecedent reflected the Court's Madisonian neutrality principle for this First Amendment analysis:

> Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite.[174]

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165. *See id.*; Richard Albert, *Beyond the Conventional Establishment Clause Narrative*, 28 SEATTLE U. L. REV. 329, 374 (2005) (discussing the great care the Court took in emphasizing the incorporation of Madison's views on religious liberty into the Constitution).
166. *Schempp*, 374 U.S. at 225 (citing Zorach v. Clausen, 343 U.S. 306, 314 (1952)).
167. *See id.* at 226.
168. *Id.*
169. Epperson v. Arkansas, 393 U.S. 97, 109 (1968).
170. *Id.*
171. *See id.*
172. *Id.* at 103.
173. *See id.* ("The antecedents of today's decision are many and unmistakable. They are rooted in the foundation soil of our Nation. They are fundamental to freedom.").
174. *Id.* at 103–04.

Here, the Court rooted its adherence to Madisonian neutrality in this area of its Establishment Clause doctrine in clear terms, stating that "[t]he First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."[175]

The second antecedent was the foundational premise of the vital importance of the Court providing safeguards against Establishment Clause violations in the public schools,[176] because "the First Amendment 'does not tolerate laws that cast a pall of orthodoxy over the classroom.'"[177] The third antecedent incorporated the Jeffersonian "wall of separation" principle utilized in *Everson, McCollum*, *Engel*, and *Schempp*.[178] Here, the Court strongly stated that "[t]here is and can be no doubt that the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma."[179] The fourth and final antecedent was a reaffirmation of the validity of the *Schempp* purpose and primary effect test.[180]

In applying these antecedents in *Epperson*, the Court determined that "[t]he State's undoubted right to prescribe the curriculum for its public schools does not carry with it the right to prohibit, on pain of criminal penalty, the teaching of a scientific theory or doctrine where that prohibition is based upon . . . fundamentalist sectarian conviction."[181] Because the Arkansas act was not one "of religious neutrality," the Court held that the antievolution teaching statute was a plain violation of the Establishment Clause.[182]

F. Lemon v. Kurtzman

The Court's next major education law Establishment Clause case in 1971, *Lemon v. Kurtzman*, articulated a new test for this jurisprudence,[183]

175. *Id.* at 104.
176. *See id.* at 104–05.
177. *Id.* at 105 (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).
178. *See id.* at 106 (quoting Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 211 (1948)).
179. *Id.* at 106.
180. *See id.* at 107 (quoting *Schempp*, 374 U.S. at 222).
181. *Id.* at 107–08.
182. *Id.* at 109.
183. *See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

which still reflected *Everson*'s Madisonian neutrality.[184] In *Lemon*, the Court held that two state statutes that provided state financial aid to nonpublic church-related elementary and secondary schools were violations of the Establishment Clause.[185] Although *Lemon* does not fall within the category of cases regarding religious activities within public schools,[186] it needs discussion in any school law Establishment Clause analysis given that the test has never been expressly overruled and that *Lemon* has been a preeminent force in the Court's overall Establishment Clause doctrine.[187]

Lemon incorporated the Madisonian neutrality principles that had been present throughout the Court's religious activities in public schools precedent. The Court did so by establishing a conjunctive,[188] three-part framework for determining if government action passes muster under the Establishment Clause that expressly built upon the *Schempp* secular purpose and neutrality primary effect test.[189] Under the *Lemon* test, in order to meet the requirements

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184. *See* Barry P. McDonald, *Democracy's Religion: Religious Liberty in the Rehnquist Court and into the Roberts Court*, 2016 U. ILL. L. REV. 2179, 2224 (stating that the tenet that the "government [must] remain neutral towards religion by refraining from either favoring or disfavoring a religious sect or religion in general" is "embodied in the *Lemon* test").

185. *Lemon*, 403 U.S. at 606–07.

186. *See* Keith S. Blair, *Praying for a Tax Break: Churches, Political Speech, and the Loss of Section 501(c)(3) Tax Exempt Status*, 86 DENV. U. L. REV. 405, 421 (2009) (discussing *Lemon* as a government aid to religious schools case); Joseph O. Oluwole & Preston C. Green III, *School Vouchers and Tax Benefits in Federal and State Judicial Constitutional Analysis*, 65 AM. U. L. REV. 1335, 1358 (2016) (same).

187. *See* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2079–80 (2019) (discussing the *Lemon* test's shortcomings, but not expressly overruling it); Daniel O. Conkle, Lemon *Lives*, 43 CASE W. RES. L. REV. 865, 882 (1993) (discussing the longevity of *Lemon* in the Court's Establishment Clause jurisprudence); Gabrielle Marie D'Adamo, Comment, *Separatism in the Age of Public School Choice: A Constitutional Analysis*, 58 EMORY L.J. 547, 564 (2008) (discussing how the *Lemon* test has never been overruled); Brandon L. Garrett, *Constitutional Reasonableness*, 102 MINN. L. REV. 61, 89 (2017) (discussing the *Lemon* test's place in the Court's Establishment Clause jurisprudence).

188. *See* Valauri, *supra* note 75, at 142 (discussing the conjunctive nature of the *Lemon* test).

189. *Lemon*, 403 U.S. at 612–13 (first citing Bd. of Educ.v. Allen, 392 U.S. 236, 243 (1968); then quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)) (articulating the three-prong, conjunctive test for constitutionality under the Establishment Clause); *see also* Abington Sch. Dist. v. Schempp, 374 U.S. 203, 222 (1963) (articulating the secular purpose and primary effect test that was incorporated into the first two of the three prongs of the *Lemon* test: "to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion" (citing Everson v. Bd. of Educ., 330 U.S. 1, 14–15 (1947); McGowan v. Maryland, 366 U.S. 420, 442 (1961))); Wallace v. Jaffree, 472 U.S. 38, 56 (1985) (noting that if one criteria of the *Lemon* test is not satisfied, then the other criteria need not be considered to find an Establishment Clause violation).

of the Establishment Clause, 1) the government action "must have a secular legislative purpose"; 2) "its principal or primary effect must be one that neither advances nor inhibits religion"; and 3) the state action "must not foster 'an excessive government entanglement with religion.'"[190] To make the determination regarding excessive government entanglement, the Court stated that it will "examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority."[191]

The Court then turned to an application of this test.[192] Specifically at issue in the case was a Pennsylvania statute that provided reimbursement to nonpublic schools for "teachers' salaries, textbooks, and instructional materials in specified secular subjects" and a Rhode Island statute that provided for the payment of 15% of nonpublic elementary school teachers' salaries.[193] These state payments included payments to private "church-related educational institutions."[194] In applying this test, the Court found that both statutes passed the first secular legislative purpose prong, as their legislative intents were "to enhance the quality of the secular education in all schools covered by the compulsory attendance laws."[195] It was not "to advance religion."[196]

The Court then declined to decide the second prong regarding a neutral primary effect, as it found that the third entanglement prong was not satisfied by these statutes.[197] The Court began its entanglement analysis by noting that "[t]he objective [of its Establishment Clause doctrine] is to prevent, as far as possible, the intrusion of either [the church or the state] into the precincts of the other."[198] However, the Court then noted this jurisprudence did "not call for total separation between church and state [because] total separation is not possible in an absolute sense" and interaction between

190. *Lemon*, 403 U.S. at 612–13 (first citing *Allen*, 392 U.S. at 243, then quoting *Walz*, 397 U.S. at 674).
191. *Id.* at 615.
192. *See id.*
193. *Id.* at 606–07.
194. *Id.* at 607.
195. *Id.* at 613.
196. *Id.*
197. *See id.* at 613–14.
198. *Id.* at 614.

government and religion is inevitable.[199] It continued this slight slide from the clearer Jeffersonian separation principle of its previous school law Establishment Clause cases by noting that "[j]udicial caveats against entanglement must recognize that the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."[200]

In applying this third prong, the ultimate holding of the Court was that "both statutes foster an impermissible degree of entanglement."[201] The Court found the Pennsylvania statute violated this prong, and, therefore, the Establishment Clause, due to the excessive entanglement created by the state giving public financial aid "directly to the church-related school[,]" rather than to students and parents like in *Everson*.[202] Similarly, the Court found the Rhode Island statute was an excessive entanglement between government and religion in violation of the Establishment Clause based on the state payments going to teachers at "parochial schools [that] involve substantial religious activity and purpose."[203]

In concluding its analysis, the Court incorporated the same notions of Madisonian neutrality as an objective of the Establishment Clause that had been at the foundation of all the Court's religious activities in public schools cases. In doing so, the Court highlighted the Framers' intent in ratifying the First Amendment: "the Constitution's authors sought to protect religious worship from the pervasive power of government"[204] and "political division along religious lines."[205] The Court also reaffirmed its establishment approach as a way to respect both spheres of the church and state, as "[t]he history of many countries attests to the hazards of religion's intruding into the political arena or of political power intruding into the legitimate and free exercise of religious belief."[206] The Court stated that, unlike these countries, America made the choice "that government is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government."[207] Therefore, to preserve both religion and government, "lines must be drawn."[208] The line that was drawn by the Court in *Lemon* was

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199. *Id.* (citing Zorach v. Clauson, 343 U.S. 306, 312 (1952)).
200. *Id.*
201. *Id.* at 615.
202. *Id.* at 621 (citing Bd. of Educ. v. Allen, 392 U.S. 236, 243–44 (1968); Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947)).
203. *Id.* at 616.
204. *Id.* at 623.
205. *Id.* at 622 (citing Freund, *supra* note 10, at 1692).
206. *Id.* at 623.
207. *Id.* at 625.
208. *Id.*

one that aligned with the Court's trajectory of incorporating Madisonian neutrality in its cases involving religious activities within public schools.

G. Stone v. Graham

The Court decided its next Establishment Clause case involving religious activities in public schools in the 1980 per curiam opinion of *Stone v. Graham*.[209] In *Stone*, the Court correctly determined that the state action at issue was a violation of the Establishment Clause by applying the Madisonian neutrality-lensed secular purpose prong of the *Lemon* test.[210] In this application, the Court found that a Kentucky statute that "require[ed] the posting of the Ten Commandments in [every] public school" classroom "ha[d] no secular legislative purpose."[211] Instead, the Court determined that "[t]he pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature" because they are "undeniably a sacred text in the Jewish and Christian faiths," not materials integrated into the school curriculum for academic study.[212] After a finding of a violation of the secular purpose prong, the Court did not need to continue its analysis under the *Lemon* test.[213]

However, the Court did provide some application of the Madisonian neutrality primary effect test that originated in *Everson*, even though it did not formally declare an application of the second prong of the *Lemon* test.[214] Here, the Court determined that the effect of the required posting would be "to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments[,]" which "is not a permissible state objective under the Establishment Clause."[215] This effect fell far short of the Madisonian neutrality requirement that the government neither aid nor inhibit religion. Therefore, the Court found that the state law violated the secular purpose prong of *Lemon*, which mirrors the *Schempp* secular purpose test that originated from *Everson*'s Madisonian neutrality

209. 449 U.S. 39 (1980) (per curiam).
210. *Id.* at 40–41 (1980) (citing *Lemon*, 403 U.S. at 612–13).
211. *Id.* at 41.
212. *Id.* at 41–42.
213. *See id.* at 40–41 (stating that if a government action violates any one of the *Lemon* prongs, it is an Establishment Clause violation).
214. *See id.* at 42.
215. *Id.*

ideology.[216] It also rejected any type of "'minor encroachment'" defense to insulate the challenged state action from constitutional invalidation.[217] Consequently, the Kentucky statute was correctly deemed unconstitutional under the Establishment Clause.[218]

H. Wallace v. Jaffree

The Court's next religious activities in public schools case, the 1985 *Wallace v. Jaffree* decision, continued to apply Madisonian neutrality.[219] Here, the Court correctly determined that an Alabama prayer and meditation statute violated the Establishment Clause because it failed the secular purpose prong of *Lemon*.[220] A father of three elementary school students challenged the statute, "which authorize[d] a period of silence for 'meditation or voluntary prayer'" in the state's public schools.[221]

Before moving to a direct articulation and application of the secular purpose inquiry, the Court rooted its examination of this issue *qua* the Madisonian neutrality principle of *Everson*. Here, the Court cited to *Everson* to set a foundational premise that "in the crucible of litigation, the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all."[222] In support of this conclusion, the Court directly cited to Madison's *Memorial and Remonstrance* to find that this neutrality requirement of the Establishment Clause

> derives support not only from the interest in respecting the individual's freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful, and from recognition of the fact that the political interest in forestalling intolerance extends beyond intolerance among Christian sects—or even intolerance among "religions"—to encompass intolerance of the disbeliever and the uncertain.[223]

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216. *See id.* at 40–42.
217. *See id.* at 42 (quoting Abington Sch. Dist. v. Schempp, 374 U.S. 203, 225 (1963)).
218. *Id.* at 43.
219. Wallace v. Jaffree, 472 U.S. 38, 60, 82 (1985).
220. *See id.* at 41–42, 56.
221. *Id.* at 41–42 (quoting ALA. CODE § 16-1-20.1 (repealed 1998)).
222. *Id.* at 52–53; *see also id.* at 53 n.37 (citing Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947)).
223. *Id.* at 53–54; *see also id.* at 53 n.38 (citing JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments, 1785*, *in* THE COMPLETE MADISON 299, 299–301 (Saul K. Padover ed., 1953)).

After setting this foundation, the Court conducted its secular purpose analysis under *Lemon*.[224] Specifically, the Court continued to incorporate Madisonian conceptions of neutrality by stating that, in applying this test, "it is appropriate to ask 'whether government's actual purpose is to endorse or disapprove of religion.'"[225] Here, the Court found that the meditation and prayer "statute had *no* secular purpose" because the legislative record expressly indicated that the purpose of the legislation was "'to return voluntary prayer' to the public schools."[226] The Court stated that this express "legislative intent to return prayer to the public schools is, of course, quite different from merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the schoolday."[227] The Court concluded that the state's intent to "characterize prayer as a favored practice" was "an endorsement [that] is not consistent with the established principle that the government must pursue a course of complete neutrality toward religion."[228] With this conclusion, the Court directly cited to *Everson's* application of Madisonian neutrality.[229]

I. Edwards v. Aguillard

In its 1987 *Edwards v. Aguillard* decision, the Supreme Court continued to employ *Everson* Madisonian neutrality through the application of the first criteria of the *Lemon* test.[230] In this case, the Court found that a Louisiana creationism statute failed to pass constitutional muster under that prong.[231] The state act, which required that any public school teaching of evolution must be accompanied by creation science instruction, was challenged by parents of public schoolchildren, public school teachers, and religious leaders under the Establishment Clause.[232]

In this case, the Court found that, although states and school boards should be given considerable deference in their operation of the public

224. *See id.* at 55–56.
225. *Id.* at 56 (quoting Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring)).
226. *Id.* at 56–57.
227. *Id.* at 59.
228. *Id.* at 60.
229. *See id.* at 60 n.50.
230. *See* Edwards v. Aguillard, 482 U.S. 578, 586 (1987).
231. *Id.* at 594, 597.
232. *Id.* at 581.

schools, these entities must still act in accordance with the First Amendment.[233] Therefore, judicial deference to state action involving religion in the public schools will always take a backseat to a proper enforcement of the Establishment Clause.[234] This finding provided the foundation for the Court's discussion of the singular importance of Establishment Clause jurisprudence in school law, which requires heightened judicial monitoring of school activity for compliance with that clause.[235] The Court then explicitly linked this particular vigilance with the necessary neutrality that it must employ in properly interpreting this religion clause in the school law context: "Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family."[236] Because of the impressionability of schoolchildren, the role-modeling effect of teachers for students, and the coercion that inheres in compulsory attendance school requirements, the Court highlighted the need for acute awareness of how the Establishment Clause could be violated in this educative environment.[237] The Court stated that these guiding neutrality principles had required it "to invalidate statutes which advance religion in public elementary and secondary schools" on multiple occasions.[238]

In applying the first prong of the *Lemon* test in light of the special circumstances of the school environment,[239] the Court determined that the creationism statute had "no clear secular purpose."[240] Here, the Court articulated that it need only give deference to a state's articulated secular purpose when that statement is sincere.[241] The Court found that "the Act's stated purpose . . . to protect academic freedom" was an insincere sham purpose.[242] Instead, the Court determined that the purpose of the statute was a preeminently religious one that was designed to "discredit[] 'evolution by counterbalancing its teaching at every turn with the teaching of

233. *Id.* at 583 (citing Bd. of Educ. v. Pico, 457 U.S. 853, 864 (1982)).
234. *See id.*
235. *See id.* at 583–84 (citing *Pico*, 457 U.S. at 864).
236. *Id.* at 584.
237. *See id.*
238. *Id.*
239. *See id.* at 585 ("Therefore, in employing the three-pronged *Lemon* test, we must do so mindful of the particular concerns that arise in the context of public elementary and secondary schools.").
240. *Id.*
241. *Id.* at 586–87.
242. *Id.* at 586–87 (citing LA. STAT. ANN. § 17:286.2 (2020)).

creationism[.]'"[243] For the Court, the legislative intent to advance a "religious viewpoint that a supernatural being created humankind"[244] was clear in the statute's effect that would "restructure the science curriculum to conform with a particular religious viewpoint."[245] Such a purpose and effect did not align with the *Everson* conceptions of Madisonian neutrality that the Court had employed throughout its education law jurisprudence involving religious activities in public schools. Therefore, because it sought "to employ the symbolic and financial support of government to achieve a religious purpose" and to advance a particular religious belief, the Act violated the Establishment Clause.[246]

J. Lee v. Weisman

In its 1992 *Lee v. Weisman* case, the Court continued to employ Madisonian neutrality to evaluate the constitutionality of a Rhode Island policy that allowed public school administrators to invite clergy members to deliver invocation and benediction prayers at middle and high school graduation ceremonies.[247] Under this policy, a middle school principal invited a rabbi to give a nonsectarian invocation and benediction at the school's graduation.[248] The graduation took place at the school, and attendance of the graduation ceremony was not compulsory.[249] The invocation and benediction prayers were both addressed to and gave thanks to God.[250] The students stood during the prayers.[251] A father of a middle school student who attended the graduation ceremony brought a constitutional lawsuit on behalf of his daughter and himself, seeking a permanent injunction barring these prayers in future public school graduations as they violate the Establishment Clause.[252]

At the outset of its analysis, the Court stated that it need not reconsider "the general constitutional framework by which public schools' efforts to

243. *Id.* at 589 (quoting Aguillard v. Edwards, 765 F.2d 1251, 1257 (1985), *aff'd*, 482 U.S. 578 (1987)).
244. *Id.* at 591.
245. *Id.* at 593.
246. *Id.* at 593, 597.
247. *See* Lee v. Weisman, 505 U.S. 577, 580 (1992).
248. *Id.* at 581.
249. *Id.* at 583–84.
250. *See id.* at 581–82.
251. *Id.* at 583.
252. *Id.* at 584.

accommodate religion are measured" or the *Lemon* test, because its religion education precedents made clear that this school graduation rabbinical prayer was a violation of the Establishment Clause.[253] Turning to its analysis, the Court reaffirmed the necessary neutrality that is required to balance the Religion Clauses in any First Amendment constitutional inquiry.[254] In light of this recognized need for neutrality, the Court was firm in stating that the Constitution's minimum threshold for educational establishment cases is a "guarantee[] that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'"[255] The Court expressly cited *Everson* for this "beyond dispute" minimum,[256] signaling the Court's continued adherence to the Madisonian neutrality that had unified all of its previous precedents on religious activities in public schools.

In evaluating this baseline in the context of the state's involvement in the middle school graduation prayer, the Court found a violation of these core principles.[257] Specifically, the Court determined that "[t]he government involvement with religious activity in this case [was] pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a public school."[258] For the Court, the school graduation prayer demonstrated a disavowal of the state's "duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people."[259] Consequently, it was a violation of the Establishment Clause.[260]

Throughout the decision, the Court relied heavily on the constitutional coercion that inheres in school prayer, but this coercion analysis was rooted in Madisonian neutrality.[261] The Court noted the particular importance of neutrality in analyzing religious activities in K-12 schools.[262] The Court stressed that constitutional coercion concerns are magnified in a school environment where "subtle coercive pressure[s]" exist.[263] This requires

253. *Id.* at 586–87.
254. *See id.* at 587 ("The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause.").
255. *Id.* (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984)).
256. *See id.*
257. *See id.*
258. *Id.*
259. *Id.* at 592.
260. *Id.* at 599.
261. *See id.* at 590 (referencing Madison's conception of neutrality as "the principal author of the Bill of Rights").
262. *Id.* at 588.
263. *Id.* at 592.

the Court to make Establishment Clause determinations that are recognizant of the "heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools."[264]

This heightened concern is amplified when analyzing religious activities that impact the impressionable constituency of public schoolchildren. Here, the Court stressed that, in a school context, what might seem like a reasonable request to respect a believer's religious practice may appear to a nonbeliever to be the use of state machinery "to enforce a religious orthodoxy."[265] The Establishment Clause bars a state from placing K-12 schoolchildren in this position, rejecting any type of "choice theory" to participate in religious exercises that might be applicable to "mature adults."[266] The Court clearly established that such a theory was inapposite in the context of whether the Establishment Clause was violated by the state's involvement in religious exercises involving children, because children are different from adults and acutely susceptible to coercive and conformist pressures.[267] In recognizing this special school environment and its student inhabitants, the Court emphasized the importance of fidelity to Madisonian neutrality when public school prayer is directed toward this impressionable group of constitutional constituents.[268]

After this emphasis, the Court continued to maintain fidelity with its other religious activities in schools precedents and their adherence to the Madisonian conceptions of neutrality. The Court expressly cited to Madison's *Memorial and Remonstrance* to justify its neutrality approach, which is

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264. *Id.*

265. *Id.*

266. *See id.* at 593 (discussing the difference of maturity in evaluating choice theories in establishment analysis).

267. *See id.* at 593–94 ("Research in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention. . . . To recognize that the choice imposed by the State constitutes an unacceptable constraint only acknowledges that the government may no more use social pressure to enforce orthodoxy than it may use more direct means." (citations omitted) (citing Clay V. Britain, *Adolescent Choices and Parent-Peer Cross-Pressures*, 28 AM. SOCIO. REV. 385 (1963); Donna Rae Classen & B. Bradford Brown, *The Multidimensionality of Peer Pressure in Adolescence*, 14 J. YOUTH & ADOLESCENCE 451 (1985); B. Bradford Brown, Donna R. Clasen & Sue A. Eicher, *Perceptions of Peer Pressure, Peer Conformity Dispositions, and Self-Reported Behavior Among Adolescents*, 22 DEVELOPMENTAL PSYCH. 521 (1986))).

268. *See id.* at 590 (discussing how "the imprint of the State" on the graduation prayers "put school-age children who objected in an untenable position").

designed to protect the religious and conscientious liberties of all Americans, no matter their beliefs, as well as the spheres of both the state and the church:

> The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State. The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission. It must not be forgotten then, that while concern must be given to define the protection granted to an objector or a dissenting nonbeliever, these same Clauses exist to protect religion from government interference. James Madison, the principal author of the Bill of Rights, did not rest his opposition to a religious establishment on the sole ground of its effect on the minority.[269]

Building on these conceptions of neutrality, the Court also rejected the state's attempt to use the "civic or nonsectarian" nature of the prayer as a defense to the constitutional violation.[270] In continuing to adhere to the Madisonian neutrality of its religion education precedents, the Court found that this majoritarian approach was not a way to evade the contours of the Establishment Clause: "That the intrusion was in the course of promulgating religion that sought to be civic or nonsectarian rather than pertaining to one sect does not lessen the offense or isolation to the objectors. At best it narrows their number, at worst increases their sense of isolation and affront."[271]

In applying this neutrality-aimed coercion framework to the public school graduation ceremony prayers, the Court found that impermissible Establishment Clause coercion was present.[272] The Court noted that the state exerted undeniable public and peer pressure upon students to stand or be respectfully silent during the invocation and benediction through its supervision and control of the graduation ceremony.[273] For the Court, such "pressure, though subtle and indirect, can be as real as any overt compulsion."[274] The coercive impact of such pressure on a schoolchild dissenter, "who has a reasonable perception that she is being forced by the State to pray in a manner her conscience will not allow," inflicts a real, constitutional injury.[275]

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269. *Id.* at 589–90.
270. *Id.* at 594.
271. *Id*.
272. *Id.* at 593.
273. *Id.*
274. *Id.*
275. *Id.*

The Court stated that finding no Establishment Clause violation in this scenario would force these public school students into "the dilemma of participating [in the religious prayer exercise], with all that implies, or protesting."[276] The Court deemed this to be a constitutionally untenable choice based on the pressures on schoolchildren that are inherent in the school environment. It did so through a reaffirmance of the necessary balance that was at the core of Madison's objectives in drafting the First Amendment:

> [The Government] fails to acknowledge that what for many . . . classmates and their parents was a spiritual imperative was for Daniel and Deborah Weisman religious conformance compelled by the State. While in some societies the wishes of the majority might prevail, the Establishment Clause of the First Amendment is addressed to this contingency and rejects the balance urged upon us.[277]

The Court also incorporated these coercion principles into its rejection of the state's claim that the lack of compulsory attendance at the graduation ceremony served to insulate these school prayers from violating the Establishment Clause.[278] Dismissing such an argument as formalism at its extreme, the Court emphasized the universal social and cultural recognition of the significance of school graduation,[279] which made the graduation with its religious exercise "in a fair and real sense obligatory."[280]

The Court refused to uphold a Hobson's choice for American public schoolchildren, as absence from such ceremonies "would require forfeiture of those intangible benefits which have motivated the student through youth and all her high school years."[281] In line with Madison's original intent, the Court flatly rejected any type of required forfeitures on the part of a school-age objector to avoid compromising one's religious or conscientious liberties.[282] The Court emphasized that, just as it is a core First Amendment tenet "that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice," it is clear "[t]he Constitution forbids the State to exact

276. *Id.*
277. *Id.* at 595–96.
278. *See id.* at 595.
279. *Id.*
280. *Id.* at 586.
281. *Id.* at 595.
282. *See id.* at 596.

religious conformity from a student as the price of attending her own high school graduation."[283]

Finally, the Court rejected the "minor encroachment" argument asserted by the state as an attempt to insulate these graduation prayers from a finding of an Establishment Clause violation, as it had in *Engel*, *Schempp*, and *Stone*.[284] Here, the Court reiterated the central principles at the heart of its stare decisis to Madisonian neutrality for cases involving religious exercises in schools.[285] On one side of this balance, the Court found that it would be an insult to the religious leader who delivered the prayers and the religious adherents to frame these school prayers as *de minimis* religious activity.[286] The Court then turned to balance the constitutional considerations for the minority students who were coerced to participate in a religious exercise through the prayer, to which they did not adhere. Although the amount of time spent in coercive participation in the prayer was brief, the effect of this participation was a long-lasting and significant constitutional injury.[287]

The Court's conclusion reflected the imperative neutrality considerations for vigilant constitutional analysis of religious activities in the special environment of public schools.[288] The Court then expressly relied upon its past religion education precedents to determine that public schools do not have the constitutional power to "persuade or compel a student to participate in a religious exercise."[289] Because the Court determined that these public school graduation prayers did compel the special constitutional constituency of students to do so, it held that this was an Establishment Clause violation.[290] The necessary Madisonian neutrality that the Court continued to incorporate into its religious activities in public schools jurisprudence simply was not satisfied.

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283. *Id.*

284. *See id.* at 592, 594, 599; *see also* Engel v. Vitale, 370 U.S. 421, 436 (1962); Abington Sch. Dist. v. Schempp, 374 U.S. 203, 224–25 (1963); Stone v. Graham, 449 U.S. 39, 42 (1980).

285. *See Lee*, 505 U.S. at 594.

286. *Id.* at 594 ("To do so would be an affront to the rabbi who offered them and to all those for whom the prayers were an essential and profound recognition of divine authority.").

287. *Id.*

288. *See id.* at 598–99.

289. *Id.* at 599.

290. *Id.*

K. Board of Education v. Grumet

The Court followed Madisonian neutrality, as it had throughout its religious activities in public schools cases since *Everson*, in its next decision, *Board of Education v. Grumet*.[291] Unlike these previous cases, this analysis dealt with an all-encompassing state act that would result in daily concerns regarding religious activities within an entire public school district.[292] Although this decision is arguably difficult to categorize,[293] these potential concerns justify its placement into the category of the Court's cases dealing with religious activities in public schools. In this 1994 decision, the Court held that a special New York statute that carved out a distinct public school district to serve the village of Kiryas Joel, "a religious enclave of Satmar Hasidism," was a violation of the Establishment Clause.[294] The Court's holding was premised upon a finding that "this unusual Act is tantamount to an allocation of political power on a religious criterion and neither presupposes nor requires government impartiality toward religion."[295]

The Court began by discussing the vigorously religious village inhabitants who educated their children in private religious schools as part of their beliefs that they should "make few concessions to the modern world and go to great lengths to avoid assimilation into it."[296] However, these schools did not provide services to disabled children.[297] Although the nearby public school district originally provided these services to the village children at one of the private religious schools, this practice was discontinued based on the Court's previous decisions that certain service provisions to nonpublic religious schools were violations of the Establishment Clause.[298]

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291. 512 U.S. 687 (1994).
292. *See* Christopher L. Eisgruber, *The Constitutional Value of Assimilation*, 96 COLUM. L. REV. 87, 96 (1996) (discussing the unique circumstances of the *Grumet* case); Christopher L. Eisgruber, *Political Unity and the Powers of Government*, 41 UCLA L. REV. 1297, 1325 (1994) (stating the case presents a "unique problem").
293. *See* Richard W. Garnett, *Religion, Division, and the First Amendment*, 94 GEO. L.J. 1667, 1703 (2006) (discussing the difficulty in categorizing the *Grumet* case, especially when trying to "assimilate [it] to the current doctrinal structure").
294. *Grumet*, 512 U.S. at 690.
295. *Id.*
296. *Id.* at 691.
297. *Id.* at 692.
298. *See id.*

Consequently, Kiryas Joel children who required special education began to "attend public schools outside the village, which their families found highly unsatisfactory."[299] Thereafter, many of these students withdrew from these schools because of the children's emotional trauma "'in leaving their own community and being with people whose ways were so different.'"[300] These mass withdrawals left just one child from the village attending public schools by 1989; the other disabled children either went without services or received privately funded services.[301] This led to the New York legislature passing a law that created a separate special public school district for Kiryas Joel,[302] which had "plenary legal authority over the elementary and secondary education of all school-aged children in the village."[303]

In evaluating the constitutionality of this state action, the Court's majority applied a neutrality test in striking down the New York statute, because of the legislative failure "to exercise governmental authority in a religiously neutral way."[304] For the Court, the creation of the special school district was a clear legislative act of preference for religion:

> The anomalously case-specific nature of the legislature's exercise of state authority in creating this district for a religious community leaves the Court without any direct way to review such state action for the purpose of safeguarding a principle at the heart of the Establishment Clause, that government should not prefer one religion to another, or religion to irreligion.[305]

The Court found this preferential treatment allocated to a singular religious community, rather than "one of many communities eligible for equal treatment under a general law," was "legislative favoritism along religious lines" that ran contrary to "[t]he general principle that civil power must be exercised in a manner neutral to religion."[306] As a result, the Court concluded the statute was a violation of the Establishment Clause.[307]

However, the Court emphasized its Establishment Clause jurisprudence neutrality requirements still provided for "ample room under the Establishment Clause for benevolent neutrality which will permit religious exercise to

299. *Id.*
300. *Id.* (quoting Bd. of Educ. v. Wieder, 527 N.E.2d 767, 770 (N.Y. 1988)).
301. *Id.* at 693.
302. *See id.* (citing 1989 N.Y. Laws 3249)
303. *Id.* at 693–94 (citing N.Y. EDUC. LAW § 3202 (McKinney 2020)).
304. *Id.* at 703.
305. *Id.*
306. *Id.* at 703–04.
307. *Id.* at 705.

exist without sponsorship and without interference."[308] Such accommodation of religion, though, "is not a principle without limits," and this type of legislative preferential treatment falls outside of those limits as an "unconstitutional delegation of political power to a religious group."[309] As the Court emphasized, while citing to *Everson*, a central rationale of the Establishment Clause is the protection of both spheres of church and state from harmful action by the other.[310]

The *Grumet* plurality decision also focused on the "course of 'neutrality' toward religion," which is required by the Religion Clauses of the First Amendment.[311] This neutrality expressly echoed Madison's views by requiring that the state "favor[] neither one religion over others nor religious adherents collectively over nonadherents."[312] The plurality determined that the New York statute violated this neutrality requirement.[313] Specifically, the law "depart[ed] from this constitutional command by delegating the State's discretionary authority over public schools to a group defined by its character as a religious community, in a legal and historical context that gives no assurance that governmental power has been or will be exercised neutrally."[314] Here, the plurality reflected the majority's decision "that neutrality as among religions must be honored" under the requirements of the Establishment Clause.[315]

Consequently, the majority and the plurality decisions reaffirmed the Court's adherence to Madisonian neutrality in religious activities in public schools Establishment Clause jurisprudence. The majority stated that it was "clearly constrained to conclude that the statute . . . fails the test of neutrality."[316] Through the delegation of a power that "'ranks at the very apex of the function of a State,' . . . to an electorate defined by common

308. *Id.* (quoting Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 334 (1987) (internal quotations omitted)).
309. *Id.* at 706.
310. *See id.* at 697 ("Establishment Clause prevents the State from 'participat[ing] in the affairs of any religious organizations or groups and *vice versa*.'" (quoting Everson v. Bd. of Educ., 330 U.S. 1, 15–16 (1947))).
311. *Id.* at 696 (quoting Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 792–93 (1973)).
312. *Id.*
313. *Id.*
314. *Id.*
315. *Id.* at 707.
316. *See id*. at 709.

religious belief and practice," the state acted "in a manner that fails to foreclose religious favoritism."[317] Therefore, this clearly nonneutral act was a violation of the Establishment Clause.[318]

L. Santa Fe Independent School District v. Doe

In its next, and last to date, decision involving religious activities in public schools, the Court continued to apply a constitutional analysis that reflected Madisonian neutrality. In 2000, the Court examined another Establishment Clause and school prayer case in *Santa Fe Independent School District v. Doe*.[319] At issue in this case was a Texas school district's policy that "permit[ted] students to deliver a brief invocation and/or message to be delivered during the pre-game ceremonies of home varsity football games to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition."[320] Under the policy, the student who would deliver the invocation was selected by an annual, secret ballot, student body election from a list of student volunteers.[321] The selected student would decide the content of the message as long as it complied with the policy.[322] Under the policy, one additional provision was included in the case that the school district was judicially enjoined from enforcing the policy: "Any message and/or invocation delivered by a student must be nonsectarian and nonproselytizing.'"[323]

The Court determined this policy, which "allowed students to . . . deliver overtly Christian prayers over the public address system at home football games," was an Establishment Clause violation.[324] At the outset of its analysis, the Court emphasized that the Constitution did not prohibit all religious activities in the American public schools as the purpose of the First Amendment's Religion Clauses was the security of religious liberty.[325] So, it does not "prohibit[] any public school student from voluntarily praying at any time before, during, or after the schoolday."[326] The Court also

317. *Id.* at 709–10 (quoting Wisconsin v. Yoder, 406 U.S. 205, 213 (1972)).
318. *See id.* at 710 (finding the legislative act crossed "the line from permissible accommodation to impermissible establishment").
319. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 301 (2000).
320. *Id.* at 298 n.6.
321. *Id.*
322. *Id.*
323. *Id.*
324. *Id.* at 295, 301.
325. *Id.* at 313.
326. *Id.*

balanced the recognition of many communities' desires to include public prayer at significant occasions with the need for school religious activity to align with the First Amendment.[327] The Establishment Clause requires this balance because the religious liberty that the Clause was designed to protect "is abridged when the State affirmatively sponsors the particular religious practice of prayer."[328] These foundational statements reflected the Court's continued adherence to Madisonian neutrality in its jurisprudence involving religious exercises at public schools.

In turning to an analysis premised on this fidelity, the Court first determined that the student invocations did not constitute private speech endorsing religion, which would be protected under the Free Speech and Free Exercise clauses and would not give rise to any Establishment Clause violation.[329] Instead, the Court determined that the invocation was government speech; thus, the Establishment Clause applied.[330] There were several reasons for this classification of the student religious speech. First, the "invocations [were] authorized by a government policy and [took] place on government property at government-sponsored school-related events."[331] The delivery of the invocation by a speaker representing the student body, who was under school supervision, at a school-sponsored function on school property over the school's public address system in a pregame ceremony that typically included the football team, cheerleaders, and band members all dressed in school uniforms with the school's name emblazoned on the field, along with banners and flags with the school's name, would lead an objective high school student to "unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval,"[332] rather than the private speech of an individual student.

Additionally, the Court determined that these invocations were not protected private student speech because they were "subject to particular regulations that confine the content and topic of the student's message."[333]

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327. *See id.* at 307.
328. *Id.* at 313.
329. *See id.* at 302.
330. *See* Michael W. McConnell, *State Action and the Supreme Court's Emerging Consensus on the Line Between Establishment and Private Religious Expression*, 28 PEPP. L. REV. 681, 708 (2001) (discussing this analysis).
331. *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 302.
332. *Id.* at 307–08.
333. *Id.* at 303.

The Court rejected the school district's argument that the policy was "one of neutrality rather than endorsement."[334] Here, the Court determined that the policy with its express inclusion of an invocation "invite[d] and encourage[d] religious messages," because an invocation is defined as "a prayer of entreaty that is usu[ally] a call for the divine presence and is offered at the beginning of a meeting or service of worship" and because the history of the school's invocations had all been "focused religious message[s]."[335] The Court emphasized that the name of the policy, "Prayer at Football Games," also demonstrated that the specific purpose of the policy was not a secular purpose; it "was to preserve a popular 'state-sponsored religious practice'" in a content-limited way that took the invocation out of the realm of private speech.[336] Consequently, the Court determined that the "school policy . . . explicitly and implicitly encourage[d] public prayer."[337]

Finally, the Court determined that these invocations were government speech subject to the Establishment Clause because they were the product of a state selective access and majoritarian process via the school-authorized election.[338] This latter reasoning again reflected the balance required by Madisonian neutrality when the Court evaluates religious activities in public schools. The Court was troubled by the fact that "the majoritarian process implemented by the District guarantees, by definition, that minority candidates will never prevail and that their views will be effectively silenced."[339] In doing so, the state was placing students with minority religious and conscientious views "at the mercy of the majority."[340] Likening the case to *Lee*, in which the Court rejected a state's attempted majoritarian defense of "civic or nonsectarian" prayer to avoid an Establishment Clause violation, the Court found the school's majoritarian invocation approach did not cure its constitutional deficiencies: while the "majoritarian election might ensure that *most* of the students are represented, it does nothing to protect the minority; indeed, it likely serves to intensify their offense."[341]

Here, the balance of protection for religious minority schoolchildren, which had been prominent in much of the Court's Madisonian neutrality analyses in school law cases, was of particular concern in that the federal

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334. *Id.* at 305.
335. *Id.* at 306–07, 307 n.19 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1190 (Philip Babcock Grove ed., 1993)).
336. *Id.* at 309–10 (quoting Lee v. Weisman, 505 U.S. 577, 596 (1992)).
337. *Id.* at 310.
338. *Id.* at 303–04.
339. *Id.* at 304.
340. *Id.*
341. *Id.* at 305 (citing *Lee*, 505 U.S. at 594).

district court had to allow the Catholic and Mormon student and family litigants to proceed anonymously as a prophylactic measure to keep them "from intimidation or harassment."[342] Consequently, the Court's constitutional concerns of safeguarding the religious and conscientious liberties of students in its previous case law evaluating the constitutionality of religious practices in public schools were central in its determination that this was school-sponsored speech that was not insulated from Establishment Clause scrutiny. The Court made clear that such "[s]chool sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherants 'that they are outsiders, not full members of the political community, and an accompanying message to adherants that they are insiders, favored members of the political community.'"[343] As a result, the Court held that these invocations were not private speech and, therefore, were subject to Establishment Clause analysis.[344]

After this determination, the Court applied a coercion analysis that, like *Lee*, was reflective of the Madisonian conception of neutrality. First, the Court examined the divisiveness that resulted from the policy, which was in direct conflict with the Madisonian balancing that was meant to avoid religious strife.[345] The unconstitutional coercion here resulted from the state's decision to authorize majoritarian elections that produced a student who would deliver a religious message.[346]

Next, the Court dismissed the state's attempt to argue that, unlike the graduation ceremony of *Lee*, coercion was not present because attendance at an extracurricular football game was voluntary.[347] The Court rejected this argument, given that certain students, like the football team, cheerleaders, and band members, were required to attend, and given that other adolescent students would feel the pressure to attend based on their susceptibility "'to pressure from their peers towards conformity.'"[348] The Court also echoed its disavowal in *Lee* of a forfeiture proposition in the context of Establishment Clause educational law, finding that

342. *Id.* at 294 & n.1.
343. *Id.* at 309–10 (quoting Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)).
344. *Id.* at 310.
345. *See id.* at 311.
346. *See id.*
347. *Id.* at 311–12.
348. *Id.* at 311–12 (quoting Lee v. Weisman, 505 U.S. 577, 593 (1992)).

> The Constitution . . . demands that the school may not force this difficult choice [between attending these games and avoiding personally offensive religious rituals] upon these students for "[i]t is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice."[349]

The Court then concluded "that the delivery of a pregame prayer has the improper effect of coercing those present to participate in an act of religious worship."[350] It was clear to the Court that orthodoxy cannot be constitutionally enforced by the state through either direct means or through social pressure.[351] Here, the special circumstances of the school context meant that this state action was the enforcement of religious orthodoxy through the pressured forfeiture of the First Amendment rights of nonadherent schoolchildren, just like the schoolchildren in *Lee*.[352] This type of tit-for-tat is unconstitutional coercion, as the Constitution will not allow the state "'to exact religious conformity from a student as the price' of joining her classmates at a varsity football game."[353] Therefore, the Court found that this policy and the coercion that resulted from it violated the Establishment Clause because "the religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer."[354] Such coercion, like the coercion in *Lee*, was a clear violation of the required Madisonian neutrality in the school law cases that the Court had applied since its first school law case of *Everson*.

M. Stare Decisis Fidelity to Madisonian Neutrality in the Court's Religious Activities in Public Schools Establishment Clause Cases

Throughout all of these religious practices in public schools cases, a unifying thread is fidelity to the key Framer's conception of neutrality that prohibits the state from either aiding or inhibiting religion. It is this fidelity that brings clarification to what has been deemed a thicket in education law Establishment Clause jurisprudence. This Madisonian neutrality, as applied in "*Everson*'s paradigm cases to derive a prescriptive guideline," is used as "a label for the required relationship between the government and religion as a state of equipoise between government as ally and government as

349. *Id.* at 312 (quoting *Lee*, 505 U.S. at 596).
350. *Id*.
351. *See id.*
352. *Id.* (quoting *Lee*, 505 U.S. at 592, 596).
353. *Id.* (quoting *Lee*, 505 U.S. at 596).
354. *Id.* at 313.

adversary."[355] This articulation of neutrality is "tantamount to constitutionality" for an Establishment Clause analysis.[356] In each of the Court's ten religious activities in public schools cases, the Court has employed this *Everson* neutrality, with its Madisonian roots, to determine correctly that the necessary state of equipoise had not been achieved by the challenged state action.[357]

By doing so, the Court has properly interpreted the Establishment Clause in accordance with the original intent of the original drafter and "principal architect of the Bill of Rights,"[358] Madison himself.[359] It is a matter of historical record that Madison had a "tremendous influence" on the framing of the Establishment Clause,[360] and, as the Court has recognized, his views on religious liberty were incorporated into the Constitution.[361] Consequently, Madison should be considered the preeminent historical reference point for interpreting the meaning of this First Amendment clause, as his conception of conscientious liberty is an integral part of proper constitutional analysis in this area.[362] Therefore, it is singularly appropriate for the Supreme Court to premise its religious activities in public schools jurisprudence upon Madisonian neutrality.

This constitutional conception of Madisonian neutrality can be traced to his 1785 *Memorial and Remonstrance*,[363] which has been cited repeatedly by the Court in its education law jurisprudence and which spurred "a provision prohibiting the establishment of religion [to become] a part of Virginia

355. Mitchell v. Helms, 530 U.S. 793, 882–83 (2000) (Souter, J., dissenting).
356. *Id.* at 883.
357. *See supra* Sections III.A–III.L.
358. *See* Preston C. Green, III, Julie F Mead & Joseph O. Oluwole, Parents Involved*, School Assignment Plans, and the Equal Protection Clause: The Case for Special Constitutional Rules*, 76 BROOK. L. REV. 503, 540 (2011).
359. *See* Edwards v. Aguillard, 482 U.S. 578, 606 (1987) (Powell, J., concurring) (discussing Madison's incorporation of "the guarantees of free exercise and against the establishment of religion . . . into the Federal Bill of Rights").
360. *See* Daniel A. Spiro, *The Creation of a Free Marketplace of Religious Ideas: Revisiting the Establishment Clause After the Alabama Secular Humanism Decision*, 39 ALA. L. REV. 1, 11 (1987) (discussing this influence).
361. *See* Abington Sch. Dist. v. Schempp, 374 U.S. 203, 214 (1963) (noting this constitutional incorporation of Madisonian views).
362. *See* Timothy J. Tracey, Christian Legal Society v. Martinez*: In Hindsight*, 34 U. HAW. L. REV. 71, 82 (2012) (citing Madison as the key authority for Establishment Clause interpretation); E. Gregory Wallace, *When Government Speaks Religiously*, 21 FLA. ST. U. L. REV. 1183, 1246 (1994) (explaining that Madison has "had a unique influence on our understanding of what the Establishment Clause means").
363. MADISON, *supra* note 123, at 187, 190.

law."[364] In it, Madison emphasized the core principle of neutrality as a necessary liberty in a new America:[365]

> The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. . . . It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him.[366]

Madison's articulation in the *Memorial and Remonstrance* demonstrated his sensitivity to how official religious practices would be violative of some individuals' religious and conscientious beliefs.[367] Madison pressed neutrality as the way to avoid the divisions and pressures on minorities created by the imposition of state religion and to ensure the liberties of conscience of all.[368]

Here, Madison was not proposing antireligious principles.[369] Instead, his argument "insisted on state neutrality between religions and between religion and non-religion."[370] So, he advocated neutrality not only as a way to avoid the harms of divisiveness and to assure liberty of conscience,[371]

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364. *Edwards*, 482 U.S. at 605–06 (discussing the impact of the *Memorial and Remonstrance* on the Virginia law).

365. *See* Richard Albert, *The Separation of Higher Powers*, 65 SMU L. REV. 3, 42–43 (2012) (discussing Madison's repeated connections between liberty and federalism).

366. MADISON, *supra* note 123, at 184.

367. *See* Wallace, *supra* note 362, at 1254 (discussing this understanding of Madison).

368. This dovetails with Madison's greater intent in drafting the Constitution as a way to "design[] a system to neutralize division." Jonathan Turley, *A Crisis of Faith: Tobacco and Madisonian Democracy*, 37 HARV. J. ON LEGIS. 433, 452 (2000).

369. *See* Greg Sergienko, *Social Contract Neutrality and the Religion Clauses of the Federal Constitution*, 57 OHIO ST. L.J. 1263, 1291 (1996) (describing Madison as a "religious individual[]"); Steven D. Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955, 967–68 (1989) (explaining how "Madison defended the 'unalienable right' of religious freedom with an explicitly religious premise" in his *Memorial and Remonstrance*).

370. Mark A. Graber, *Foreword: Our Paradoxical Religion Clauses*, 69 MD. L. REV. 8, 10 (2009).

371. *See* Patricia E. Curry, *James Madison and the Burger Court: Converging Views of Church-State Separation*, 56 IND. L.J. 615, 619 (1981) (discussing Madison's view in the *Memorial and Remonstrance* that religious establishment should not be permitted because it "promote[s] faction" and "is fundamentally divisive" (citing MADISON, *supra* note 123, at 187–90)); René Reyes, *Justice Souter's Religion Clause Jurisprudence: Judgments of Conscience*, 43 CONN. L. REV. 303, 311 (2010) (discussing Madison's conception of liberty of consciences as requiring freedom from coercive religious practices); Francisco Valdes, *Piercing Webs of Power: Identity, Resistance, and Hope in LatCrit Theory and Praxis*, 33 U.C. DAVIS L. REV. 897, 913 n.49 (2000) ("The divisive and vexatious power of human faith in organized religions prompted James Madison to cite this phenomenon as one of the reasons for a system of government that separates and disperses political

but also to preserve inviolability between the spheres of government and religion.[372] In the *Memorial and Remonstrance*, Madison specifically called for recognition of these aims:

> Above all are they to be considered as retaining an "*equal* title to the free exercise of Religion according to the dictates of Conscience." Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us. If this freedom be abused, it is an offence against God, not against man: To God, therefore, not to man, must an account of it be rendered. As the Bill violates equality by subjecting some to peculiar burdens, so it violates the same principle, by granting to others peculiar exemptions.[373]

This advocacy for the preservation of distinct governmental and religious spheres did not make its only appearance in Madison's *Memorial and Remonstrance*. It was also evident in Madison's 1788 statements at the Virginia convention ratifying the Constitution, wherein he stated that "'[t]here is not a shadow of right in the [federal] government to intermeddle with religion. Its least interference would be a most flagrant usurpation.'"[374]

This conception of neutrality, with its explicit ties to safeguarding necessary religious and conscientious liberties in a democratic republic to protect minorities and the spheres of church and state, was also in Madison's original proposals for the amendments to the Constitution at the First Congress, which he reported to the House of Representatives on June 8, 1789.[375] Here, Madison called on his fellow Representatives to amend the

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power: 'different opinions concerning religion' cause humans to 'vex and oppress each other.'" (quoting THE FEDERALIST NO. 10, at 18 (James Madison) (Roy P. Fairfield ed., 1966))).

372. *See* M. Elisabeth Bergeron, Note, *"New Age" or New Testament?: Toward A More Faithful Interpretation of "Religion"*, 65 ST. JOHN'S L. REV. 365, 369 (1991) ("James Madison, however, understood that religious and secular interests alike were advanced by diffusing and decentralizing power; both religion and government could reach their independent goals only if each were allowed to flourish in its own sphere." (citing THE FEDERALIST NOS. 10, 51 (James Madison))).

373. MADISON, *supra* note 123, at 300 (quoting THE VIRGINIA DECLARATION OF RIGHTS art. 16 (1776)).

374. Spiro, *supra* note 360, at 12 (quoting 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 330 (Jonathan Elliot ed., 2d ed. 1891)).

375. *See* 1 ANNALS OF CONG. 440–41, 451 (1789) (Joseph Gales ed., 1834) (providing Madison's introduction to the proposed amendments to the Constitution).

Constitution as a way to demonstrate their "sincere[] devot[ion] to liberty and a Republican Government."[376]

In a compelling and convincing manner, Madison set the foundation of these proposed constitutional amendments on the importance of "prudent constitutional reasoning to the practical governance of a large republic."[377] These original proposed amendments included a provision that "[t]he civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed."[378] After introducing all of his proposed amendments, Madison demarcated the primacy of this proposed amendment, labeling "[t]he freedom of the press and rights of conscience" as the "choicest privileges of the people."[379]

Like the *Memorial and Remonstrance*, Madison's introduction of the proposals for the Bill of Rights in the First Congress stated that a motivating force in these amendments was to protect the minority:

> in a Government modified like this of the United States, the great danger lies rather in the abuse of the community than in the legislative body. The prescriptions in favor of liberty ought to be levelled against that quarter where the greatest danger lies, namely, that which possesses the highest prerogative of power. But this is not found in either the executive or legislative departments of Government, but in the body of the people, operating by the majority against the minority.[380]

Madison viewed these constitutional amendments as "one means to control the majority from those acts to which they might be otherwise inclined."[381] Consequently, this proposed amendment aligned with his essays on government and the Federalist Papers.[382] All of these writings demonstrated "that Madison saw religion as a crucial oppositional force in politics and a vital check on the tyranny of the majority, but only when its role is properly structured to prevent it from serving instead as an instrument of popular tyranny."[383]

Madison also emphasized the importance of the judiciary in proposing these amendments to the Constitution, stating that if the Bill of Rights was

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376. *See id.* at 449.

377. J. Richard Broughton, *What Is It Good for? War Power, Judicial Review, and Constitutional Deliberation*, 54 OKLA. L. REV. 685, 724 (2001).

378. 1 ANNALS OF CONG., *supra* note 375, at 451.

379. *Id.* at 453.

380. *Id.* at 454–55.

381. *Id.* at 455.

382. *See* Vincent Blasi, *School Vouchers and Religious Liberty: Seven Questions from Madison's* Memorial and Remonstrance, 87 CORNELL L. REV. 783, 799 (2002) (discussing the interconnectedness in Madison's writings).

383. *Id.*

"incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights."[384] Madison stressed the important role that the judicial branch would play as a matter of checks and balances; for him, the judiciary would "be an impenetrable bulwark against every assumption of power in the legislative or executive."[385] The Bill of Rights would invigorate the judiciary to be "naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights."[386] So, for Madison, vigilant judicial review was vital for the preservation of the constitutional rights if these proposed amendments were adopted.

After these proposals were sent to a Select House committee, Madison's original proposal was modified to read that "no religion shall be established by law, nor shall the equal rights of conscience be infringed."[387] On August 15, 1789, Madison offered his understanding of the new proposal to mean "that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience."[388] Madison's commentary on a proposal that retained his original language on "the equal rights of conscience" again reinforced his commitment to neutrality as a way to protect minorities, religious liberties, and the sanctity of governmental and religious spheres.

On August 20, 1789, the House adopted language by Representative Fisher Ames for the amendment before sending it to the Senate.[389] This amendment retained Madison's neutrality language, and it read, "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience."[390] Ultimately, after many iterations of the proposed amendment in the Senate, as well as a House rejection of the Senate's version, a joint conference committee was held that produced the final text of the Establishment Clause.[391] While Madison's express language of the equal rights of conscience did not survive this final amendment, the

384. 1 ANNALS OF CONG., *supra* note 375, at 457.
385. *Id.*
386. *Id.*
387. *Id.* at 757.
388. *Id.* at 758.
389. *See* Lee v. Weisman, 505 U.S. 577, 613 (1992) (Souter, J., concurring) (discussing the modifications to the proposed amendment).
390. 1 ANNALS OF CONG., *supra* note 375, at 796.
391. *Lee*, 505 U.S. at 613–14 (Souter, J., concurring) (outlining the Establishment Clause's legislative history).

neutrality of Madison's initial proposals and his vision of the proper rights and liberties of the American people remained at the heart of the balance between both Religion Clauses.[392]

Based on this history of Madison and his understanding of the intent of the establishment provision of the Bill of Rights, the Supreme Court has applied a proper constitutional approach in embracing Madisonian neutrality in this line of cases. This fidelity to Madisonian neutrality originated in *Everson*, where "the Court stated in clear and unequivocal terms that the Establishment Clause required an absolute neutrality on the part of government, both as between particular religions and as between religion and nonreligion."[393] In doing so, *Everson* reaffirmed Madisonian neutrality as the guiding force for the predominant goals of the Establishment Clause: avoidance of divisiveness of the people and protection of the minority from majoritarian compulsion when religion and government intertwined;[394] protection of all people's conscientious and religious liberties;[395] and maintenance of the protections for each sphere of church and state from degradation by the other to preserve their distinct authority, value, and meaning.[396] Each of these aims was designed to be safeguarded by a

392. *See* Ronald J. Krotoszynski, Jr., *Agora, Dignity, and Discrimination: On the Constitutional Shortcomings of "Conscience" Laws That Promote Inequality in the Public Marketplace*, 20 LEWIS & CLARK L. REV. 1221, 1255 (2017) (discussing how Madison's belief in the importance of religious conscience is evident in the Free Exercise and Establishment Clauses).

393. Frederick Mark Gedicks, *The Improbability of Religion Clause Theory*, 27 SETON HALL L. REV. 1233, 1240 (1997).

394. *See Toward a Constitutional Definition of Religion*, *supra* note 30, at 1058 (including "avoiding the political strife that might result if religion and politics were intertwined" as a predominant goal of the Establishment Clause); Blasi, *supra* note 382, at 788–89 (discussing how Madison's "deepest concern was with the tyranny of the majority" and how that concern was central in his views on the "subject of church and state"); Corbin, *supra* note 76, at 647 (discussing Madison's views of "religious assessments as a first step toward the persecution and subordination of religious minorities").

395. *See Toward a Constitutional Definition of Religion*, *supra* note 30, at 1058 (including "protecting religious freedom of choice" as a predominant goal of the Establishment Clause); James D. Nelson, *Corporate Disestablishment*, 105 VA. L. REV. 595, 628 (2019) (discussing the Court's freedom of conscience Establishment Clause analysis in school law cases).

396. *See Toward a Constitutional Definition of Religion*, *supra* note 30, at 1058 (including "insuring the integrity of both church and state by immunizing each from contamination by the other" as a predominant goal of the Establishment Clause); Corbin, *supra* note 76, at 648 ("Madison thought government-supported religion would corrupt and degrade its beneficiaries . . . ."); Carl H. Esbeck, *Religion and the First Amendment: Some Causes of the Recent Confusion*, 42 WM. & MARY L. REV. 883, 906 (2001) (identifying the reduction of "civic/religious tensions and minimiz[ing] governmental intrusions into religious matters" as "objectives that help maintain the separate spheres of church and state

vigilant judiciary. By employing Madisonian neutrality as the basis for its analysis in the religious activities in public schools cases, the Court has properly realized these three objectives of the Establishment Clause to create a constitutionally correct thicket that reflects the guiding intent of the First Amendment.

IV. A RECLAMATION OF THICKET THEORY IN EDUCATIONAL ESTABLISHMENT CLAUSE JURISPRUDENCE INVOLVING RELIGIOUS ACTIVITIES IN PUBLIC SCHOOLS

The pejoration of thicket theory in educational Establishment Clause jurisprudence needs reclamation. The identification of the unified fidelity to Madisonian neutrality at the core of the Court's cases involving religious activities in public schools allows for this reclamation as a constitutionally correct and net positive theory. This new thicket theory reveals that by maintaining adherence to Madisonian neutrality, the Court has decided these cases in a way that has produced the primary results the Framers had intended the Establishment Clause would achieve.

Specifically, this theory reveals a thicket of beneficial safeguarding for all American schoolchildren, which aligns with the Court's precedent on the special constitutional considerations for this group and for the setting of American public schools. This result also aligns with Madison's intent that the inherent neutrality in the Establishment Clause would serve to tamper division and would protect minorities from religious compulsion by majority forces. It is a thicket that safeguards the freedom of conscience of American schoolchildren, no matter their religious beliefs, while balancing respect for their autonomy to engage in constitutionally protected religious practices. This result aligns with Madison's intent that the neutrality of the Establishment Clause would extend to protect the religious and conscientious liberties of the people. Finally, this thicket has preserved the teaching of actual democratic principles within American public schools through the Court's vigilant and constitutionally correct application of the Establishment Clause. This result aligns with Madison's intent that the Establishment

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so sought after by the Establishment Clause"); Alice Ristroph & Melissa Murray, *Disestablishing the Family*, 119 YALE L.J. 1236, 1239 (2010) ("[O]ne of the goals of the Establishment Clause is to preserve distinctive spheres of meaning, value, and authority for [religion and government].").

Clause maintain protections for each sphere of church and state from degradation by the other and that the judiciary act as guardian of these protections. Ultimately, this new thicket theory demonstrates that this case law is constitutionally aligned, recognizant of the special environment of American public schools, properly protective of the religious and conscientious liberties of the impressionable constitutional constituency of children as a political minority, and pedagogically demonstrative of the civics education that should be imparted to this group.

A. This Thicket Protects the Political Minority of American Public Schoolchildren from Divisive Forces of State-Established Religion

The Court has stated that its religious activities in public schools Establishment Clause jurisprudence implements Madisonian neutrality because of the special environment of the public school and the special constitutional constituency of American public schoolchildren. In *Edwards*, the Court noted the required invalidation of multiple types of religious activities in public schools based on this special analysis:

> The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary. . . . The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure. . . . "In no activity of the State is it more vital to keep out divisive forces than in its schools[.]"[397]

Throughout these religion education precedents, the Court has worked to protect K-12 students from these divisive forces.

Here, the Court has appropriately decided these cases in a way that has demonstrated that "[t]he First Amendment is not a majority rule"[398] and that has aligned with Madison's view of the original intent of the

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397. Edwards v. Aguillard, 482 U.S. 578, 583–84 (1987) (citations omitted) (quoting Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 231 (1948)).

398. Town of Greece v. Galloway, 572 U.S. 565, 582 (2014); *see also* Lee v. Weisman, 505 U.S. 577, 596 (1992) ("While in some societies the wishes of the majority might prevail, the Establishment Clause of the First Amendment is addressed to this contingency and rejects the balance urged upon us.").

Establishment Clause.[399] In *Santa Fe Independent School District*, the Court determined that the state's majoritarian voting mechanism to elect a student speaker to deliver a prayer at school football games unconstitutionally "undermines the essential protection of minority viewpoints[,] . . . encourages divisiveness along religious lines[,] and threatens the imposition of coercion upon those students not desiring to participate in a religious exercise."[400] In *Engel*, the Court also emphasized the inherent unconstitutionality of school prayer practices because of their "indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion."[401] By implementing Madisonian neutrality in this case law, the only thicket that has been created by the Court's jurisprudence is one that appropriately protects the school environment and the schoolchildren therein from the divisive, harmful forces against minority groups that Madison sought to have the Bill of Rights eliminate.[402]

To protect public schools from injurious division along religious lines, the Court has acted in accordance with the Framers' intent by delineating these spaces as special ones for Establishment Clause analysis.[403] In *Lee*, the Court acknowledged that the delicate, fact-sensitive nature of its Establishment Clause jurisprudence requires it to "distinguish the public school context."[404] This distinct analysis entails "special sensitivity [to] the Establishment Clause problems that result when religious observances are moved into the public schools."[405] This heightened judicial scrutiny has resulted in the Court's indubitable antecedent that "the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or

399. *See* J. Woodford Howard, Jr., *The Robe and the Cloth: The Supreme Court and Religion in the United States*, 7 J.L. & POL. 481, 489 (1991) ("Madison, [by] accenting civil peace and minority rights, construe[d] the establishment clause broadly in order to segregate private religion and public authority into autonomous spheres.").

400. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 317 (2000).

401. Engel v. Vitale, 370 U.S. 421, 431 (1962).

402. *See* Kurt T. Lash, *The Status of Constitutional Religious Liberty at the End of the Millennium*, 32 LOY. L.A. L. REV. 1, 2, 4 (1998) (discussing Madison's view of religious establishment "as a divisive and potentially dangerous force in public affairs").

403. *See* Steven D. Smith, *Constitutional Divide: The Transformative Significance of the School Prayer Decisions*, 38 PEPP. L. REV. 945, 993 (2011) (discussing how the Court's Establishment Clause jurisprudence has reflected the central role that public schools play in American democracy).

404. Lee v. Weisman, 505 U.S. 577, 597 (1992).

405. Bd. of Educ. v. Mergens *ex rel.* Mergens, 496 U.S. 226, 287 (1990) (Stevens, J., dissenting) (citing Edwards v. Aguillard, 482 U.S. 578, 583–84 (1987)).

prohibitions of any religious sect or dogma,"[406] which appropriately recognizes the pedagogical environment of K-12 schools. Considering Madison's constitutional concerns about curbing majoritarian tyranny, the *Epperson* Court stated that another one of these fundamental freedom antecedents is that "the First Amendment 'does not tolerate laws that cast a pall of orthodoxy over the classroom.'"[407] Consequently, the Court has frequently affirmed the special importance of protecting religious liberty in public schools.[408] This repeated recognition of the special school setting has resulted in the creation of a protective "schools are different" ideology for Establishment Clause analysis.[409]

Within this ideology, the Court's awareness of the special nature of the school environment dovetails with its constitutionally cautious treatment of schoolchildren, who are a paradigmatic American political minority.[410] In implementing the Madisonian neutrality balance that was at the core of *Everson*, this Establishment Clause school law reflects the Court's intent to provide specific safeguards to the political minority group of schoolchildren in general and to the nonreligious or religious minority schoolchildren in the special schoolhouse environment[411] —a minority within a minority group of the American populace.[412] This treatment is merited by the

406. Epperson v. Arkansas, 393 U.S. 97, 106 (1968).

407. *Id.* at 105 (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

408. Strossen, *supra* note 46, at 608 (discussing the Court's repeated acknowledgment of this important principle).

409. Ironically, this Establishment Clause "schools are different" ideology is markedly different from the Court's rights-based school law jurisprudence "schools are different" ideology that has been employed in a harmful way to strip away students' First Amendment speech rights and Fourth Amendment privacy rights. *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 656 (1995) ("Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere . . . ."); Erwin Chemerinsky, *The Deconstitutionalization of Education*, 36 LOY. U. CHI. L.J. 111, 112, 134–35 (2004) (arguing that the Court has almost completely decimated students' First and Fourth Amendment rights); Amanda Harmon Cooley, *An Efficacy Examination and Constitutional Critique of School Shaming*, 79 OHIO ST. L.J. 319, 342, 366 (2018) (discussing the Court's increasing circumscription of students' constitutional rights under the First and Fourth Amendment through the application of a "schools are different" ideology).

410. *See* Laura J. Rees, Comment, *"No (Christian) Child Left Behind": The Supreme Court's Jurisprudence in Establishment Clause Cases Involving Schoolchildren*, 42 HOUS. L. REV. 197, 235 n.263 (2005) (highlighting schoolchildren as a minority group that merits special protection in Establishment Clause analysis).

411. *See* Esbeck, *supra* note 86, at 599 n.457 ("[E]nforcement of the Establishment Clause has the consequence of protecting . . . the right of conscience to be free of government-imposed religion even for those who subscribe to no religion.").

412. *See* Ruti G. Teitel, *Postmodernist Architectures in the Law of Religion*, 1993 BYU L. REV. 97, 109 n.44 (discussing a school law argument that characterizes non-praying K-12 students as "a political minority").

"heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools."[413]

Any religious doctrine inculcation within schools has a magnified impact due to the impressionability of K-12 students.[414] Given their stage of cognitive development,[415] schoolchildren, unlike mature adults,[416] are "'readily susceptible to religious indoctrination or peer pressure.'"[417] Because of this susceptibility to peer pressure and schoolchildren's desire to emulate school officials as role models,[418] the state has a tremendous amount of authority to wield coercive majoritarian power over public school students.[419] The Court has specifically stated that "The symbolism of a union between church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice."[420] Students' vulnerability becomes acute when they are subject to "inculcation of orthodoxy in the guise of pedagogy."[421] Therefore, the Court has used this jurisprudence to protect all schoolchildren from the divisive forces that can result from Establishment Clause violations within the school environment in a way that properly reflects the Framers' intent.

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413. Lee v. Weisman, 505 U.S. 577, 592 (1992).

414. Lemon v. Kurtzman, 403 U.S. 602, 616 (1971).

415. *See* Marty Beyer, *Developmentally-Sound Practice in Family and Juvenile Court*, 6 NEV. L.J. 1215, 1218 (2006) ("Young children's cognitive development is intricately connected with their social and emotional functioning." (quoting Alicia F. Lieberman & Patricia Van Horn*, Assessment and Treatment of Young Children Exposed to Traumatic Events*, *in* YOUNG CHILDREN AND TRAUMA: INTERVENTION AND TREATMENT 111, 115 (Joy Osofsky ed., 2004))); Katherine Hunt Federle, *Children, Curfews, and the Constitution*, 73 WASH. U. L.Q. 1315, 1323 n.45 (1995) (providing a comprehensive citation to sources discussing the cognitive development of children).

416. *See* Scott W. Gaylord, *When the Exception Becomes the Rule:* Marsh *and Sectarian Legislative Prayer Post*-Summum, 79 U. CIN. L. REV. 1017, 1032 (2011) (discussing how adults are "assumed capable of warding off the dual threats of religious indoctrination and peer pressure").

417. Town of Greece v. Galloway, 572 U.S. 565, 590 (2014) (quoting Marsh v. Chambers, 463 U.S. 783, 792 (1983)).

418. Edwards v. Aguillard, 482 U.S. 578, 584 (1987).

419. *See* Jonathan C. Drimmer, *Hear No Evil, Speak No Evil: The Duty of Public Schools to Limit Student-Proposed Graduation Prayers*, 74 NEB. L. REV. 411, 417 (1995) ("[S]chool prayer is the state's implicit promotion of majoritarian beliefs . . . .").

420. Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373, 390 (1985), *overruled in part on other grounds by* Agostini v. Felton, 521 U.S. 203, 235 (1997).

421. Cole v. Me. Sch. Admin. Dist. No. 1, 350 F. Supp. 2d 143, 150 (D. Me. 2004).

In addition to protection of the political minority group of all schoolchildren, the Court has used this area of jurisprudence to shelter the minority of the minority group—nonadherent K-12 students.[422] The Court emphasized in *Lee* that schoolchildren who do not ascribe to the belief of a state school religious exercise require special protection: "What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy."[423] Resistance essentially becomes futile to the schoolchildren in this highly controlled, highly coercive environment, in which minority students are "left with no alternative but to submit."[424]

Consequently, the Court has been appropriately concerned with school religious activities as local and state school officials "inevitably mold young minds with the instruction and values inculcation of the public schools."[425] The state control that inheres in public school environments elevates the potential for harmful division and harm to minorities, and minorities of minorities,[426] in direct conflict with the intent of the Establishment Clause.[427] And it is this phenomenon that "suffices to make [any such school] religious exercise a First Amendment violation."[428] Therefore, the Court has taken corrective steps to invalidate any religious exercise in public schools that tips the balance of Madisonian neutrality in an effort to protect a vulnerable group, which aligns with the Framers' intent to have the Establishment Clause shield minorities from state religious compulsion.

To avoid harmful and unconstitutional establishment of religion in the public schools, the Court has employed Madisonian neutrality to safeguard K-12 students. In doing so, the Court has stressed the need to avoid that "crucial symbolic link between government and religion, thereby enlisting—

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422. *See* Hillel Y. Levin, Allan J. Jacobs & Kavita Shah Arora, *To Accommodate or Not to Accommodate: (When) Should the State Regulate Religion to Protect the Rights of Children and Third Parties?*, 73 WASH. & LEE L. REV. 915, 963 (2016) (noting that religious minority groups and children "are already underrepresented and under-protected in the political arena").

423. Lee v. Weisman, 505 U.S. 577, 592 (1992).

424. *Id.* at 597.

425. Amanda Harmon Cooley, *Inculcating Suppression*, 107 GEO. L.J. 365, 394 (2019).

426. *See* Hillel Y. Levin, *Rethinking Religious Minorities' Political Power*, 48 U.C. DAVIS L. REV. 1617, 1621–24 (2015) (discussing how American institutions often do not adequately protect minority groups).

427. *See* Drimmer, *supra* note 419, at 415, 417–18 ("Thus, the pressure inherent in school prayer both inflicts a state-created 'status harm' by alienating nonadherents, and induces religious conformity in children, who are particularly susceptible to such pressures.").

428. *Lee*, 505 U.S. at 597.

at least in the eyes of impressionable youngsters—the powers of government to the support of the religious denomination operating the school."[429] By recognizing the tipping of the Madisonian neutrality scale towards aiding religion and towards Establishment Clause violations in the cases involving religious activities in public schools, the Court has properly acknowledged the special circumstances of constitutional analysis within the schoolhouse environment as applied to the K-12 students within it. Through this approach, the Court has created an appropriately protective thicket for the special constitutional constituency of American public schoolchildren.

B. This Thicket Safeguards All Schoolchildren's Religious and Conscientious Liberties

By applying Madisonian neutrality in its Establishment Clause cases dealing with religious activities in public schools, the Court has created a protective thicket that safeguards all children's beliefs with a balance between conscientious and religious liberties and constitutional free exercise.[430] This is in express alignment with the objective of the Framers in drafting and adopting the First Amendment.[431] In articulating this conception of neutrality that was an original objective of the Establishment Clause, Madison argued in his *Memorial and Remonstrance* for a preservation of all liberties of conscience in order to guard against division and preserve religion and government.[432] Similarly, in his first proposed Bill of Rights, Madison advocated for a provision that "the full and equal rights of conscience [shall not] be in any manner, or on any pretext, infringed."[433] This balance of neutrality was reflected in *Everson*, where the Court stated the First

429. Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373, 385 (1985), *overruled in part on other grounds by* Agostini v. Felton, 521 U.S. 203, 235 (1997).

430. *See generally* Tracey Levy, *Rediscovering Rights: State Courts Reconsider the Free Exercise Clauses of Their Own Constitutions in the Wake of* Employment Division v. Smith, 67 TEMP. L. REV. 1017, 1027 (1994) (defining Madisonian neutrality as neutrality that "protects all beliefs and conduct unless the preservation of equal liberty and the existence of the state are manifestly endangered" (citing Stephen Pepper, *Conflicting Paradigms of Religious Freedom: Liberty Versus Equality*, 1993 BYU L. REV. 7, 26–27)).

431. Wallace v. Jaffree, 472 U.S. 38, 50 (1985) ("[T]he Court has identified the individual's freedom of conscience as the central liberty that unifies the various Clauses in the First Amendment.")

432. Everson v. Bd. of Educ., 330 U.S. 1, 12 (1947) (citing MADISON, *supra* note 123, at 184).

433. 1 ANNALS OF CONG., *supra* note 375, at 451.

Amendment was adopted to ensure that "[s]tate power is no more to be used so as to [impede] religions than it is to favor them."[434]

The Court's usage of Madisonian neutrality in these cases reflects the Establishment Clause's status as "an equal liberty provision[.]"[435] It also demonstrates the Lockean liberty of conscience, which was at the core of Madison's writings and profoundly influential on the Founders.[436] By assuring conscientious and religious liberty of all students and by safeguarding K-12 students' free exercise rights, this jurisprudence properly balances all schoolchildren's beliefs. The Court explicitly recognized this balance in *Wallace*:

> Just as the right to speak and the right to refrain from speaking are complementary components of a broader concept of individual freedom of mind, so also the individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority. . . . But when the underlying principle has been examined in the crucible of litigation, the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all. This conclusion derives support not only from the interest in respecting the individual's freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful, and from recognition of the fact that the political interest in forestalling intolerance extends beyond intolerance among Christian sects—or even intolerance among "religions"—to encompass intolerance of the disbeliever and the uncertain.[437]

What has been vital to this liberty of conscience aspect of the thicket of school law Establishment Clause jurisprudence has been an avoidance of the slippery slope that can result from labeling state religious practices in schools as minor encroachments or innocuous exercises.[438] Claimed *de minimis* Establishment Clause violations in this school law are still Establishment Clause violations.[439] The Court has stated that "it is no defense

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434. *Everson*, 330 U.S. at 18.

435. Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555, 568 (1991).

436. *See* Feldman, *supra* note 30, at 383 (discussing Madison's derivation of ideas about neutrality and liberty of conscience from John Locke); Tara Smith, *What Good Is Religious Freedom? Locke, Rand, and the Non-Religious Case for Respecting It*, 69 ARK. L. REV. 943, 974 (2017) (discussing Locke's influence on the Founders in their conceptions of religious liberty).

437. Wallace v. Jaffree, 472 U.S. 38, 52–54 (1985).

438. *See* Epstein, *supra* note 123, at 2088–89 (cautioning against "slippery slope" Establishment Clause jurisprudence).

439. *See* Richard H. Fallon, Jr., *Tiers for the Establishment Clause*, 166 U. PA. L. REV. 59, 91 & n.160 (2017) ("Steven G. Gey argues strongly that there are no trivial constitutional violations." (citing Steven G. Gey, *"Under God," the Pledge of Allegiance, and Other Constitutional Trivia*, 81 N.C. L. REV. 1865 (2003))).

to urge that [these] religious practices here may be relatively minor encroachments on the First Amendment."[440] In *Engel*, the Court expressly quoted Madison's *Memorial and Remonstrance* to knock down the state's attempt to classify "the governmental endorsement of [school] prayer [as] relatively insignificant when compared to the governmental encroachments upon religion which were commonplace 200 years ago."[441]

Similarly, the Court has correctly found that the brevity of a religious practice in public schools also cannot be the constitutional basis for evading a violation of the Establishment Clause.[442] In *Engel*, the Court used the words of "Madison, the author of the First Amendment[,]" to respond to the belief that the challenged school prayer was "so brief and general there can be no danger to religious freedom in its governmental establishment"[443]:

> Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?[444]

The Court also rejected a brevity defense in *Lee*, where the Court recognized that the constitutional injury that resulted from students' participation in a school graduation religious prayer exercise extended beyond the short time that it took for the prayers to take place.[445] As the Court emphasized in *Wallace*, the importance of "the established principle that the government must pursue a course of complete neutrality toward religion" means that the Court cannot treat school law religion cases as brief religious exercises in "inconsequential case[s] involving nothing more than a few words of symbolic speech on behalf of the political majority."[446]

Through finding that state encroachments on students' conscientious choices by forcing compulsion or by requiring nonparticipation violates

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440. Abington Sch. Dist. v. Schempp, 374 U.S. 203, 225 (1963); *see also* Stone v. Graham, 449 U.S. 39, 42 (1980) (rejecting a "minor encroachment" defense to a claimed Establishment Clause violation (citing *Schempp*, 374 U.S. at 225)).

441. Engel v. Vitale, 370 U.S. 421, 436 (1962).

442. *See* Epstein, *supra* note 123, at 2133 (discussing the Court's rejection of brevity assertions to defend against school law Establishment Clause violations).

443. *Engel*, 370 U.S. at 436.

444. *Id.* (quoting MADISON, *supra* note 123, at 185–86).

445. *See* Lee v. Weisman, 505 U.S. 577, 594 (1992).

446. Wallace v. Jaffree, 472 U.S. 38, 60 (1985).

Madisonian neutrality, the Court has rejected any type of proffered forced choice or forfeiture defense to an Establishment Clause violation. The undue influence created by state-sponsored religious activities in public schools conflicts with the constitutional "concern for individual autonomy[,]" in that the "[g]overnment violates that principle whenever it interferes with individual choice around religion by influencing individual choice in favor of a particular religion, all religion, or no religion."[447] This is magnified when this pressure is asserted on impressionable schoolchildren.[448] Quite rightly, the Court has held that the State cannot "exact religious conformity from a student as the price of attending" core school events and maintain within the bounds of the Constitution.[449] As the Court concluded this point in *Lee*, "[t]his is the calculus the Constitution commands."[450] Consequently, forced forfeiture of students' liberties to avoid a religious practice in the public schools will not survive Establishment Clause scrutiny.[451] This was made clear by the Court in *Lee*:

> The Government's argument gives insufficient recognition to the real conflict of conscience faced by the young student. The essence of the Government's position is that with regard to a civic, social occasion of this importance it is the objector, not the majority, who must take unilateral and private action to avoid compromising religious scruples, hereby electing to miss the graduation exercise. This turns conventional First Amendment analysis on its head. It is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice. To say that a student must remain apart from the ceremony at the opening invocation and closing benediction is to risk compelling conformity in an environment analogous to the classroom setting, where we have said the risk of compulsion is especially high.[452]

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447. Nelson Tebbe, *The End of Religious Freedom: What Is at Stake?,* 41 PEPP. L. REV. 963, 973–74 (2014) (citing 2 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS 9 (2008)).

448. *See* Alan E. Garfield, *Protecting Children from Speech*, 57 FLA. L. REV. 565, 600 n.169 (2005) (discussing the Court's repeated acknowledgments within its school law Establishment Clause jurisprudence "that government involvement with religion 'can have a magnified impact on impressionable young minds'" (quoting Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373, 383 (1985), *overruled in part by* Agostini v. Felton, 521 U.S. 203 (1997))).

449. *Lee*, 505 U.S. at 596.

450. *Id.*

451. *See id.* at 595 ("[A] student is not free to absent herself from the graduation exercise in any real sense of the term 'voluntary,' for absence would require forfeiture of those intangible benefits which have motivated the student through youth and all her high school years.").

452. *Id.* at 596.

By rejecting these *de minimis*, brevity, and forfeiture defenses, the Court has properly ensured protection of the conscientious and religious liberties of all schoolchildren in accordance with the original intent of the Framers in adopting the Establishment Clause.

Commensurately, in implementing Madisonian neutrality, the Court's case law in this area has recognized and reaffirmed how this jurisprudence is not an impingement on individual students' free exercise rights.[453] In *Schempp*, the Court made clear that Madisonian neutrality, "which does not permit a State to require a religious exercise even with the consent of the majority of those affected," does not "collide[] with the majority's right to free exercise of religion."[454] The liberty balance of these cases just provides that the protection of these free exercise rights cannot result from the majority's use of State mechanisms to practice and enforce those beliefs.[455]

Therefore, the Court's constitutionally aligned Establishment Clause doctrine in education law is not antireligious.[456] In fact, it provides protection of religion by standing "as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate."[457] By ensuring that students' free exercise rights are maintained through a vigilant enforcement of the Establishment Clause, the Court has made clear that this clause is not a sword that harms religion. Instead, it is a shield that protects religion as was originally envisaged by Madison, who often argued that his conception of neutrality "shielded religious liberty from civil authority."[458]

The Court has emphasized this alignment by noting that "James Madison, the principal author of the Bill of Rights, did not rest his opposition to a religious establishment on the sole ground of its effect on the minority."[459] Instead, a primary ground for his original proposal for the Bill of Rights

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453. *See* Richard F. Duncan, *Public Schools and the Inevitability of Religious Inequality*, 1996 BYU L. REV. 569, 573 (1996) (discussing students' ability to engage in constitutionally permissible religious practices at school).

454. Abington Sch. Dist. v. Schempp, 374 U.S. 203, 225–26 (1963).

455. *See id.* at 226.

456. *See Lee*, 505 U.S. at 598 (stating that the Court "express[es] no hostility to" religion in these school law cases).

457. Engel v. Vitale, 370 U.S. 421, 431–32 (1962) (quoting MADISON, *supra* note 123, at 187).

458. John J. Infranca, *(Communal) Life, (Religious) Liberty, and Property*, 2017 MICH. ST. L. REV. 481, 497–98 (citing JAMES MADISON, DETACHED MEMORANDA (1817)).

459. *Lee*, 505 U.S. at 590.

was the perspective that "'experience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation.'"[460] Like Madison, the Court in this jurisprudence has recognized "through bitter experience that it is not within the power of government to invade that citadel [of religion], whether its purpose or effect be to aid or oppose."[461] Consequently, the Court has determined in these religious exercises in public schools cases that "the State [must be] firmly committed to a position of neutrality" in order to comply with the dictates of the First Amendment.[462]

Through a consistent application of Madisonian neutrality, the Court has created a thicket of school law Establishment Clause cases involving religious activities in schools that creates a constitutional balance of religious liberty and liberty of conscience with free exercise for all schoolchildren.[463] This protection is beneficial on all sides for "[a] state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed."[464] This school law neutrality

> is meant to guarantee the right of individual conscience against compulsion, to protect the integrity of religion against the corrosion of secular support, and to preserve the unity of political society against the implied exclusion of the less favored and the antagonism of controversy over public support for religious causes.[465]

Therefore, the Court's fidelity to Madisonian neutrality that composes this thicket of jurisprudence is properly reflective of one of the core intended purposes of the Establishment Clause.

C. This Thicket Conveys a Positive Jurisprudential Lesson that Protects the Spheres of Religion and Government

By incorporating Madisonian neutrality into its decision-making in cases involving religious activities in public schools, the Court has fulfilled the Framers' goal for the Establishment Clause to protect the inviolability of

460. *Id.* (quoting MADISON, *supra* note 123, at 301).
461. Abington Sch. Dist. v. Schempp, 374 U.S. 203, 226 (1963).
462. *Id.*
463. *See* Perry Dane, *Master Metaphors and Double-Coding in the Encounters of Religion and State*, 53 SAN DIEGO L. REV. 53, 100 (2016) ("[N]eutrality-talk is an effective bridge between the general conventions of constitutional discourse and the distinctive claims of religion.").
464. *Lee*, 505 U.S. at 592.
465. Mitchell v. Helms, 530 U.S. 793, 868 (2000) (Souter, J., dissenting).

the spheres of religion and government.[466] The Court's precedents in this area have also had a pedagogical effect in a meta sense—these school law decisions, which preserve both church and state from degradation by the other, have illustrated to the students and educators impacted by these decisions how the First Amendment was designed by the Framers to function. Through this approach, the Court has imparted lessons about civic democratic principles to K-12 students by preserving conscientious liberties in schools, which are the educative spaces for civic values inculcation in those children.[467] In doing so, the Court has acted in alignment with Madison's call for the judiciary to act as the guardian of the liberties that the Establishment Clause was designed to protect.[468]

Throughout Madison's writings and original proposal for the Bill of Rights, he argued that one of the goals of disestablishment was to preserve the spheres of religion and government. For Madison, the state sponsorship of religious exercises "corrupted religion itself, and thus corrupted religion's capacity for generating true virtue."[469] Madison strongly believed that "religion [and government] will both exist in greater purity, the less they are mixed together."[470] This was the basis for the neutrality that he urged in the evaluation of religious activities in governmental enterprises. And this is the neutrality that the Court has incorporated into its cases involving

466. *See* Alan Brownstein, *The Religion Clauses as Mutually Reinforcing Mandates: Why the Arguments for Rigorously Enforcing the Free Exercise Clause and Establishment Clause Are Stronger When Both Clauses Are Taken Seriously*, 32 CARDOZO L. REV. 1701, 1707 (2011) ("[B]ecause of the Establishment Clause[, religion] is much more independent of government than its secular counterparts.").

467. *See* Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 231 (1948) (Frankfurter, J., concurring) ("The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny.").

468. *See* John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1394–95 (1997) (discussing Madison's intent that the federal courts safeguard the protections within the Bill of Rights).

469. Timothy L. Hall, *Religion and Civic Virtue: A Justification of Free Exercise*, 67 TUL. L. REV. 87, 121 (1992) (citing JAMES MADISON, *A Memorial and Remonstrance*, *in* SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 5, 9–10 (Marvin Meyers ed., rev. ed. 1981)).

470. JAMES MADISON, Letter from James Madison to Edward Livingston (July 10, 1822), *reprinted in* JAMES MADISON ON RELIGIOUS LIBERTY 82, 83 (Robert S. Alley ed., 1985).

religious exercises in public schools.[471] Through the creation of this constitutionally correct thicket, the Court has worked in alignment with the Establishment Clause's "first and most immediate purpose [that] rested on the belief that a union of government and religion tends to destroy government and to degrade religion."[472]

The Court's incorporation of Madisonian neutrality is particularly appropriate because public schools have been deemed the primary places for civic values education of American children.[473] Public schools have long played a central role in American democracy.[474] For over 200 years, American public schools have been acknowledged as "sites for the creation of American identity" through their inculcation of students with core American values and civic democratic principles.[475] In *West Virginia State Board of Education v. Barnette*, the Court emphasized that public schools "are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."[476] Consequently, "the unique role schools play in forming moral character" of schoolchildren gives rise to appropriately heightened judicial scrutiny of the Establishment Clause in school law cases.[477]

By deciding these cases in alignment with Madisonian neutrality, the Court has taught American schoolchildren how the judiciary should safeguard religion and government,[478] as these are some of "the most cherished features

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471. *See McCollum*, 333 U.S. at 212 ("For the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere.").

472. Engel v. Vitale, 370 U.S. 421, 431 (1962).

473. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 681 (2002) (Thomas, J., concurring) ("[O]ne of the purposes of public schools was to promote democracy and a more egalitarian culture . . . .").

474. *See* Adler v. Bd. of Educ., 342 U.S. 485, 508 (1952) (Douglas, J., dissenting) ("The public school is in most respects the cradle of our democracy."), *overruled in part by* Keyishian v. Bd. of Regents, 385 U.S. 589 (1967).

475. NOAH FELDMAN, DIVIDED BY GOD 70 (2005) (discussing the importance of American public schools since the mid-1800s).

476. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

477. Michele Estrin Gilman, *"Charitable Choice" and the Accountability Challenge: Reconciling the Need for Regulation with the First Amendment Religion Clauses*, 55 VAND. L. REV. 799, 871 (2002).

478. *See* Aaron H. Caplan, *Freedom of Speech in School and Prison*, 85 WASH. L. REV. 71, 97–98 (2010) (discussing how many of the Court's decisions have been driven by its beliefs about the significance of education in public schools).

of our constitutional system."[479] In addition to the direct effect of this case law on students, these decisions have educated educators and educational policymakers, whose decisions may not align with the key purposes of the First Amendment and who may not be providing the types of civic education that the Court is offering.[480] Such religion-education precedents have supported all school constituencies to engage with the broader American narrative of creating educative spaces for young people to develop into democratic citizens.[481]

The Court has acknowledged the pedagogical impact of this line of constitutional analysis, noting in *Lee* that the "timeless lesson" of the First Amendment "is that if citizens are subjected to state-sponsored religious exercises, the State disavows its own duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people."[482] By holding to a Madisonian neutrality line in these cases, the Court has set a stance that "has its roots in the Framers' beliefs that the sacred practices of religious instruction and prayer were best left to be taught by private institutions, the family, and houses of worship, and not by the schools."[483] At the same time, it has functioned "to keep out divisive forces . . . in [America's public] schools, to avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart."[484]

Throughout this category of school law Establishment Clause jurisprudence, the Court has emphasized that "the vigilant protection of constitutional

479. Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 795 (1973).

480. *See, e.g.*, Rachel F. Moran, *City on A Hill: The Democratic Promise of Higher Education*, 7 U.C. IRVINE L. REV. 73, 103 (2017) (discussing the "weaknesses in civic education at the elementary and secondary school level"). *But see* Lauren Maisel Goldsmith & James R. Dillon, *The Hallowed Hope: The School Prayer Cases and Social Change*, 59 ST. LOUIS U. L.J. 409, 441 (2015) ("[E]mpirical studies show that most school districts, most of the time, have aimed to interpret the Court's orders [in its school prayer decisions] in good faith (if not generously) and to comply with their perceived legal obligations.").

481. *See* Abington Sch. Dist. v. Schempp, 374 U.S. 203, 230 (1963) (Brennan, J., concurring) ("Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government."); Osamudia R. James, *Business as Usual: The Roberts Court's Continued Neglect of Adequacy and Equity Concerns in American Education*, 59 S.C. L. REV. 793, 812 (2008) (discussing the Court's characterization of education as vital to preserving democratic government).

482. Lee v. Weisman, 505 U.S. 577, 592 (1992).

483. Jeffrey E. Blivaiss, *A Case for the Unconstitutionality of Student-Led Prayer at High School Graduation Ceremonies*, 26 RUTGERS L. REC. 1, 4 (2002).

484. Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 231 (1948).

freedoms is nowhere more vital than in the community of American schools."[485] The Court must continue to be vigilant in ensuring that the state complies with these requirements of the Establishment Clause in the operation of its public schools.[486] These decisions must be viewed through the lens of providing protection for K-12 students' growth, because these shielding school environments give students the tools to learn the basic parameters of civic life and to interrogate their views[487]—seeing where they coincide and conflict with each other while learning what it means to be an active participant in American democracy.[488] Maintaining fidelity to Madisonian neutrality in the special circumstances of the school environment lays the predicate for the Court to lead the charge to assist schoolchildren "to become self-fulfilling, self-sustaining adults who can contribute to the civic community."[489] As a result of this jurisprudence, these students can learn that, although the state can control many things in their lives,[490] it cannot dictate matters of faith, religion, or disbelief. This is the *sine qua non* of civic education. It is this education that the Court has allowed through the protective thicket of its religious activities in public schools jurisprudence.

V. CONCLUSION

It seems almost impossible to find a coherent theory within the Court's entire Establishment Clause doctrine.[491] As a result, there has been a

485. Epperson v. Arkansas, 393 U.S. 97, 104 (1968) (quoting Shelton v. Tucker, 364 U.S. 479, 487 (1960)).

486. *See* Edwards v. Aguillard, 482 U.S. 578, 583–84 (1987) (noting the Court's particular vigilance in this area).

487. *See* Cooley, *supra* note 425, at 372–73 (2019) (arguing that American public schools are the primary state force in educating children about civic virtues and democratic principles).

488. *See* Laura Rene McNeal, *Hush Don't Say a Word: Safeguarding Students' Freedom of Expression in the Trump Era*, 35 GA. ST. U. L. REV. 251, 296 (2019) (discussing public schools' role in preparing children for democratic participation); Steven D. Smith, *Constitutional Divide: The Transformative Significance of the School Prayer Decisions*, 38 PEPP. L. REV. 945, 994 (2011) ("[C]ore democratic conceptions and values are supposed to be inculcated in the rising generation [in public schools].").

489. Rodney J. Blackman, *Showing the Fly the Way Out of the Fly-Bottle: Making Sense of the First Amendment Religion Clauses*, 42 U. KAN. L. REV. 285, 350 (1994).

490. *See* Amanda Harmon Cooley, *Controlling Students and Teachers: The Increasing Constriction of Constitutional Rights in Public Education*, 66 BAYLOR L. REV. 235, 237–38 (2014) (discussing the extensive control schools exercise over students' speech and privacy interests).

491. *See* Thomas C. Berg, *Religion Clause Anti-Theories*, 72 NOTRE DAME L. REV. 693, 693 (1997) ("[T]he Supreme Court has made a mess of this area . . . ."); John M.

tremendous amount of critical scholarship regarding the constitutional religion clauses,[492] with diametrically opposed perspectives from learned academics, jurists, and experts on the same subjects.[493] Because of the complexities and difficulties of these cases,[494] the Court has stated that one fixed Establishment Clause jurisprudential rule or test is impossible.[495]

Likewise, the evolution of the Court's establishment doctrine in the difficult area of education has been inconsistent.[496] School law cases have produced a variety of tests, touchstones, analyses, and applications.[497] The

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Bickers, *False Facts and Holy War: How the Supreme Court's Establishment Clause Cases Fuel Religious Conflict*, 51 IND. L. REV. 305, 307 & n.3 (2018) (discussing scholarly Establishment Clause criticism); Daniel O. Conkle, *The Establishment Clause and Religious Expression in Governmental Settings: Four Variables in Search of a Standard*, 110 W. VA. L. REV. 315, 315 (2007) (deeming this doctrine "a muddled mess"); Eisgruber & Sager, *supra* note 15, at 578 (labeling this jurisprudence "not at all reassuring[,] . . . relatively theory-free, [and] . . . a complete hash"); Steven G. Gey, *Life After the Establishment Clause*, 110 W. VA. L. REV. 1, 35 (2007) (discussing scholarly and judicial agreement about this doctrine being "a chaotic and contradictory mess").

492. *See, e.g.*, Roald Mykkeltvedt, *Tension Between the Religion Clauses of the First Amendment:* Mozert v. Hawkins County Public Schools, 56 TENN. L. REV. 693, 693–94 (1989) (arguing that the Court has failed to create a rational body of Establishment Clause jurisprudence).

493. *See* Alberto B. Lopez, *Equal Access and the Public Forum:* Pinette*'s Imbalance of Free Speech and Establishment*, 55 BAYLOR L. REV. 167, 179 (2003) (discussing the variety of scholarly interpretations of the meaning of the Establishment Clause); Nelson Tebbe, *Religion and Social Coherentism*, 91 NOTRE DAME L. REV. 363, 372 (2015) (discussing cross-critiques of Establishment Clause scholarship, labeling the other side as "not just eclectic but erratic").

494. *See* Comm. for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 662 (1980) (Blackmun, J., dissenting) (articulating the difficulties of these cases).

495. *See* Lynch v. Donnelly, 465 U.S. 668, 678 (1984) ("In each case, the inquiry calls for line-drawing; no fixed, *per se* rule can be framed. The Establishment Clause . . . is not a precise, detailed provision in a legal code capable of ready application."); William J. Dobosh, Jr., *Coercion in the Ranks: The Establishment Clause Implications of Chaplain-Led Prayers at Mandatory Army Events*, 2006 WIS. L. REV. 1493, 1499 (discussing the Court's repeated acknowledgement of the lack of a singular test for Establishment Clause analysis).

496. *See* Kevin T. Baine, *Education Litigation: Prospects for Change*, 35 CATH. LAW. 283, 287 (1994) ("[T]he Supreme Court has decided a series of [Establishment Clause] education cases that, read together, simply defy comprehension.").

497. *See* Gey, *supra* note 439, at 1883 ("The problem is not that the Supreme Court has failed to articulate a standard for deciding Establishment Clause cases; the problem is that the Court has articulated too many standards for deciding Establishment Clause cases."); Edward A. Liva, *Even Silence Has No Prayer: The Third Circuit Sacks Coach's Silent Team Prayer in* Borden v. School District of East Brunswick, 54 VILL. L. REV. 801, 803,

Court's educational Establishment Clause jurisprudence has also produced four major categories of cases just within this one subset of its overall Establishment Clause body of case law: 1) substantive religious activities in public schools cases; 2) substantive governmental assistance to nonpublic, sectarian schools cases; 3) substantive equal access cases; and 4) justiciability and jurisdictional requirements cases.[498] It is no wonder then that there is a perception that the Court's education law Establishment Clause jurisprudence, like all of its Establishment Clause jurisprudence, is a thicket in the very worst sense of the term.[499]

However, when the religious activities in public schools cases are separated from the remainder of the Court's inconsistent school law doctrine,[500] a new version of thicket theory emerges that mirrors thickets in the natural world. These thickets in nature often provide protection for young and vulnerable animal species from predators and other harms.[501] The Court's educational Establishment Clause jurisprudence involving religious activities in public schools is this type of thicket, and it is one that is composed of fidelity to Madisonian neutrality. No matter the tactical approach, the constitutional neutrality in these cases adheres to the original objectives of the Framers in drafting the Establishment Clause—that the government

806–07 (2009) (discussing the various tests the Court has used in its school prayer Establishment Clause jurisprudence); Louis J. Virelli III, *Making* Lemon*ade: A New Approach to Evaluating Evolution Disclaimers Under the Establishment Clause*, 60 U. MIAMI L. REV. 423, 434 (2006) (criticizing the variety of tests used by the Court in its public school evolution instruction cases).

498. *See supra* notes 67–70 and accompanying text.

499. *See, e.g.*, Mary Ann Glendon, *Law, Communities, and the Religious Freedom Language of the Constitution*, 60 GEO. WASH. L. REV. 672, 674 (1992) ("[T]he Supreme Court's Religion Clause case law [is] confused, inconsistent, and incoherent.").

500. *See, e.g.*, Laurence H. Winer & Nina J. Crimm, *A Perspective on Suitable Latitude for Religious Establishments: Lessons from Contrasting the Student Educational Arena with the Adult Political Square*, 49 ARIZ. ST. L.J. 223, 224 (2017) (arguing that the Court has "emasculated the Establishment Clause and 'betray[ed] [James] Madison's vision'" in its Establishment Clause cases analyzing government aid to religious education (quoting Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 168 (2011) (Kagan, J., dissenting))).

501. *See, e.g.*, JOHN C. DYES, NESTING BIRDS OF THE COASTAL ISLANDS: A NATURALIST'S YEAR ON GALVESTON BAY, at vi (1993) (depicting a prickly pear cactus thicket that provides protection of nesting birds' eggs from predators); *Coyotes 101*, COYOTE SMARTS, https://www.coyotesmarts.org/coyotes101/ [https://perma.cc/SHP5-HMBS] (discussing how many coyotes make their dens in dense thickets); David Graves, *Plum Thickets Add Cover for Ground-Nesting Birds, Rabbits and Deer*, ARK. GAME & FISH COMM'N (Apr. 24, 2019), https://www.agfc.com/en/news/2019/04/24/plum-thickets-add-cover-for-ground-nesting-birds-rabbits-and-deer/ [https://perma.cc/T2FW-ML4R] (discussing the importance of thickets as protection for a variety of prey species from predators).

can neither aid nor inhibit religion. This is an appropriate constitutional harnessing of the interplay of these mechanisms in our democracy.[502]

Consequently, a thicket theory can be reclaimed through the identification of this unified Framers' fidelity and through the beneficial consequences of this case law. The Court's school law Establishment Clause jurisprudence relating to religious activities in schools is not an incomprehensible thicket.[503] Instead, it is an intricate thicket composed of fidelity vines to Madison's conception of neutrality, which aligns with the original purposes of the Establishment Clause. It is a thicket that has properly provided protection to a special constitutional constituency—impressionable American schoolchildren within the important constitutional arena of American public schools. It is a thicket that safeguards the freedom of conscience and religious liberty of all American schoolchildren, no matter their religious or spiritual beliefs. Finally, it is a thicket that sets a positive jurisprudential precedent that teaches expansive actual civic democratic principles. These educative benefits, which result from the Court's proper stare decisis application of Madisonian neutrality, demonstrate that this is the proper constitutional course for the difficult cases that will inevitably continue to arise in the future.[504]

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502. *See* Richard W. Garnett, *Religion, Division, and the First Amendment*, 94 GEO. L.J. 1667, 1670 (2006) ("Those who crafted our Constitution believed that both authentic freedom and effective government could and should be secured . . . by harnessing, rather than homogenizing, the messiness of democracy.").

503. *See* Harry G. Hutchison, *Liberal Hegemony? School Vouchers and the Future of the Race*, 68 MO. L. REV. 559, 640 (2003).

504. *See* Rosemary C. Salomone, *Public Forum Doctrine and the Perils of Thinking Categorically: Lessons from* Lamb's Chapel, 24 N.M. L. REV. 1, 1 (1994) (discussing the continued constitutional controversies that arise from the intersection of the First Amendment's religion clauses in public schools).