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TIERS FOR THE ESTABLISHMENT CLAUSE

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*When compared with other constitutional doctrines, Establishment Clause doctrine is confused and anomalous, both substantively and with regard to standing. The Supreme Court ought to craft reforms in light of a wide-angle appraisal of pertinent comparisons, analogies, and interconnections. Substantively, the Justices should adopt the tiers-of-scrutiny approach that the Court employs under the Free Exercise, Free Speech, and Equal Protection Clauses. Within a tiered-scrutiny regime, the Court should strictly scrutinize any statute that classifies or requires classifications based on religion. It should prescribe intermediate scrutiny for statutes that expend tax revenues to provide material benefits to churches or religiously affiliated organizations on a nondiscriminatory, nonpreferential basis. And it should clarify its approach to determining which symbolic supports for religion rise to the level of Establishment Clause violations. Correspondingly, the Court should realign standing doctrine to equate the injuries needed for standing more closely with those against which the Establishment Clause furnishes substantive protection.*

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## INTRODUCTION

Establishment Clause doctrine is notoriously confused and disarrayed—“a farrago of unstable rules, tests, standards, principles, and exceptions” that “leaves constitutional law scholars reminiscing wistfully about the elegance and simplicity of the Uniform Commercial Code or the Rule Against Perpetuities.”<sup>1</sup> Establishment Clause doctrine is also anomalous as compared with the rule structure that prevails in analogous areas of constitutional law. In this Article, I argue that consideration of two central anomalies, and of some of the confusions that surround them, will illumine a path to attractive, rationalizing, clarifying reforms.

First, unlike many other doctrines that protect individual rights, the Supreme Court’s Establishment Clause cases do not employ an analytically sequenced, tiered framework for judicial review of the kind that the Court uses to enforce the Free Speech, Free Exercise, Equal Protection, and Due

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<sup>1</sup> PAUL HORWITZ, THE AGNOSTIC AGE 223 (2011).

Process Clauses, for example.<sup>2</sup> In tiered-scrutiny regimes, a court asks first whether a challenger has alleged a violation of a right or interest to which a particular constitutional provision plausibly extends protection.<sup>3</sup> If not, the court dismisses any constitutional challenges without further analysis. If a case plausibly comes within a provision's protective ambit, however, the court applies a more or less elevated level of scrutiny, depending on the violation alleged.<sup>4</sup> In cases involving direct infringements of fundamental rights or interests, either strict or intermediate scrutiny—as distinguished from rational basis review—normally applies. Admittedly, the Supreme Court has blurred the lines between its traditional tiers of review in some recent cases, especially involving gay rights.<sup>5</sup> Nevertheless, analytically sequenced, tiered review defines the norm in important swathes of constitutional law.

Establishment Clause cases disdain this approach. In the words of leading commentators, “long-standing Establishment Clause methodology” dictates that “[o]nce a practice . . . is judicially determined to be an establishment of religion . . . [c]ompeting government interests play no part.”<sup>6</sup> Instead, the Supreme Court has often held that statutes that were adopted either exclusively or predominantly for the forbidden purpose of promoting religion, or that have the principal or primary effect of doing so, are per se

<sup>2</sup> See Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1268-69 (2007) (documenting the Supreme Court's reliance on a strict scrutiny test to identify constitutional violations under these and other provisions).

<sup>3</sup> See, e.g., Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1769-74 (2004) (distinguishing between the “coverage” of the First Amendment and the protection that it ultimately affords or does not afford following the application of a First Amendment test).

<sup>4</sup> See, e.g., RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 87-89 (2001) (discussing suspect- and non-suspect-content tests); Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783, 786-87 (explaining the role of tiers of review in Free Speech Clause doctrine); Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 494-503 (2004) (examining the development of suspect-classification analysis under the Equal Protection Clause).

<sup>5</sup> See, e.g., *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013) (holding that the Defense of Marriage Act violated the Fifth Amendment without specifying the level of scrutiny applied); *Lawrence v. Texas*, 539 U.S. 558, 564 (2003) (invalidating an anti-sodomy ordinance under the Due Process Clause without invoking strict scrutiny); *Romer v. Evans*, 517 U.S. 620, 632 (1996) (holding that a Colorado constitutional amendment that barred anti-discrimination protections for gays and lesbians failed to meet even the rational basis test).

<sup>6</sup> Ira C. Lupu & Robert W. Tuttle, *The Mystery of Unanimity in Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 20 LEWIS & CLARK L. REV. 1265, 1276-77 (2017); see also *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 710 (2012) (“The interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission. When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us. The church must be free to choose those who will guide it on its way.”).

invalid.<sup>7</sup> Yet the Court has not applied that test—which is often associated with *Lemon v. Kurtzman*<sup>8</sup>—consistently. Some leading cases have reached results that would be hard if not impossible to justify if the Court applied *Lemon*'s stated prohibitions categorically.<sup>9</sup>

In cases involving the permissibility of statutes that lift burdens on religious institutions and religiously motivated individuals, the Court has said that no Establishment Clause violation occurs if the government responds to severe, governmentally imposed hardships and “take[s] adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.”<sup>10</sup> This formulation may hint that the government must closely tailor any religiously-based preferences to the promotion of governmental interests of some kind, but does not say so expressly. Moreover, tailoring analysis is wholly absent in most Establishment Clause cases, including both those that uphold and those that reject constitutional challenges. As if befuddled about how to rationalize the existing pattern of results, the Court has sometimes rejected Establishment Clause challenges without clear reliance on any doctrinal formula whatsoever.<sup>11</sup>

The introduction of a regime of analytically sequenced, tiered scrutiny would help impose both clarity and rational order on the currently chaotic Establishment Clause landscape. No linguistic or historical logic dictates that all constitutional doctrines should have the same structure. But the attractions of analytically sequenced, tiered scrutiny are familiar and intuitive.<sup>12</sup> Consider a hypothetical case in which a state legislature long ago adopted the

<sup>7</sup> See, e.g., *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 850 (2005) (affirming that “a determination of the counties’ [forbidden] purpose is a sound basis” for finding an Establishment Clause violation); *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987) (“[A]ppellants have identified no clear secular purpose for the Louisiana Act.”); *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) (striking down the statute at issue since it “had no secular purpose” (emphasis in original)).

<sup>8</sup> 403 U.S. 602, 612 (1971). See *infra* note 104 and accompanying text (quoting the *Lemon* test).

<sup>9</sup> See, e.g., *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1828 (2014) (upholding a town’s practice of beginning official meetings with a public prayer); *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (ruling that a town’s display of a crèche did not violate the Establishment Clause).

<sup>10</sup> *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005).

<sup>11</sup> See, e.g., *Town of Greece*, 134 S. Ct. at 1819 (“*Marsh* stands for the proposition that it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted. Any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change.”); *Van Orden v. Perry*, 545 U.S. 677, 686 (2005) (plurality opinion) (“Whatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds. Instead, our analysis is driven both by the nature of the monument and by our Nation’s history.”).

<sup>12</sup> See Fallon, *supra* note 2, at 1292-93 (discussing the attractions of strict judicial scrutiny); Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 295-96 (1992) (describing the role of tiers of review in efforts to promote judicial restraint).

state statute prohibiting murder for the sole purpose—in the psychological sense of that term—of enforcing one of God’s commandments. To hold such a statute *per se* invalid because of the legislature’s forbidden intent would seem draconian and untenable. Many of us would have a similar reaction if local authorities required the vaccination of school children solely for the forbidden purpose of discouraging Christian Scientists from moving into a community, but it later became apparent that requiring vaccinations served vital public health interests. For those who share these intuitions, a typical response, informed by other constitutional doctrines, would postulate that the hypothesized statutes should incur strict judicial scrutiny, but that they should survive if sufficiently narrowly tailored to compelling governmental interests.<sup>13</sup>

A real, topical example further illustrates the anomalous character of the Supreme Court’s failure to apply analytically sequenced, tiered judicial scrutiny under the Establishment Clause. Statutes that exempt religious institutions or religiously motivated individuals from otherwise generally applicable laws require religiously-based classifications in order to sort those who qualify for exemptions from those who do not. If challenged under the Equal Protection Clause, classifications based on religion, the Court has sometimes asserted, would be assimilated to those based on race.<sup>14</sup> And race-based classifications trigger strict judicial scrutiny.<sup>15</sup> The Court has also prescribed strict scrutiny for religiously-based classifications under the Free Exercise Clause, at least when they are used to exclude some from benefits

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13 This conclusion represents an application of the broader thesis that statutes should never be deemed *per se* impermissible based solely on legislative intentions in the psychological sense. See Richard H. Fallon, Jr., *Constitutionally Forbidden Legislative Intent*, 130 HARV. L. REV. 523, 558 (2016).

14 See, e.g., *United States v. Armstrong*, 517 U.S. 456, 464-65 (1996) (“[T]he decision whether to prosecute may not be based on ‘an unjustifiable standard such as race, religion, or other arbitrary classification.’” (quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962))); *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (“At the heart of the Constitution’s guarantee of equal protection lies the simple command that the Government must treat citizens ‘as individuals, not ‘as simply components of a racial, religious, sexual or national class.’” (quoting *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 602 (1990))); *Burlington N. R.R. Co. v. Ford*, 504 U.S. 648, 651 (1992) (identifying classifications drawn along “lines like race or religion” as “suspect”); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (characterizing “distinctions such as race, religion, or alienage” as “suspect”).

15 See, e.g., *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2208 (2016) (“[B]ecause racial characteristics so seldom provide a relevant basis for disparate treatment,” “[r]ace may not be considered [by a university] unless the admissions process can withstand strict scrutiny.” (citations omitted)); *Johnson v. California*, 543 U.S. 499, 505 (2005) (“We have held that ‘all racial classifications [imposed by government] . . . must be analyzed by a reviewing court under strict scrutiny.’” (alteration in original) (emphasis in original) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995))). In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, after having determined that the exclusion of a church from eligibility for participation in a state funding program solely because of its status as a church failed strict scrutiny under the Free Exercise Clause, the Court determined that it “need not reach the Church’s claim that the policy also violates the Equal Protection Clause.” 137 S. Ct. 2012, 2024 n.5 (2017).

available to others based on their religious status.<sup>16</sup> If classifications based on religion are suspect under the Equal Protection and Free Exercise Clauses, why, one wonders, should they escape strict judicial scrutiny in Establishment Clause cases?<sup>17</sup> A possible response would be that the Court regards many statutory accommodations for religious practitioners as benign, even desirable, and believes that they should be upheld if they do not impose excessive burdens on third parties. But in cases involving other classifications drawn along “suspect” lines, including those involving race-based affirmative action in higher education, that conclusion would need to emerge from a strict scrutiny framework.<sup>18</sup> A disposition to favor otherwise suspect line-drawing in a particular context would not furnish a justification for forgoing searching analysis.

Adoption of an analytically sequenced, tiered-scrutiny approach would also invite a rationalizing reconceptualization of the relationship among some prominent subcategories within Establishment Clause doctrine that now appear more dissonant than harmonious. One important strain of decisions involves material support for religious institutions or activities.<sup>19</sup> In this branch of Establishment Clause doctrine, leading cases have demanded

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<sup>16</sup> See *id.* at 2019 (“[L]aws that target the religious for ‘special disabilities’ based on their ‘religious status’” trigger strict judicial scrutiny under the Free Exercise Clause. (quoting *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533, 542 (1993))); *Emp’t Div. v. Smith*, 494 U.S. 872, 886 n.3 (1990) (“[W]e strictly scrutinize governmental classifications based on religion.”). In *Locke v. Davey*, the Supreme Court applied only rational basis review in adjudicating an equal protection challenge to a state scholarship program that denied funding for studies designed to induce religious faith. 540 U.S. 712, 720 n.3 (2004). The Court reasoned that because “the program is not a violation of the Free Exercise Clause, . . . we apply rational-basis scrutiny to his equal protection claims.” *Id.* But *Locke* did not involve a classification based on religious status per se, as the Court recently emphasized. See *Trinity Lutheran*, 137 S. Ct. at 2016 (“Davey was not denied a scholarship because of who he *was*; he was denied a scholarship because of what he proposed to *do*—use the funds to prepare for the ministry. Here there is no question that Trinity Lutheran was denied a grant simply because of what it is—a church.” (emphasis in original)).

<sup>17</sup> So far no clear test of permissibility has emerged under the Establishment Clause, especially insofar as accommodations for one person result in heightened burdens on another. See *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) (discussing that “courts must take adequate account of the burdens” that may be imposed on nonbeneficiaries); Kent Greenawalt, *Establishment Clause Limits on Free Exercise Accommodations*, 110 W. VA. L. REV. 343, 343 (2007) (“[T]he Supreme Court has given us no theory, or no tenable theory, for drawing the line between permissible accommodation and impermissible establishment.”). Carl H. Esbeck purports to discern “ten Black Letter Rules that fairly restate the cases.” Carl H. Esbeck, *When Accommodations for Religion Violate the Establishment Clause: Regularizing the Supreme Court’s Analysis*, 110 W. VA. L. REV. 359, 371 (2007). But even his portrait is one of complexity and, I would say, consequent indeterminacy.

<sup>18</sup> See, e.g., *Fisher*, 136 S. Ct. at 2214-15 (upholding an affirmative action program as narrowly tailored to a compelling governmental interest); *Grutter v. Bollinger*, 539 U.S. 306, 326, 334 (2003) (same).

<sup>19</sup> See, e.g., *Mitchell v. Helms*, 530 U.S. 793, 835-36 (2000) (holding that it did not violate the First Amendment for a state to provide educational materials for use by religious as well as secular schools); *Walz v. Tax Comm’n*, 397 U.S. 664, 667-74 (1970) (upholding property tax exemptions for religious institutions along with other nonprofit organizations).

governmental neutrality,<sup>20</sup> both among religions and between religious and nonreligious beneficiaries.<sup>21</sup> Their categorical formulations suggest that any preferences for or among religious institutions or adherents of different faiths would violate the Establishment Clause.

In a second set of cases, however, demands for neutrality vanish, as the Supreme Court sometimes tolerates the singling out of religious institutions and religious believers for exemptions from otherwise applicable regulatory burdens,<sup>22</sup> including those of complying with antidiscrimination laws.<sup>23</sup>

More confusion enters the picture when one looks at cases involving symbolic support for religion. Representative examples arise when the government sponsors prayers<sup>24</sup> or maintains displays with religious elements, such as the Ten Commandments.<sup>25</sup> Sometimes the Supreme Court has

<sup>20</sup> The term “neutrality” is admittedly a vexed one. See ANDREW KOPPELMAN, *DEFENDING AMERICAN RELIGIOUS NEUTRALITY* 15-45 (2013) (cataloguing various senses of the term “neutrality” as used throughout American history); Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 999-1011 (1990) (differentiating among different possible senses of “neutrality”). In Professor Laycock’s terms:

A law is formally neutral if it does not use religion as a category—if religious and secular examples of the same phenomenon are treated exactly the same. Substantive neutrality requires neutral *incentives*. A law is substantively neutral if it neither encourages [n]or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance.

Douglas Laycock, *Substantive Neutrality Revisited*, 110 W. VA. L. REV. 51, 54 (2007) (internal quotation and citation omitted). The Supreme Court predominantly uses the term in a formal sense to refer to statutes and programs that do not explicitly distinguish between or among religious and nonreligious people, activities, or organizations in imposing burdens or distributing benefits. Unless the context indicates otherwise, I use the term “neutrality” in this admittedly contestable formal sense.

<sup>21</sup> See, e.g., *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 9 (1989) (plurality opinion) (affirming that “government may not be overtly hostile to religion” nor “place its prestige, coercive authority, or resources behind a single religious faith or behind religious belief in general”). Even cases that uphold neutral distributions strongly suggest that neutrality is a necessary predicate for their rulings. See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002) (explaining the focus “on neutrality and the principle of private choice” in *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993)); *Mitchell v. Helms*, 530 U.S. 793, 802, 830 (2000) (emphasizing that “[t]he program makes a broad array of schools eligible for aid without regard to their religious affiliations or lack thereof”).

<sup>22</sup> See, e.g., *Cutter*, 544 U.S. at 719-26 (upholding a challenged exemption mandate of the Religious Land Use and Institutionalized Persons Act of 2000); *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 329-30 (1987) (holding that an exemption provided to the secular nonprofit activities of a religious organization did not violate the Establishment Clause).

<sup>23</sup> See generally *Corp. of the Presiding Bishop*, 483 U.S. 327.

<sup>24</sup> See, e.g., *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1828 (2014) (permitting prayers at town meetings); *Marsh v. Chambers*, 463 U.S. 783, 795 (1983) (permitting the Nebraska Legislature’s practice of opening with a prayer).

<sup>25</sup> See, e.g., *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844 (2005); *Van Orden v. Perry*, 545 U.S. 677, 692 (2005); *County of Allegheny v. ACLU*, 492 U.S. 573, 620 (1989); *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984).

invalidated such practices.<sup>26</sup> Sometimes, however, it upholds them.<sup>27</sup> In cases of this third, symbolic kind, the Supreme Court cannot credibly require strict governmental neutrality toward religion—at least unless or until it is prepared to forbid symbolic support for religion altogether.<sup>28</sup> Even so, it sometimes applies the *Lemon* test and says that any statute with the predominant purpose or effect of promoting religion violates the Establishment Clause<sup>29</sup>—even though it takes formidable machinations to conclude that this test would not forbid all symbolic support for religion, including such seemingly untouchable practices as the engraving of “In God We Trust” on the currency.<sup>30</sup> When focused on this set of problems, some of the Justices have sometimes maintained that the government violates the Establishment Clause only when it engages in coercion or sustained, one-sect proselytization.<sup>31</sup> But this conclusion fits uneasily with cases involving the provision of material benefits to religious institutions and activities, some of which appear to imply that any form of non-neutral, preferential treatment would violate the Establishment Clause, often without specific reference to whether coercion or one-sect proselytization occurs.<sup>32</sup>

A fourth strand of cases, cleaved off from the third, comprises challenges to religious teaching and practice in the public schools. Cases involving school prayer illustrate the distinction. In *Town of Greece v. Galloway*, the Supreme Court, by 5 to 4, upheld a town’s practice of beginning official meetings with a public prayer.<sup>33</sup> By contrast, the Court, since the 1960s, has adhered to the view that the Constitution prohibits any officially sponsored prayer in the public schools.<sup>34</sup>

Much if not all of the tension among these strands of cases would dissolve if the Supreme Court integrated them into an analytically

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<sup>26</sup> See, e.g., *McCreary Cty.*, 545 U.S. at 881 (affirming the preliminary injunction against the display of the Ten Commandments); *Lee v. Weisman*, 505 U.S. 577, 599 (1992) (declaring a public school’s practice of including prayers as part of the graduation ceremony unconstitutional).

<sup>27</sup> See, e.g., *Van Orden*, 545 U.S. at 692 (permitting display of a Ten Commandments monument on the grounds of the Texas State Capitol); *Marsh*, 463 U.S. at 795.

<sup>28</sup> For the view that the Establishment Clause categorically bars the government from taking stands on matters of religious truth in any context, see HORWITZ, *supra* note 1, at 256-62. But even Professor Horwitz acknowledges that judges who refuse rigorously to enforce the principle that he espouses “may be right” in light of what he calls “the constitutional easement mess” that arises from longstanding violations of that principle and the adverse practical consequences that might ensue from judicial efforts to uproot long-ensconced and honored traditions. *Id.* at 262, 266.

<sup>29</sup> See *supra* note 7 and accompanying text.

<sup>30</sup> For discussion, see *infra* note 103 and accompanying text.

<sup>31</sup> See *infra* note 109 and accompanying text.

<sup>32</sup> See *supra* note 21 and accompanying text.

<sup>33</sup> 134 S. Ct. 1811, 1828 (2014).

<sup>34</sup> See *Engel v. Vitale*, 370 U.S. 421, 424 (1962) (“We think that by using its public school system to encourage recitation of the Regents’ prayer, the State of New York has adopted a practice wholly inconsistent with the Establishment Clause.”).



sequenced, tiered-scrutiny framework. Within such a regime, strict scrutiny, intermediate scrutiny, or rational basis review would supplant the ultimate tests of constitutional validity that the Court has articulated within the various categories that I just distinguished. Yet the categories and the principles that the Court has established in constructing them would retain the important function of defining diverse rights or interests that the Establishment Clause presumptively protects, any infringement of which would trigger judicial scrutiny of a specified level. To be slightly more concrete, within an analytically sequenced, tiered-scrutiny regime, there would be different triggers for the application of elevated scrutiny in cases respectively involving governmental expenditures to support religion, exemptions of religiously motivated conduct from otherwise applicable duties, symbolic support for religion, and religion in the public schools. For example, we could recognize that the Establishment Clause creates a presumptively protected right or interest in not having tax dollars expended on a non-neutral basis to support religious activities, but that it does not generate a comparable, presumptively protected right to government neutrality with respect to matters of symbolic support. We could also recognize, as we should, that the Establishment Clause creates presumptive rights not to be classified on the basis of religion for purposes of determining one's statutory obligations or entitlements to benefits.

Overall, an analytically sequenced, tiered-scrutiny doctrinal structure would encourage recognition and embrace of the multifarious values that the Establishment Clause protects. At the same time, it would force acknowledgment that sufficiently important governmental interests might sometimes justify infringements of presumptively protected rights—for example, if the government has a compelling interest in employing religious classifications to exempt believers from generally applicable laws in order to facilitate their free exercise of religion in some ways or under some circumstances.<sup>35</sup> To expect that all Establishment Clause issues and problems could be governed by a few elegant substantive principles that would cut across the categories that I outlined above is procrustean if not delusional.

The second major anomaly in Establishment Clause doctrine involves standing. The Establishment Clause has generated a unique body of standing law that, ironically, is often misaligned with reigning substantive principles.<sup>36</sup>

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<sup>35</sup> For an argument to this effect, see *infra* notes 227–251 and accompanying text.

<sup>36</sup> To date, the interconnections between standing and merits tests have drawn less scholarly attention than one might expect, but have not been wholly ignored. For discussions of standing in the context of the Establishment Clause, see Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 34–35 (1998) (“Of interest here is the Court’s general refusal to grant standing in instances of structural violations that result in no ‘injury in fact.’”); Richard W. Garnett, *Standing, Spending, and Separation: How the No-Establishment Rule Does*

Under other constitutional provisions, the Supreme Court has held that taxpayers have no standing to complain about allegedly unconstitutional taxing and spending programs.<sup>37</sup> In *Flast v. Cohen*, the Court carved out an exception for taxpayer standing to challenge governmental spending under the Establishment Clause.<sup>38</sup> Nearly fifty years later, *Flast* remains a doctrinal lynchpin. But the Court has sharply limited its reach, without explaining clearly how standing determinations relate to substantive analysis of the rights and interests that the Establishment Clause protects.<sup>39</sup> In an effort to bring Establishment Clause standing more nearly into line with general standing principles, the Court ruled in *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.* that “the psychological consequence presumably produced by observation of conduct with which one disagrees . . . is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms.”<sup>40</sup>

The misalignment between merits and standing doctrine emerges when one presses the question of how the Supreme Court could have thought standing justified in a number of its leading Establishment Clause cases, including some in which it has found constitutional violations. Consider, for example, cases in which it has ruled on constitutional challenges to governmental displays of religious symbols, such as crèches and the Ten Commandments, most frequently without any discussion of standing.<sup>41</sup> In

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(and Does Not) Protect Conscience, 54 VILL. L. REV. 655, 672 (2009) (arguing that “*Flast* was wrongly decided” based on a correct understanding of the substantive values that the Establishment Clause protects); Ira C. Lupu & Robert W. Tuttle, *Ball on a Needle: Hein v. Freedom from Religion Foundation, Inc. and the Future of Establishment Clause Adjudication*, 2008 B.Y.U. L. REV. 115, 120 (2008) (“Under the broad standing doctrines that have governed for the past several decades, the gap between substance and justiciability is relatively narrow.”); William P. Marshall & Gene R. Nichol, *Not a Winn-Win: Misconstruing Standing and the Establishment Clause*, 2011 SUP. CT. REV. 215, 215 (2011) (“In no line of cases over the past half-century has the Supreme Court so directly faced the tension between constitutional accountability and jurisdictional traditions of personal harm as in the taxpayer standing decisions under the Establishment Clause.”); Richard C. Schragger, *The Relative Irrelevance of the Establishment Clause*, 89 TEX. L. REV. 583, 599 (2011) (discussing federal courts’ avoidance of utilizing the nonendorsement norm when considering standing under the Establishment Clause).

<sup>37</sup> See *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 347-49 (2006) (acknowledging a “general prohibition on taxpayer standing”).

<sup>38</sup> 392 U.S. 83, 88 (1968).

<sup>39</sup> See *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 130 (2011) (distinguishing and refusing to extend *Flast*); *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 593 (2007) (same); *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 489-90 (1982) (same).

<sup>40</sup> 454 U.S. at 485-86.

<sup>41</sup> See, e.g., *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1816-17 (2014) (religious invocations at public meetings of town board); *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 851-52 (2005) (Ten Commandments display); *Van Orden v. Perry*, 545 U.S. 677, 681 (2005) (plurality opinion) (Ten Commandments display); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 758, 770

light of the straitening of taxpayer standing and the forceful rejection of standing based on psychological harm in *Valley Forge*, one might puzzle about who has suffered exactly what cognizable injury. Lower courts that have had to struggle with such questions have exhibited division and perplexity.<sup>42</sup> Adding to the fog, the Supreme Court has suggested that there might be some Establishment Clause violations that literally no one has standing to challenge.<sup>43</sup>

In order to bring substantive principles and standing doctrine under the Establishment Clause into a rational, functionally workable equilibrium, the Supreme Court needs to acknowledge the necessary interconnections between merits and standing inquiries. Only confusion can come from a failure—which both the Supreme Court and academic commentators have often exhibited—to keep merits and standing issues simultaneously in view.<sup>44</sup> On the surface, taxpayer standing to challenge federal and state governmental expenditures in Establishment Clause cases may appear anomalous, because comparable taxpayer standing does not exist under other constitutional provisions.<sup>45</sup> But that anomaly is more apparent than real: the only genuine anomaly is a mismatch between substantive and standing doctrines. Throughout constitutional law, what counts as an injury adequate to support standing should vary with the evils that a particular provision affords

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(1995) (cross erected on public property by the Ku Klux Klan); *County of Allegheny v. ACLU*, 492 U.S. 573, 589-94 (1989) (crèche); *Lynch v. Donnelly*, 465 U.S. 668, 672-73 (1984) (crèche). For a review of the standing analysis, or lack thereof, in these cases, see generally Ashley C. Robson, *Measuring a "Spiritual Stake": How to Determine Injury-in-Fact in Challenges to Public Displays of Religion*, 81 *FORDHAM L. REV.* 2901, 2925-28 (2013).

<sup>42</sup> See David Spencer, Note, *What's the Harm? Nontaxpayer Standing to Challenge Religious Symbols*, 34 *HARV. J. L. & PUB. POL'Y* 1071, 1082-92 (2011) (discussing the varied approaches that lower courts have adopted).

<sup>43</sup> See *Winn*, 563 U.S. at 145 (denying taxpayer standing to challenge tax credits for donations to religious education foundations but affirming that “[i]f an establishment of religion is alleged to cause real injury to particular individuals, the federal courts may adjudicate the matter”).

<sup>44</sup> This thesis largely accords with the analysis of William A. Fletcher, who argues that the question of standing is inseparable from the question of whether a particular party has a right to enforce the duties that a particular constitutional or statutory provision creates. *The Structure of Standing*, 98 *YALE L.J.* 221, 223-24 (1988).

<sup>45</sup> See *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 347 (2006) (citing plaintiffs’ concession that only Establishment Clause cases have offered standing for suits brought by federal taxpayers). The rule barring taxpayer standing to challenge expenditures applies to suits involving state and federal taxpayers but not to municipal taxpayers challenging municipal expenditures. See *Doremus v. Bd. of Educ.*, 342 U.S. 429, 433-34 (1952) (holding that a taxpayer can sue a municipality for misuse of spending); *Crampton v. Zabriskie*, 101 U.S. 601, 609 (1879) (“Of the right of resident taxpayers to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county or the illegal creation of a debt which they in common with other property-holders of the county may otherwise be compelled to pay, there is at this day no serious question.”); RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER, & DAVID L. SHAPIRO, *HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 127 & n.1 (7th ed. 2015) [hereinafter *HART & WECHSLER*] (citing *Everson v. Bd. Of Educ.*, 330 U.S. 1 (1947)).

protection against.<sup>46</sup> If the Establishment Clause creates a presumptively protected right not to be taxed to support establishments of religion, then taxpayers should have standing to complain about expenditures of tax dollars that benefit religious institutions or activities—even though it should be a further question whether some or all such expenditures ultimately violate the Clause. The same logic extends to other contexts. Across the board, the Court should recognize that infringements of interests that the Establishment Clause protects substantively will normally also confer standing on those whose interests are affected most directly.

In recommending a tiered-scrutiny regime to enforce the Establishment Clause and in calling for a realignment of standing doctrine and substantive principles, my methodology in this Article is, loosely speaking, doctrinalist and coherentist. I assume, though without attempting to prove, that evidence bearing on the original meaning of the Establishment Clause is too mixed and controverted to justify upsetting relatively settled understandings.<sup>47</sup>

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<sup>46</sup> See Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1070-77 (2015) [hereinafter Fallon, *Fragmentation*]; Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—and Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 690-704 (2006).

<sup>47</sup> Some commentators believe that the historical background reflected a shared understanding of protecting liberty of conscience, especially against governmental taxation to support religious institutions, and argue that the modern Court has strayed far from original meanings by seeking to enforce values of religious equality. See NOAH FELDMAN, *DIVIDED BY GOD* 235-49 (2005). Some insist that a central or even the sole purpose of the Establishment Clause was to bar federal governmental intermeddling in religion, including the state-supported churches that existed in seven of the original states. See, e.g., AKHIL REED AMAR, *THE BILL OF RIGHTS* 34 (1998); Steven D. Smith, *The Jurisdictional Establishment Clause: A Reappraisal*, 81 NOTRE DAME L. REV. 1843, 1891-93 (2006) (arguing that the founders intended to leave the issue of religion in the domain of the states). Others, however, adopt a broader view, partly in reliance on positions taken by James Madison and Thomas Jefferson, on whom Justice Black relied in *Everson*. See, e.g., JOHN WITTE, JR. & JOEL A. NICHOLS, *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT* 97 (4th ed. 2016) (asserting that “[r]ead in historical context” the Religion Clauses “can be seen to ‘embody’—to ‘incorporate’—multiple expressions of the essential rights and liberties of religion,” including “religious equality” and “separation of church and state”). Further complexities and controversies surround the issue of which Establishment Clause guarantees, if any, the Fourteenth Amendment “incorporated” against the states. In *Elk Grove Unified School District v. Newdow*, Justice Thomas, concurring in the judgment, maintained that the Establishment Clause is “a federalism provision, which, for this reason, resists incorporation.” 542 U.S. 1, 45 (2004). Decades before, in *School District of Abington Township v. Schempp*, Justice Brennan sought to refute similar arguments by arguing that by the time of the Fourteenth Amendment’s ratification in 1868, the Establishment Clause had emerged and could be understood as a “co-guarantor” of religious liberty along with the Free Exercise Clause. 374 U.S. 203, 253-59 (1963) (Brennan, J., concurring). Professor Kurt Lash has reached similar but not identical conclusions. See, e.g., Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106, 1110, 1141-45 (1994) (discussing religious liberty in the context of military exemptions). In this Article, I take stands on none of these historical questions, except to affirm that, in light of historical uncertainty and subsequent practice, I do not believe that modern Establishment Clause questions should be resolved in exclusive reliance on any reasonably disputable claim about original constitutional meaning.

Rather than seeking to establish foundational historical or normative premises, I propose reforms that would better, less confusingly advance the most important commitments that Establishment Clause jurisprudence currently embodies. My doctrinal perspective, moreover, is insistently wide-angled. It seeks to draw insights by comparing Establishment Clause with free exercise, equal protection, and free speech doctrine.<sup>48</sup> I employ a similarly wide-angle approach in emphasizing connections between merits and standing issues.<sup>49</sup>

The Article unfolds in four main parts. Part I provides an overview of modern Establishment Clause doctrine, spanning both its merits and its standing dimensions. Part I also identifies an ordered structure of Establishment Clause cases and issues, but highlights conflict and disarray within that structure. Part II lays out general arguments supporting a tiered-scrutiny framework and a better integration of standing doctrine with substantive doctrine. Part III applies the general reform strategy developed in Part II to a catalogue of substantive issues under the Establishment Clause. Part IV advances specific reform proposals with respect to standing.

#### I. AN OVERVIEW OF MODERN DOCTRINE, ITS ANOMALIES, AND ITS CONFUSIONS

This Part provides an opinionated, introductory survey of Establishment Clause doctrine. It consists in large part of a map of disorder. The anomalies and confusions that this Part charts, involving both substantive and standing issues, will generate and structure the reform agenda that subsequent Parts pursue.

In laying out modern Establishment Clause doctrine, this Part arrays the leading cases into four relatively familiar categories: (1) cases involving governmental financial assistance to religious institutions; (2) “accommodation” cases in which the government exempts religious institutions or religiously motivated actors from legal regulations that otherwise would forbid religiously required or compel religiously forbidden action; (3) “symbolic support” cases comprising such matters as crèches, Ten Commandments displays, and “In God We Trust” on the currency; and (4) cases concerning religion in the

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<sup>48</sup> For a discussion of parallels and divergences between Establishment Clause and equal protection doctrine, see Joy Milligan, *Religion and Race: On Duality and Entrenchment*, 87 N.Y.U. L. REV. 393, 394-97 (2012). For a partially analogous exploration of disparities between Free Exercise Clause doctrine and other bodies of constitutional law, see Frederick Mark Gedicks, *The Normalized Free Exercise Clause: Three Abnormalities*, 75 IND. L.J. 77, 81-84 (2000).

<sup>49</sup> Even some of the best and otherwise most comprehensive discussions—including KENT GREENAWALT, 2 RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS (2008), and HORWITZ, *supra* note 1—largely overlook standing issues and the connections between merits-based and standing analysis.

public schools.<sup>50</sup> In light of my emphasis in this Part on anomaly and confusion, I should point out that an important, implicit premise of the categorical scheme that I employ here will escape critique: I do not question that the categories that organize this Part successfully define and differentiate distinctive doctrinal problems. Moreover, as Part II will argue more explicitly, the four categories that I employ here are analytically helpful because they implicitly recognize the existence of distinctive rights or interests to which the Establishment Clause affords protection, or at least solicitude, of varying degrees. In short, diversity and multiplicity in Establishment Clause doctrine are endemic and ineradicable.

Because Establishment Clause cases have notoriously divided the Supreme Court, my review of the case law will sometimes focus on divisions among the Justices as well as on the positions that prevailed in leading decisions. In discussing divisions, I shall sometimes refer to “liberal” and “conservative” Justices.<sup>51</sup> Despite risks of oversimplification, this approach

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<sup>50</sup> For analogous classificatory arrangements, see DANIEL O. CONKLE, RELIGION, LAW, AND THE CONSTITUTION 191 (2016) (dividing the cases into “religion and the public schools,” “religious expression and symbolism in other public contexts,” and “public aid to religious schools, organizations, and individuals”); WITTE & NICHOLS, *supra* note 47, at 155 (categorizing cases as involving religion in the public schools, the place of government in religious schools, and “the place of religion in public life and public policy”); Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 156 (2004) (discussing the “three major lines of religious liberty cases: funding of religious organizations, regulation of religious practice, and sponsorship and regulation of religious speech”). I do not claim that absolutely all Establishment Clause cases fit into one of these categories. Consistent with that recognized limitation, I make no effort to analyze, or to prescribe frameworks for analyzing, other kinds of cases.

<sup>51</sup> What I call “liberals” largely correspond to what others have called “separationists.” See, e.g., HORWITZ, *supra* note 1, at 225–28; Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230, 231 (1994). According to Professor Horwitz:

Separationism . . . suggested that “religion should be private rather than public.” Second, it meant that any law that lacked a secular purpose was inconsistent with the Establishment Clause. Third, read broadly it prohibited a broad variety of common government actions that appeared to teach or endorse religion . . . . Fourth, . . . separationists argued that “[n]o tax in any amount, large or small,” could be used to support religion.

HORWITZ, *supra* note 1, at 227 (footnotes omitted). What I call “conservatives” approximate, though less closely, what Professor Horwitz calls “accommodationism”: “Accommodationists argue that the Establishment Clause is not violated by laws that attempt to make room for religious beliefs and observances that many people hold dear.” *Id.* at 228. The “conservative” view, as I understand it, also includes a reliance on “neutrality” to justify government support for religion in some contexts—for example, in the provision of financial assistance to religious institutions—but not in others. At a not terribly distant historical point, liberals tended to look sympathetically on demands for religious accommodation, but the political valence with regard to accommodation appears to have shifted in more recent years. See, e.g., Michael W. McConnell, *Justice Brennan’s Accommodating Approach Toward Religion*, 95 CAL. L. REV. 2187, 2187 (2007) (discussing Justice Brennan’s nuanced approach to balancing between free exercise rights and prohibition on the establishment of religion). The shift

will make it possible to identify points of confusion or inconsistency among frequently allied groups of Justices. This categorizing tactic will also aid my effort to craft reform proposals that may have different appeals to those who are categorized as holding generally liberal or conservative views. It should also promote recognition that the positions of both liberal and conservative Justices have displayed internal conflicts and inconsistencies. Neither camp offers a path to an attractive, coherent doctrinal future.

#### A. Cases Involving Material or Financial Support for Religion

All agree that a tax levied specifically to support a religious institution—however small the tax might be—would constitute a paradigmatic violation of the Establishment Clause.<sup>52</sup> Issues arise as the relationship between tax levies and support for religious institutions or practice becomes more attenuated, typically along one or both of two dimensions. First, most tax levies are general, not linked to the promotion of religion. Second, many governmental expenditures that benefit religious institutions also provide parallel support to secular organizations.

The two leading modern cases are *Mitchell v. Helms*<sup>53</sup> and *Zelman v. Simmons-Harris*.<sup>54</sup> Both make neutrality in distribution between religious and nonreligious beneficiaries—in the sense of making the same assistance available to both, without formal distinction<sup>55</sup>—a touchstone of constitutional permissibility under the Establishment Clause.<sup>56</sup> *Mitchell* upheld a federal program that loaned “secular, neutral, and non-ideological” educational

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appears to respond at least in part to exemptions of religious institutions and religiously motivated service providers from mandates to provide contraceptive coverage to women and from antidiscrimination norms otherwise applicable to same-sex weddings and surrounding celebrations. On the political and social context of disputes over religious accommodations, see Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839, 846.

<sup>52</sup> See, e.g., *Everson v. Bd. of Educ.*, 330 U.S. 1, 15-16 (1947).

<sup>53</sup> 530 U.S. 793 (2000).

<sup>54</sup> 536 U.S. 639 (2002).

<sup>55</sup> With regard to different possible senses of neutrality, see *supra* note 20.

<sup>56</sup> Earlier cases from the 1970s and 1980s had imposed a more complex and confusing pattern of restrictions on the provision of financial benefits to sectarian institutions. See, e.g., *Aguilar v. Felton*, 473 U.S. 402, 413-14 (1985) (finding a New York City program to provide remedial education in parochial schools unconstitutional due to the pervasively sectarian environment), *overruled by* *Agostini v. Felton*, 521 U.S. 203, 226-27 (1997) (holding that secular education could be funded even if it took place on sectarian premises provided that no sectarian indoctrination was permitted); *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 380-81 (1985) (striking down a city program to provide secular education funding for religious schools), *overruled in part by* *Agostini*, 521 U.S. at 235-36. For discussion of cases from the earlier era, see CONKLE, *supra* note 50, at 219-22. John C. Jeffries, Jr. and James E. Ryan ascribe the rulings during that era to a “pervasive secularism that came to dominate American public life, especially among educated elites” and trace subsequent changes to shifting political currents that have produced alliances among Catholics and evangelical Christians. *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 281 (2001).

materials to both public and private schools.<sup>57</sup> Speaking for a plurality of four, Justice Thomas wrote that in cases of this kind, “we have consistently turned to the principle of neutrality.”<sup>58</sup> He continued: “[I]f the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose, then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose.”<sup>59</sup> Concurring, Justice O’Connor would have added the requirement that governmental aid must not actually be used for religious purposes—as would happen if, for example, a church-affiliated school employed government-loaned materials in the teaching of religious dogma.<sup>60</sup>

*Zelman v. Simmons-Harris* upheld a school voucher scheme that provided low income parents with financial support for tuition at private schools.<sup>61</sup> The program allowed parents to cash the vouchers at religious as well as secular institutions. Although far more voucher recipients attended parochial than secular private schools,<sup>62</sup> the Court deemed it decisive that state money found its way to religiously affiliated institutions only as a result of private choice.<sup>63</sup> The majority saw no objection under the Establishment Clause when “neutral government programs . . . provide aid directly to a broad class of individuals, who, in turn, direct the aid to religious schools or institutions of their own choosing.”<sup>64</sup>

If we look for the basis for standing in challenges to governmental expenditures and other distributions of material aid that benefit religious institutions, the principal ground comes from *Flast*. In diverse contexts, the Supreme Court has affirmed that standing requires “injury in fact.”<sup>65</sup> And ordinarily, the Court has held, any purported injury that a taxpayer suffers

<sup>57</sup> 530 U.S. at 802 (plurality opinion) (quoting 20 U.S.C. § 7372(a)(1) (1994)).

<sup>58</sup> *Id.* at 809. Justice Thomas was joined by Chief Justice Rehnquist and Justices Scalia and Kennedy.

<sup>59</sup> *Id.* at 810 (citation omitted).

<sup>60</sup> *Id.* at 840 (O’Connor, J., concurring in the judgment).

<sup>61</sup> 536 U.S. 639, 644-48 (2002).

<sup>62</sup> Forty-six of fifty-six private schools participating in the Ohio program at the time of the litigation were religiously affiliated. *Id.* at 655.

<sup>63</sup> *Id.* at 649 (distinguishing between “government programs that provide aid directly” and “programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals”).

<sup>64</sup> *Id.*

<sup>65</sup> For cases explaining that establishing standing requires an injury in fact, a causal link between the injury and the action complained of, and a likelihood that the injury will be redressed by a favorable decision, see *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 134 (2011) (holding that plaintiffs did not have standing as tax payers when the state provided a tuition tax credit to private religious schools); *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) (holding that the Earth Island Institute did not have standing because no application of the relevant Forest Service regulations threatened imminent harm); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000) (holding that the environmental group plaintiffs still had standing, even after the defendant had come into compliance and ceased the relevant unlawful conduct).



from expenditures by the state or federal government does not suffice.<sup>66</sup> In *Flast*, the Court crafted an exception. Emphasizing the Establishment Clause's historic purpose of protecting taxpayers from being coerced to support a state-sponsored religion, *Flast* predicated taxpayer standing on the satisfaction of a "double nexus" test: "First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked . . . . Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged."<sup>67</sup> On the facts before it, the *Flast* Court found that the link between taxpayer status and exercises by Congress of the taxing and spending power met the first requirement.<sup>68</sup> The second nexus, the Court held, existed between taxpayer status and the Establishment Clause.<sup>69</sup>

Recent decades have witnessed recurring battles aimed at limiting *Flast* if not overthrowing it entirely. The first broadside came in *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, which held that the respondents lacked standing as taxpayers to challenge the donation of surplus federal property to a church college.<sup>70</sup> According to the majority, "*Flast* limited taxpayer standing" to challenges to enactments under the Taxing and Spending Clause.<sup>71</sup> Because the legislation that underlay the challenged conveyance in *Valley Forge* was "an evident exercise of Congress' power under" a clause authorizing it to "dispose of" federal property, *Flast* did not apply.<sup>72</sup>

In *Hein v. Freedom from Religion Foundation, Inc.*, taxpayers challenged a number of federal executive actions that, they said, violated the Establishment Clause by expending public funds to promote religious community groups over secular ones.<sup>73</sup> Justice Alito's plurality opinion—for himself, Chief Justice Roberts, and Justice Kennedy—distinguished *Flast* on the ground that the expenditures at issue did not occur pursuant to any particular act of Congress appropriating money for religious groups or purposes, but instead stemmed from executive action.<sup>74</sup> The other six Justices all thought *Flast* indistinguishable. Justices Scalia and Thomas would have

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<sup>66</sup> See, e.g., *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 348 (2006) (distinguishing *Flast* and affirming "the principle, underlying the Article III prohibition on taxpayer suits, that a litigant may not assume a particular disposition of government funds in establishing standing").

<sup>67</sup> 392 U.S. 83, 102 (1968).

<sup>68</sup> *Id.* at 103-06.

<sup>69</sup> *Id.*

<sup>70</sup> 454 U.S. 464, 482 (1982).

<sup>71</sup> *Id.* at 479.

<sup>72</sup> *Id.* at 480, 466 (quoting U.S. CONST. art. IV, § 3, cl. 2 ("The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States . . . .")).

<sup>73</sup> 551 U.S. 587, 592 (2007).

<sup>74</sup> *Id.* at 605 (plurality opinion).

overruled *Flast*.<sup>75</sup> Four dissenting Justices maintained that “[w]hen executive agencies spend identifiable sums of tax money for religious purposes, no less than when Congress authorizes the same thing, taxpayers suffer injury.”<sup>76</sup>

Most recently came *Arizona Christian School Tuition Organization v. Winn*,<sup>77</sup> in which the Court found that a taxpayer lacked standing to challenge a scheme of dollar-for-dollar tax credits for donations to organizations that support religious schools. A “tax credit is not tantamount to a religious tax or to a tithe and does not visit the injury identified in *Flast*,” Justice Kennedy reasoned for a 5-4 majority.<sup>78</sup>

Following *Valley Forge*, *Hein*, and *Winn*, one might wonder whether *Flast* hangs by a thread. So far, however, only Justice Thomas and the late Justice Scalia have explicitly stated that *Flast* should be overruled.<sup>79</sup>

Nonetheless, a puzzle remains. If we look back at cases in which the Court’s conservative Justices applied their neutrality test to uphold statutes providing material benefits to religious organizations and activities, it is not clear on what basis Justices Scalia and Thomas would have thought that the challengers had standing. If not as taxpayers, then how? Strikingly, the Court made no mention of standing in either *Zelman v. Simmons-Harris* or *Mitchell v. Helms*.<sup>80</sup>

In contrast with the Justices who view *Flast* skeptically, the liberal Justices would presumably think standing obvious in cases such as *Zelman* and *Mitchell* based on *Flast*’s authority. With regard to the merits, however, the liberals dissented in both cases.<sup>81</sup> Their preferred tests for gauging governmental expenditures that violate the Establishment Clause have tended to be relatively fact-specific, focused on the nature and extent of the benefit that religious institutions derive from facially neutral programs.<sup>82</sup>

<sup>75</sup> *Id.* at 637 (Scalia, J., joined by Thomas, J., concurring in the judgment).

<sup>76</sup> *Id.* at 639 (Souter, J., dissenting).

<sup>77</sup> 563 U.S. 125, 130 (2011).

<sup>78</sup> *Id.* at 142-43.

<sup>79</sup> *Id.* at 146-47 (Scalia, J., concurring). Justice Kennedy, who joined the *Hein* plurality, wrote separately to affirm his commitment to *Flast*. See *Hein*, 551 U.S. at 615-16 (Kennedy, J., concurring).

<sup>80</sup> In *Zelman*, the Court noted in passing that the respondents were “taxpayers,” which may have been shorthand for finding standing under *Flast*. *Zelman v. Simmons-Harris*, 536 U.S. 639, 648 (2002). The plurality opinion in *Mitchell* said *nothing* about the identity of the respondents, see *Mitchell v. Helms*, 530 U.S. 793, 803 (2000) (plurality opinion), although Justice Souter mentioned in dissent that one of the respondents was a parishioner and parent who objected to the provision of government aid to her parish school. *Id.* at 902 n.20, 913 & n.30 (Souter, J., dissenting).

<sup>81</sup> *Zelman*, 536 U.S. at 684 (Stevens, J., dissenting); *id.* at 686 (Souter, J., dissenting); *id.* at 717 (Breyer, J., dissenting); *Mitchell*, 530 U.S. at 867 (Souter, J., dissenting). Justice Breyer broke with the dissenting liberal Justices in *Mitchell* to join Justice O’Connor’s concurrence in the judgment, despite dissenting in *Zelman*. See *infra* note 205 and accompanying text.

<sup>82</sup> See, e.g., *Zelman*, 536 U.S. at 726-28 (Breyer, J., dissenting) (distinguishing school vouchers “in both *kind* and *degree* from aid programs upheld in the past” under the Establishment Clause); *Mitchell*, 530 U.S. at 869 (Souter, J., dissenting) (“[T]he Court has isolated no single test of

### B. Accommodation Cases

The second category of Establishment Clause cases involves government attempts to accommodate religious institutions or religiously motivated individuals by carving out exceptions from generally applicable laws. The Supreme Court has given a wide but not unlimited berth to such endeavors. *Cutter v. Wilkinson*<sup>83</sup> unanimously upheld the Religious Land Use and Institutionalized Persons Act (RLUIPA), which provides that “[n]o government shall impose a substantial burden on the religious exercise of a person residing . . . in an institution” unless the burden furthers “a compelling governmental interest” and does so by “the least restrictive means.”<sup>84</sup> In rejecting a facial challenge, Justice Ginsburg’s opinion emphasized that RLUIPA “alleviates exceptional government-created burdens on private religious exercise” and “take[s] adequate account of the burdens a requested accommodation may impose on non-beneficiaries.”<sup>85</sup> Although *Cutter* can surely be reconciled with prior authorities, it leaves a number of matters unexplained, including when and to what extent third-party burdens matter to judicial analysis. In 1985, *Thornton v. Caldor, Inc.* imposed a limit on the accommodations that the Establishment Clause will tolerate by invalidating a Connecticut mandate “that those who observe a Sabbath any day of the week as a matter of religious conviction must be relieved of the duty to work on that day, no matter what burden or inconvenience this imposes on the employer or fellow workers.”<sup>86</sup> Two years later, however, in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*,<sup>87</sup> the Court upheld an amendment to the 1964 Civil Rights Act that exempts religious organizations from the Act’s prohibitions against employment discrimination on the basis of religion. In *Amos*, the Court found it acceptable that a religiously disfavored employee lost his job as a result of the exemption.<sup>88</sup>

Among the other issues with which the leading cases fail to come convincingly to grips is the conflict framed by attempted accommodations that require the government to classify people and institutions based on their religious beliefs. If statutes that classify people based on their religious beliefs, and accordingly subject them to disparate treatment, were challenged under either freedom of thought and association principles that inhere in the

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constitutional sufficiency . . . . Particular factual circumstances control, and the answer is a matter of judgment.”).

<sup>83</sup> 544 U.S. 709, 714 (2005).

<sup>84</sup> 42 U.S.C. § 2000cc-1(a) (2012).

<sup>85</sup> *Cutter*, 544 U.S. at 720.

<sup>86</sup> 472 U.S. 703, 708-09 (1985).

<sup>87</sup> 483 U.S. 327, 330 (1987).

<sup>88</sup> *Id.* at 338-39.

Free Speech Clause<sup>89</sup> or under the equal protection principles that mark classifications along religious lines as “suspect,”<sup>90</sup> Supreme Court precedents would suggest that elevated scrutiny ought to apply.<sup>91</sup> Under the Establishment Clause, too, one might think religious accommodation statutes could best be justified—if and when they are justifiable—on the ground that the accommodations are closely tailored to a compelling governmental interest. Yet the Supreme Court appears never expressly to have adopted such an approach under the Establishment Clause.

To date, standing has never emerged as an issue in Supreme Court cases challenging exceptions to otherwise applicable regulations for religiously motivated people and activities. In all of the leading decisions, the challenger has suffered a palpable harm, such as the denial of an accommodation or the financial burden of needing to accommodate someone else’s wish to engage in religiously motivated activities.<sup>92</sup> But standing to challenge accommodation statutes might be less than obvious in other, imaginable cases—for example, if someone alleged that draft exemptions for religiously motivated conscientious objectors increased her chances of being conscripted.

### C. Cases Involving Nonmaterial, Symbolic Support for Religion

A third, recurrently important category of Establishment Clause cases involves governmental provision of symbolic support for religion by, for example, displaying religious symbols or asserting religious messages. The Court’s decisions within this category form a variegated pattern. By closely divided votes in every instance, the Court upheld a crèche display in *Lynch v. Donnelly*,<sup>93</sup> when the crèche stood alongside other holiday symbols that included reindeer, a teddy bear, and hundreds of colored lights,<sup>94</sup> but invalidated a crèche display in *County of Allegheny v. American Civil Liberties*

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<sup>89</sup> See, e.g., *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958) (“[S]tate action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny”).

<sup>90</sup> See *supra* notes 15–17 and accompanying text.

<sup>91</sup> See *Emp’t Div. v. Smith*, 494 U.S. 872, 886 n.3 (1990) (summarizing equal protection and free exercise precedents and concluding that “[j]ust as we subject to the most exacting scrutiny laws that make classifications based on race . . . or on the content of speech . . . so too we strictly scrutinize governmental classifications based on religion.”).

<sup>92</sup> See, e.g., *Cutter v. Wilkinson*, 544 U.S. 709, 725 (2005) (challenging limitations on prisoners’ ability to engage in religious exercise); *Amos*, 483 U.S. at 339 (challenging religiously-based employment discrimination); *Thornton v. Caldor, Inc.*, 472 U.S. 703, 709-10 (1985) (challenging burdens imposed by a statute granting employees the right to abstain from work on any day they designated as a religious Sabbath).

<sup>93</sup> 465 U.S. 668, 681 (1983).

<sup>94</sup> *Id.* at 671.

*Union Greater Pittsburgh Chapter*<sup>95</sup> when it stood alone.<sup>96</sup> The Court ruled that a public exhibition of the Ten Commandments violated the Establishment Clause in *McCreary County v. ACLU*,<sup>97</sup> but determined that a longer-standing Ten Commandments monument, in *Van Orden v. Perry*,<sup>98</sup> did not. The Justices long ago invalidated prayer in the public schools,<sup>99</sup> and have forbidden prayer at school graduation ceremonies,<sup>100</sup> but they have allowed prayer by legislative chaplains<sup>101</sup> and by invited clergy at the beginning of public meetings of town government.<sup>102</sup>

No cases have so far come before the Court involving what Justice Breyer has called “references to, and invocations of, the Deity in the public words of public officials; the public references to God on coins, decrees, and buildings; [and] the attention paid to the religious objectives of certain holidays, including Thanksgiving.”<sup>103</sup> These practices are an obvious source of discomfiture for judicial liberals, who have often professed adherence to the three-part test of *Lemon v. Kurtzman*, which deems a statute or policy invalid if it (1) lacks a “secular legislative purpose,” (2) has a “principal or primary effect” that either “advances [or] inhibits religion,” or (3) “foster[s] ‘an excessive government entanglement with religion.’”<sup>104</sup> William J. Brennan, who was the leading liberal Justice of his era, once explained uneasily that “such practices as the designation of ‘In God We Trust’ as our national motto, or the references to God contained in the Pledge of Allegiance to the flag can best be understood . . . as a form [of] ‘ceremonial deism,’ protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content.”<sup>105</sup> With regard to the prong of the *Lemon* test that requires statutes to have a secular purpose, Justice Brennan apparently proposed—at least for “ceremonial deism” cases—to disassociate statutory purposes from the subjective intent of the enacting legislature and to deem *Lemon* satisfied as long as a law or practice “serve[d] such wholly secular purposes as solemnizing public occasions, or inspiring commitment to meet some national challenge in a manner that simply could

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<sup>95</sup> 492 U.S. 573, 601 (1989).

<sup>96</sup> *Id.* at 579-81 (plurality opinion).

<sup>97</sup> 545 U.S. 844, 872-74 (2005).

<sup>98</sup> 545 U.S. 677, 688-90 (2005).

<sup>99</sup> *Engel v. Vitale*, 370 U.S. 421, 424 (1962).

<sup>100</sup> *Lee v. Weisman*, 505 U.S. 577, 593 (1992).

<sup>101</sup> *Marsh v. Chambers*, 463 U.S. 783, 788 (1983).

<sup>102</sup> *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1822-23 (2014).

<sup>103</sup> *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring in the judgment).

<sup>104</sup> 403 U.S. 602, 612-13 (1971) (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970)). In *Agostini v. Felton*, the Court recast the entanglement inquiry as part of the inquiry into a statute’s principal or primary effect. 521 U.S. 203, 232-33 (1997).

<sup>105</sup> *Lynch v. Donnelly*, 465 U.S. 668, 716 (1984) (Brennan, J., dissenting) (footnote omitted).

not be fully served in our culture if government were limited to purely non-religious phrases.”<sup>106</sup> In other cases, by contrast, Justice Brennan and other judicial liberals have understood the “purpose” prong of the *Lemon* test as contemplating inquiry into the actual, subjective, predominant intentions of the legislature at the time when it enacted a statute.<sup>107</sup>

With all of these cases in mind, the conservative Justices have generally rejected the *Lemon* test and any glosses on it<sup>108</sup> as applied to symbolic establishment issues. In *County of Allegheny*, Justice Kennedy wrote for four conservatives in arguing that symbolic support for religion does not violate the Establishment Clause absent coercion or sustained one-sect proselytization.<sup>109</sup> In *Town of Greece v. Galloway*, he relied on historical practice in ruling that a town did not contravene the Establishment Clause by opening its board meetings with a prayer, which did not necessarily have to be nonsectarian.<sup>110</sup>

When one stands back to scan the gamut of symbolic support cases, no clear test of constitutional validity emerges. In addition to the approaches that I have described already, several cases have adopted a suggestion by Justice O’Connor and held that a statute has a principal or primary effect of promoting religion—and thus fails the *Lemon* test—if a reasonable, objective observer would view its purpose as one of endorsing religion.<sup>111</sup> I shall say more about this test below. The Court’s opinions in several leading cases have eschewed reliance on any general test at all.<sup>112</sup>

In addition, standing once again presents puzzles. Consider the conservative Justices’ conclusion in *County of Allegheny* that “the permanent erection of a large Latin cross on the roof of city hall” would violate the Establishment Clause “because such an obtrusive year-round religious display would place the government’s weight behind an obvious effort to proselytize on

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<sup>106</sup> *Id.* at 717.

<sup>107</sup> See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 59-60 (1985) (invalidating a statute authorizing a period of silence in all public schools “for meditation or voluntary prayer” based on evidence of subjective legislative intent to promote prayer).

<sup>108</sup> For a description of a proposed gloss that would use the perspective of objective observer to measure a statute’s principal or primary effect, see *infra* note 111. On conservatives’ rejection of that proposed gloss, see *infra* notes 269–71 and accompanying text.

<sup>109</sup> *County of Allegheny v. ACLU*, 492 U.S. 573, 661 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part).

<sup>110</sup> 134 S. Ct. 1811, 1822 (2014).

<sup>111</sup> See, e.g., *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 862 (2005) (upholding the examination of legislative purpose as part of the *Lemon* test but equating purpose with the perceptions of a “reasonable observer”); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (quoting *Wallace* that it is relevant to ask “whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement” of religion).

<sup>112</sup> See *supra* note 11.

behalf of a particular religion.”<sup>113</sup> Despite the conservatives’ acknowledgement that a violation would occur, one wonders who, if anyone, they thought would have standing to sue to terminate the violation—especially if, for example, a private group bought and installed the cross, so that taxpayer standing would not exist.

The Court’s opinions give no guidance concerning this question. Remarkably, in most of the symbolic speech cases that have reached the Supreme Court, the Justices’ opinions have not referred to standing.<sup>114</sup>

#### D. *Religion in the Public Schools*

In pathbreaking cases decided during the 1960s, the Supreme Court held that officially sponsored prayer<sup>115</sup> and Bible-reading<sup>116</sup> in the public schools violated the Establishment Clause. One could imagine that the conservative majority that decided *Town of Greece v. Galloway* would want to reconsider the school prayer decisions. But apart from Justice Thomas, who questions whether the Establishment Clause should apply to state and local governments at all,<sup>117</sup> the conservative Justices have not contested the principle—traceable to the school prayer cases—that the government must not employ its coercive power to compel school attendance to inculcate religious belief in impressionable young people.<sup>118</sup> In *Santa Fe Independent School District v. Doe*, a 6-3 majority affirmed that the Establishment Clause forbids “government speech endorsing religion” in the public schools.<sup>119</sup>

Nevertheless, the Justices have divided repeatedly about that principle’s proper application. To enforce the requirement of non-endorsement of religion in public education, liberals—for so long as they had five votes—often relied on the *Lemon* test to invalidate legislation or policies based on forbidden governmental purposes. They did so, for example, in *Wallace v. Jaffree*, which struck down a state statute authorizing a moment of silence “for meditation or voluntary prayer” on the ground that the statute had a forbidden purpose

<sup>113</sup> 492 U.S. 573, 661 (Kennedy, J., concurring in the judgment in part and dissenting in part).

<sup>114</sup> See *supra* note 41 and accompanying text.

<sup>115</sup> *Engel v. Vitale*, 370 U.S. 421, 424 (1962).

<sup>116</sup> *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 226-27 (1963).

<sup>117</sup> See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 49-50 (2004) (Thomas, J., concurring in the judgment) (arguing that “the Establishment Clause is best understood as a federalism provision—it protects state establishments from federal interference but does not protect any individual rights”—and that it therefore makes little sense to treat it as “incorporated” and enforceable against state and local governments).

<sup>118</sup> See, e.g., *Lee v. Weisman*, 505 U.S. 577, 643 (1992) (Scalia, J., dissenting) (observing that “school prayer occurs within a framework in which legal coercion to attend school (*i.e.*, coercion under threat of penalty) provides the ultimate backdrop” and that “the classroom is inherently an instructional setting”).

<sup>119</sup> 530 U.S. 290, 302 (2000).

of promoting religion.<sup>120</sup> The Court reached a similar conclusion, in *Edwards v. Aguillard*, concerning a statute providing that if public school teachers taught evolution, they must also present the alternative theory of “creation science.”<sup>121</sup> By contrast, conservatives have relatively consistently excoriated the *Lemon* test, as much in school cases as in others.

In more recent years, a more conservative Court has frequently drawn a line between pro-religious speech that occurs within the educational program pursuant to government sponsorship—and remains forbidden—and private speech occurring within school facilities.<sup>122</sup> Pursuant to this distinction, the Justices have upheld programs and statutes that grant religious groups and speakers the same after-school access to school facilities as their secular counterparts.<sup>123</sup> Liberals have often dissented, protesting that impressionable school children would perceive religious speech and activities on school premises as carrying the government’s imprimatur.<sup>124</sup>

In the important case of *Lee v. Weisman*,<sup>125</sup> Justice Kennedy split from his characteristic conservative allies to join four liberal Justices in holding that prayer by a clergyman at a public school graduation ceremony violated the Establishment Clause due to coercive aspects of the setting. Impressionable students, he reasoned, would experience “public pressure, as well as peer pressure . . . to stand as a group or, at least, maintain respectful silence during the invocation and benediction.”<sup>126</sup> In his judgment, “[t]his pressure, though subtle and indirect, can be as real as any overt compulsion.”<sup>127</sup> The other conservative Justices responded derisively to Justice Kennedy’s finding of coercion.<sup>128</sup> But they did not doubt that school-sponsored prayer would violate the Establishment Clause if it occurred within a school’s instructional program.<sup>129</sup>

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<sup>120</sup> 472 U.S. 38 (1985).

<sup>121</sup> 482 U.S. 578, 597 (1987).

<sup>122</sup> See *Santa Fe Ind. Sch. Dist.*, 530 U.S. at 302.

<sup>123</sup> See, e.g., *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (holding that the denial of school room use to a private religious organization amounted to unconstitutional discrimination against religion); *Bd. of Educ. v. Mergens ex rel. Mergens*, 496 U.S. 226 (1990) (enforcing a public school’s statutory obligation not to discriminate against a Christian student club and finding that the mandate did not violate the Establishment Clause).

<sup>124</sup> See, e.g., *Good News Club*, 533 U.S. at 142-43 (Souter, J., dissenting) (emphasizing “the particular impressionability of schoolchildren” and calling for “special protection . . . for those in the elementary grades” from religious indoctrination).

<sup>125</sup> 505 U.S. 577 (1992).

<sup>126</sup> *Id.* at 593.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 642 (Scalia, J., dissenting) (“I see no warrant for expanding the concept of coercion beyond acts backed by threat of penalty—a brand of coercion that, happily, is readily discernible to those of us who have made a career of reading the disciples of Blackstone rather than of Freud.”).

<sup>129</sup> *Id.* at 643.



In only one case involving religion in the public schools has the Court divided about standing. In *Elk Grove Unified School District v. Newdow*, the Court held, by 5 to 3, that the father of a schoolchild lacked “prudential” standing to challenge a daily classroom recitation of the Pledge of Allegiance, which since 1954 has included the words “under God.”<sup>130</sup> Because the girl’s mother opposed the action, Newdow, as a matter of California law, could not sue as his daughter’s representative, but only on his own behalf.<sup>131</sup> Under the circumstances, the Court’s majority asserted a discretionary prerogative to dismiss the action for want of standing in order to avoid interference with relations governed by California family law.<sup>132</sup> Dissenting from that ruling, Chief Justice Rehnquist argued that the Court had misapplied prudential standing principles. In his view, the Court should have decided the case on the merits after upholding Article III standing based on a cognizable injury to the father’s state-recognized “right to influence his daughter’s religious upbringing.”<sup>133</sup> For the majority, Justice Stevens did not dispute that the father had suffered an injury adequate to permit standing under Article III if prudential considerations had not warranted dismissal.<sup>134</sup>

In none of its leading cases has the Court ever questioned the standing of a student, when suing on her own behalf, to object to being subjected to religious teaching or unwanted attempts at religious influence in the public schools. Recalling the conservative Justices’ skepticism of claims of injury in other contexts, one again might wonder why. One possibility is that student standing rests on plausible allegations of injury resulting from coercion—even if no coercion is ultimately found to exist. But the Court, without conservative objections to the plaintiffs’ standing, has ruled on cases in which the only plausible claim of coercion involved coerced exposure (through required school attendance) to governmental endorsement of religion. In *Stone v. Graham*, for example, the Court invalidated a state statute that called for public schools to display copies of the Ten Commandments paid for by private funds, even though the law did not require students to do or say anything.<sup>135</sup>

#### E. *Concluding Observations*

Overall, the existing scheme of Establishment Clause doctrine reveals disarray along multiple dimensions. Although the prevailing confusion has many

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<sup>130</sup> 542 U.S. 1, 17-18 (2002).

<sup>131</sup> *Id.* at 15-16.

<sup>132</sup> *Id.* at 17-18.

<sup>133</sup> *Id.* at 23 (Rehnquist, C.J., concurring in the judgment).

<sup>134</sup> *Id.* at 18 n.8 (“Even if [Newdow’s] arguments suffice to establish Article III standing, they do not respond to our prudential concerns.”).

<sup>135</sup> 449 U.S. 39 (1980).

contributing causes, two related factors stand out. The first is over-ambition by shifting coalitions of Justices in seeking to unify Establishment Clause doctrine pursuant to a master, substantive test or principle that can apply trans-categorically. The *Lemon* test, which purports to ban all statutes and policies with either the predominant purpose or primary effect of promoting religion, furnishes the best-known example. Even in its heyday, *Lemon* invited and possibly required evasion and manipulation—for example, in cases involving such historically entrenched practices as tax breaks for churches and many of the symbolic supports for religion that Justice Brennan sought to categorize under the heading of “ceremonial deism.”<sup>136</sup> Analogous proposals to order the entirety of Establishment Clause doctrine based on a general principle of non-coercion and condemnation of one-sect proselytization, coupled with a professedly absolute tolerance for other governmental aid to religion, seem similarly procrustean. Among other difficulties, conservatives have so far failed to align their acknowledgment that one-sect proselytization would violate the Establishment Clause with a satisfactory account of who would have standing to challenge “the permanent erection of a large Latin cross on the roof of city hall.”<sup>137</sup>

A second major contributor to doctrinal incoherence is a tendency by the Supreme Court to craft Establishment Clause doctrine without taking a sufficiently wide-angle view of the constitutional landscape. One vivid example involves the misalignment of merits and standing doctrines. Another resides in the Justices’ failure to draw lessons from doctrines in other constitutional domains that apply tiers of scrutiny and take account of governmental interests that can sometimes justify *prima facie* infringements of individual rights.

## II. ELEMENTS OF A STRATEGY FOR REFORM

This Part lays out a general, two-part strategy for the rehabilitation of Establishment Clause doctrine. One aspect proposes a scheme of analytically sequenced, tiered judicial scrutiny analogous to that used to enforce the Free Speech, Free Exercise, Due Process, and Equal Protection Clauses. This proposal is bold in one respect: tiered scrutiny plays no visible role under current Establishment Clause law. But my suggestion is modest in another way: rather than starting from scratch, it calls for distilling the rights and interests that would trigger elevated judicial scrutiny from existing doctrinal categories. The other primary suggested reform involves the realignment of standing

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<sup>136</sup> See *supra* notes 105–06 and accompanying text.

<sup>137</sup> *County of Allegheny v. ACLU*, 492 U.S. 573, 661 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part).

doctrine in light of the rights and interests that the substantive components of Establishment Clause doctrine implicitly or explicitly recognize.

This Part focuses more on conceptual foundations than on doctrinal detail. Part III will offer specific recommendations for implementing the reform agenda that this Part lays out with regard to substantive Establishment Clause doctrine. Part IV will do the same with respect to standing.

A. *Embracing and Implementing a Regime of Sequenced, Tiered Judicial Scrutiny*

My proposal for a regime of analytically sequenced, tiered judicial scrutiny requires defense and elaboration along two main dimensions. First, I argue that there are important benefits to tiered review that analyzes presumptive violations of protected rights in light of potentially justifying governmental interests. Second, I offer an attractive, workable approach to identifying the presumptively protected rights or interests any infringement of which would call for more or less searching judicial review.

1. In Defense of Tiers and a Weighing of Governmental Interests

The case for an analytically sequenced, tiered scheme of judicial review begins with the premise that Establishment Clause cases—like those under the Free Speech, Equal Protection, Due Process, and Free Exercise Clauses—often present conflicts between competing values of fundamental constitutional significance. One example arises when the government classifies citizens on the basis of their religious beliefs for the purpose of sparing religious believers from needing to choose between breaching their religious duties and violating the secular law. On the one hand, religiously-based classifications pose dangers of division and unfairness that make such classifications suspect under the Equal Protection Clause.<sup>138</sup> On the other hand, the government has powerful reasons, rooted in free exercise values, to want to spare citizens the cruel choice of deciding whether to disobey either the government or their God.<sup>139</sup> Another example resides in longstanding practices of granting tax advantages and various forms of material assistance—which can range from police and fire protection to support for parochial schools—to churches or religious activities. In light of well-justified anxieties about taxation to support religious institutions, direct and indirect financial assistance ought to be regarded as threatening interests that the Establishment Clause protects. But sometimes such aid might be justified by sufficiently important governmental

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<sup>138</sup> See *supra* note 14 and accompanying text.

<sup>139</sup> See *infra* notes 232–61 and accompanying text.

interests—for example, in preventing crime or in ensuring that students who choose to attend parochial schools receive competent instruction in secular subjects.<sup>140</sup> Some, of course, would argue that there is no sufficiently important government interest in the latter of these two cases. Whatever one's view about the strength of the government's interest, my principal point is simply that a clash of values is involved that constitutional doctrine and judicial analysis ought to acknowledge and address openly.

As surveyed in Part I, Establishment Clause doctrine has never recognized that sufficiently important or compelling governmental interests could justify the infringement of presumptively protected rights.<sup>141</sup> But insistence that government interests have no role in determining the success of Establishment Clause claims is either dishonest or myopic, as on the disorderly doctrinal pattern that emerged from Part I conclusively attests. Existing law does not accord absolute protection to all interests grounded in the Establishment Clause, nor could it sensibly do so. If consideration of competing values does not occur on the surface of the doctrine, it manifestly happens beneath. And it would be unwarrantedly single-minded to exclude values that compete with Establishment Clause-based interests and concerns wholly from account.

Within constitutional law, value conflict is of course not unique to the Establishment Clause. There is, and should be, no single prevailing approach. But in other contexts that involve clashes of important constitutional values, the Supreme Court has evolved a framework of analytically sequenced, tiered judicial review that is designed to recognize the constitutional (and often the moral) complexity of collisions between genuinely fundamental rights, which ought not be lightly “balanced” away, and governmental interests of high importance.<sup>142</sup> That framework asks first whether a fundamental right is implicated or infringed. If so, it shifts the burden to the government to establish that a sufficiently compelling governmental interest justifies the challenged practice. In cases subject to “strict” judicial scrutiny, infringements of fundamental rights fail judicial review unless “necessary” or “narrowly tailored” to promote a “compelling” governmental interest.<sup>143</sup> A slightly weaker variant of analytically sequenced, tiered analysis is intermediate scrutiny, under which

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<sup>140</sup> See *infra* notes 203–26 and accompanying text.

<sup>141</sup> See *supra* notes 6–11 and accompanying text.

<sup>142</sup> See generally Fallon, *supra* note 2, at 1293–94 (explaining the historical emergence of “fundamental rights” protected by the “strict scrutiny” formula as “a restraint on the impulse to balance away civil liberties”).

<sup>143</sup> E.g. *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198, 2209–14 (2016); *Citizens United v. FEC*, 588 U.S. 310, 340 (2010); *Johnson v. California*, 543 U.S. 499, 505 (2005). For discussion of indeterminacies in this formula and vagaries in its application, see Fallon, *supra* note 2.

courts ask a question such as whether the infringement of a right is substantially related to important governmental interests.<sup>144</sup>

Although not perfect by anyone's lights, analytically sequenced, tiered scrutiny successfully highlights clashes of values and promotes nuanced analysis in cases involving arguably justifiable infringements of fundamental rights. An important indicator of the attractiveness of an analytically sequenced, tiered-scrutiny regime comes from comparisons of U.S. doctrine with the constitutional law of other nations. An emerging international consensus recognizes that the judicial protection of fundamental rights best follows a two-staged sequence, involving an initial determination of whether a right or interest is presumptively protected and, if so, a further inquiry into whether it must yield to sufficiently important countervailing interests. The Canadian Charter of Rights and Freedoms exemplifies this design when it states that "guarantees of the rights and freedoms set out in it [are] subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."<sup>145</sup> An even more prominent example of analytically sequenced judicial analysis involves the proportionality review that many liberal democracies—including a number of western European nations, post-Communist states in Central and Eastern Europe, Israel, South Africa, and New Zealand—use to enforce fundamental rights.<sup>146</sup> Under it, courts first ask whether fundamental rights have been restricted. If so, they apply a multifactor test to determine whether ultimate violations should be found.<sup>147</sup>

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<sup>144</sup> This is perhaps the most familiar formulation of an intermediate scrutiny test, introduced for cases involving gender discrimination in *Craig v. Boren*, 429 U.S. 190, 197 (1976) (invalidating a statute that established different drinking ages for men and women). For the most recent formulation in a case involving gender-based discrimination, emphasizing any disparity must have an "exceedingly persuasive" justification, see *Sessions v. Morales-Santana*, 137 S.Ct. 1678, 1690 (2017) (holding that a provision of the Immigration and Nationality Act violated equal protection by giving unmarried women a preference over unmarried men (and married couples) in conferring their U.S. citizenship on children born abroad). On alternative formulations of intermediate scrutiny tests in other doctrine contexts, see Fallon, *supra* note 2, at 1299-1301.

<sup>145</sup> Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

<sup>146</sup> See Jud Mathews & Alec Stone Sweet, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNATIONAL L. 72, 74 (2008) (describing the spread of proportionality analysis from Germany to other countries in Europe and beyond); see also Carlos Bernal Pulido, *The Migration of Proportionality Across Europe*, 11 N.Z. J. PUB. & INT'L L. 483, 499-500 (2013) (listing states where proportionality analysis has been adopted); Moshe Cohen-Eliya & Iddo Porat, *Proportionality and the Culture of Justification*, 59 AM. J. COMPARATIVE L. 463, 465 (2011) (documenting the spread of proportionality analysis).

<sup>147</sup> In its original German form, proportionality review consists of a three-stage analysis that asks whether (1) a legislative measure restricting basic rights is rationally related to a desired end, (2) the measure impairs the right or freedom in question as little as possible, and (3) an infringement of rights is proportionate to the desired objective. See Francis G. Jacobs, *Recent Developments in the*

The clarifying benefits of applying a sequenced, tiered-scrutiny regime to the Establishment Clause begin to emerge at the first step of analysis. The step-one question is whether a challenged governmental action comes within the “coverage,”<sup>148</sup> or the ambit of protective concern, of a constitutional provision such as the Establishment Clause. One could restate this question as whether the government has impinged on a presumptive constitutional right or a fundamental interest. This is an important inquiry, meant to identify fundamental rights or interests any infringement of which ought to occasion suspicion and trigger searching judicial review. As I shall emphasize below, not every alleged violation of the Establishment Clause should survive this threshold inquiry and thereby provoke elevated scrutiny. (To foreshadow a concrete example, some expressions of symbolic governmental support for religion, such as printing “In God We Trust” on the currency, should not be deemed to violate any presumptively protected rights.<sup>149</sup>)

If the step-one threshold is surmounted, analytically sequenced, tiered frameworks thrust a burden of justification onto the government to demonstrate that a challenged action or practice both serves important goals and minimizes harm to protected values or interests. Importantly, the step-two analysis calls for more than mere “balancing.” The demand for the government to justify its infringement on a right or interest by demonstrating close tailoring to a compelling (or in some cases an important) governmental interest takes seriously the fundamentality of the rights-based interests at stake.

Some may insist that the Establishment Clause demands an even more categorical analysis, partly because of its structural function in ensuring separation between secular government and religion. There is rhetorical power in the protest that the Constitution recognizes no possible justification for a practice that is properly deemed to be “an establishment of religion.”<sup>150</sup> But this formulation is either tautological or question-begging. Within an elevated scrutiny framework, the question is not whether an establishment of religion

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*Principle of Proportionality in European Law*, in THE PRINCIPLE OF PROPORTIONALITY IN THE LAWS OF EUROPE 1, 1 (Evelyn Ellis, ed., 1999); see also NICHOLAS EMILIOU, THE PRINCIPLE OF PROPORTIONALITY IN EUROPEAN LAW: A COMPARATIVE STUDY 268 (1996). Different jurisdictions now use somewhat varied protocols. See Vicki C. Jackson, *Being Proportional About Proportionality*, 21 CONST. COMMENTARY 803, 806-07 (2004) (book review). For a comparative discussion of proportionality doctrine as exercised in French, Belgian, Dutch, and British law, see Walter Van Gerven, *The Effect of Proportionality on the Actions of Member States of the European Community: National Viewpoints from Continental Europe*, in THE PRINCIPLE OF PROPORTIONALITY IN THE LAWS OF EUROPE 37, 37 (Evelyn Ellis, ed., 1999). For an exploration of the limited use of proportionality principles in U.S. constitutional law, see Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 2680 (2015).

<sup>148</sup> Schauer, *supra* note 3.

<sup>149</sup> See *infra* notes 262–83 and accompanying text.

<sup>150</sup> See Lupu & Tuttle, *supra* note 6, at 1276–77.

can be justified. It is whether a practice that exhibits certain hallmarks of an establishment of religion should ultimately be condemned as constituting one. The narrow tailoring of a particular practice to a compelling governmental interest would indicate that it is not an “establishment of religion” in the forbidden sense and ultimately violates no constitutional right.

As I have argued, moreover, any purported absolutism is almost inevitably more of a façade than a reality, due to the need to accommodate competing values. Historically entrenched practice and precedent further undermine arguments for rules that would dismiss otherwise compelling governmental interests as categorically irrelevant. It is both desirable, and ample, that step-one determinations that the government has infringed a fundamental right or interest under the Establishment Clause should shift the burden to the government to demonstrate that it has an unusually potent justification for doing so.

In touting sequenced, tiered scrutiny, I make no claim to offer a panacea. Especially in recent years, the Supreme Court has sometimes blurred the sharp lines between strict scrutiny and rational basis review, with a resulting diminution in those categories’ analytically structuring benefits.<sup>151</sup> In addition, the Supreme Court has never laid down rigorous criteria for the derivation of compelling governmental interests.<sup>152</sup> Nevertheless, schemes of sequenced, tiered scrutiny have endured because of their capacity to structure and discipline judicial judgment, and thereby to enable illuminating comparisons, even in the absence of algorithmic determinacy. In the context of the Establishment Clause, elevated judicial scrutiny—which recognizes the suspect character of certain governmental classifications, but permits them in cases of narrow tailoring to important interests—would invite a more appropriately honest and searching analysis than currently available doctrinal templates elicit.

## 2. Identifying Presumptively Protected Interests, Rights, and Values

Though sometimes daunting, the first-stage judicial inquiry into whether challenged governmental action infringes presumptively protected rights should not prove unmanageable under the Establishment Clause. To determine which rights or interests properly trigger elevated scrutiny, the Supreme Court should begin by excavating the presuppositions of the doctrinal categories that Part I surveyed. When carefully examined, those categories exhibit an immanent logic in defining distinctive rights and interests that require differentiated forms of judicial protection. However confused the patterns of Supreme Court decisions that Part I reviewed may

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<sup>151</sup> See *supra* note 5 and accompanying text.

<sup>152</sup> See Note, *Let the End Be Legitimate: Questioning the Value of Heightened Scrutiny’s Compelling- and Important-Interest Inquiries*, 129 HARV. L. REV. 1406, 1408-09 (2016).

appear on the surface, the leading cases embody articulable, sensible, and often compelling assumptions about guiding Establishment Clause interests and values, as reflected in judicially recognized rights. As Part I's doctrinal summary manifests, these include rights—which admittedly need to be better defined and delimited—(a) not to be taxed to support religion, (b) not to be classified and unreasonably disadvantaged on the basis of religion, (c) not to be symbolically demeaned or marginalized by governmental endorsement of religion, or coerced into participating in a religious exercise, and (d) not to be subjected to governmentally sponsored religious instruction or endorsement as an aspect of public education.

Among this category-based catalogue of rights—none of which is necessarily absolute in the face of competing governmental interests—the protected interest in not being taxed to support religion is easily, intuitively comprehensible and should command nearly universal assent. *Everson v. Board of Education*, which many commentators view as having initiated the modern era of Establishment Clause jurisprudence, said flatly that “[t]he ‘establishment of religion’ clause of the First Amendment means at least this: . . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions.”<sup>153</sup> Against the backdrop of history, this proclamation reflects a forceful, normatively attractive claim of individual right: the Establishment Clause protects each of us against being taxed or otherwise coerced to support a religion to which we do not subscribe.<sup>154</sup> The precise contours of this right may be in doubt (for example, in cases in which general tax revenues flow to churches among other institutions), but its core is not. One important rationalizing task—which Part III pursues in detail—is to define the relevant right and to determine the nature of the judicial protection that it deserves.

The right that is implicit in the second category of cases that Part I reviewed—not to be classified and unreasonably disadvantaged on the basis of religion—is also normatively compelling and derives from values of religious nonpreferentialism and equal citizenship.<sup>155</sup> Once again the exact scope of the right is uncertain and debatable. Throughout history, some

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<sup>153</sup> 330 U.S. 1, 15-16 (1947).

<sup>154</sup> See FELDMAN, *supra* note 47, at 41 (“In the debates that led up to the drafting and ratification of the First Amendment . . . all condemned use of coercive taxes to support religious institutions with which the taxpayer might disagree.”).

<sup>155</sup> See, e.g., CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 4-9 (2007); Steven H. Shiffrin, *The Pluralistic Foundations of the Religion Clauses*, 90 CORNELL L. REV. 9, 12-13 (2004) (“I will suggest that understanding the proper place of equality in religion clause jurisprudence requires appreciation of a broader range of values with regard to both religion clauses, and a recognition that this appreciation is itself independently important.”).



statutory and even constitutionally mandated accommodations—in the form of exemptions from otherwise applicable regulatory obligations—have existed.<sup>156</sup> In some instances, third parties have had to bear costs.<sup>157</sup> Nonetheless, a right not to be substantially burdened by religious classifications and benefits for others presumptively obtains, and for readily understandable reasons. Even in cases having nothing to do with taxation to support religion, history has shown religion-based classification to be dangerous.<sup>158</sup> When the government employs such classifications, it should, accordingly, bear a significant burden of justification.

The third kind of Establishment Clause right that emerges from a category-based analysis—not to be demeaned or marginalized on the basis of religion, and certainly not to be coerced into religious practice—requires more complex explication.<sup>159</sup> As a doctrinal matter, it seems incontrovertible that not all governmental expressions of symbolic support for religion infringe constitutionally protected interests or violate individual rights, no matter how acute the psychological sense of grievance that a particular plaintiff may feel.<sup>160</sup> Some uses of religious symbols, such as the engraving of “In God We Trust” on the currency, fall into a category of what Professor Greenawalt calls “mild endorsement” that the Supreme Court—

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<sup>156</sup> See, e.g., Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 NOTRE DAME L. REV. 1793, 1837 (2006) (“From the late seventeenth century to the present, there is an unbroken tradition of legislatively enacted regulatory exemptions. James Ryan, using a Lexis search and sampling techniques, estimated that there were 2000 religious exemptions on state and federal statute books in 1992.”).

<sup>157</sup> See, e.g., Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 329-30 (1987) (upholding an exemption of religious organizations from a prohibition against religious discrimination that resulted in an employee losing his job).

<sup>158</sup> David Cole, *Faith and Funding: Toward an Expressivist Model of the Establishment Clause*, 75 S. CAL. L. REV. 559, 577 (2002) (“Religious division is renowned throughout history”).

<sup>159</sup> Professor Feldman views such a right as lacking original historical support and traces its origins to *McCullum v. Board of Education*, 333 U.S. 203 (1948). FELDMAN, *supra* note 47, at 50-53, 177-82. Nonetheless, Professor Feldman characterizes the views that support this right as the modern “orthodoxy.” *Id.* at 201-03.

<sup>160</sup> Steven G. Gey argues strongly that there are no trivial constitutional violations. “*Under God, the Pledge of Allegiance, and Other Constitutional Trivia*,” 81 N.C. L. REV. 1865 (2003) (rejecting a triviality defense used in the wake of the Ninth Circuit’s decision that the inclusion of “under God” in the Pledge of Allegiance violated the Establishment Clause); see also *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 36-37 (2002) (O’Connor, J., concurring in the judgment) (“There are no *de minimis* violations of the Constitution—no constitutional harms so slight that the courts are obliged to ignore them.”). Although this claim may be true, it is a different question whether a particular provision of the Constitution confers judicially enforceable protection against a particular kind of asserted injury that can be categorized as *de minimis* as a matter of law. Cf. Laycock, *supra* note 50, at 235 (“The *de minimis* exception makes sense as a prudential judgment not to pay the costs of absolutist enforcement of an unpopular rule, but it is hard to make the line appear principled.”).

whether for better or for worse—plainly regards the Constitution as tolerating.<sup>161</sup>

Nevertheless, as I emphasized above, Establishment Clause doctrine also teaches that exhibitions of governmental support for religion violate individual rights in some cases. Moreover, the violations are not restricted to instances in which people are taxed to support a church or classified and subjected to disfavored treatment on account of their religious beliefs. An additional category comprises practices that have the practical effect of stigmatizing or marginalizing particular individuals based on their status as religious outsiders. The modern Supreme Court has repeatedly recognized as much, including in its sometime reliance on an “objective observer” test aimed at identifying practices that carry a message of outsider status to some members of the sponsoring community.<sup>162</sup> Establishment Clause interests and values become implicated when, as Justice O’Connor put it in *Lynch v. Donnelly*,<sup>163</sup> governmental actions have the symbolic effect of “send[ing] a message to nonadherents [of a favored religion] that they are outsiders.”<sup>164</sup> In sum, it is impossible to make sense of all of the decided cases without recognizing that the Establishment Clause creates rights against governmentally sponsored actions and displays that give rise to coercion, stigmatization, or marginalization in matters involving governmentally preferred religion. What is more, the values that would support recognition of such rights are inherent in ideas of equal citizenship and religious freedom.<sup>165</sup>

The fourth right that Part I implicitly identified—involving a right of children not to be subjected to governmental endorsement of religion in the coercive aspects of public school education, and of parents not to have their children socialized into religious belief through governmental endorsement of religion in the public schools—stands largely on its own bottom. The general right of parents to direct the upbringing of their children, which is

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<sup>161</sup> See GREENAWALT, *supra* note 49, at 101. As Greenawalt summarizes, “factors [that] are relevant” to the aptness of this characterization include “the inclusiveness of the view that is endorsed, historical pedigree, [and] the brevity of references to religion.” *Id.*

<sup>162</sup> See, e.g., *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308-10 (2000); *County of Allegheny v. ACLU*, 492 U.S. 573, 631 (1989) (O’Connor, J., concurring in part and concurring in the judgment).

<sup>163</sup> 465 U.S. 668 (1984).

<sup>164</sup> *Id.* at 688.

<sup>165</sup> Eisgruber and Sager ascribe to the Religion Clauses an “equal liberty” theory that forbids governmental action that demeans anyone based on his or her religious commitments, but that affirmatively protects religion only through a scheme of generally applicable rights that allow religion to flourish without characterizing religious practice or belief as especially deserving of solicitude. EISGRUBER & SAGER, *supra* note 155, at 4-9.

rooted in the Due Process Clause,<sup>166</sup> forms a part of the picture. Nevertheless, the Establishment Clause both generates independent rights in the children themselves and sharpens and buttresses parental rights. As the Court said in *Engel v. Vitale*, “the constitutional prohibition against laws respecting an establishment of religion 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.”<sup>167</sup> In addition, children who are frequently coerced into public school attendance should possess a right to be free of unwanted religious proselytization, and thus of possible subtle pressures to assimilate to majority norms, during school attendance and related activities.<sup>168</sup>

### B. *Aligning Standing and Merits Doctrine*

Sound analysis under the Establishment Clause requires an appreciation of how standing and substantive doctrine relate to one another. In thinking about standing as about substantive constitutional principles, analysis should begin with an appraisal of the rights or interests that the Establishment Clause protects, whether to a greater or a lesser degree. Some prominent commentators disagree. For example, Professors Lupu and Tuttle maintain that the Establishment Clause is a purely “structural,” as opposed to a rights-conferring, provision.<sup>169</sup> This characterization mistakes a genuine but partial insight for a categorical truth. Sensibly interpreted in the light of case law and history, the Establishment Clause has a structural aspect.<sup>170</sup> It embodies a constitutional commitment to

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<sup>166</sup> See, e.g., *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534-35 (1925) (recognizing the “liberty of parents and guardians to direct the upbringing and education of children under their control”).

<sup>167</sup> 370 U.S. 421, 425 (1962); see also *Lee v. Weisman*, 505 U.S. 577, 590 (1992) (“[O]ur precedents do not permit school officials to assist in composing prayers as an incident to a formal exercise for their students.”).

<sup>168</sup> See *id.* at 594 (“Assuming, as we must, that the prayers were offensive to the student and the parent who now object, the intrusion was both real and, in the context of a secondary school, a violation of the objectors’ rights.”).

<sup>169</sup> IRA C. LUPU & ROBERT W. TUTTLE, *SECULAR GOVERNMENT, RELIGIOUS PEOPLE* 4-20 (2014); see Esbeck, *supra* note 36, at 3-4 (maintaining that “the Supreme Court’s case law is more easily understood when the Establishment Clause is conceptualized as a structural restraint on the government’s power to act on certain matters pertaining to religion” than as a rights-conferring provision); see also *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 49 (2002) (Thomas, J., concurring in the judgment) (characterizing the Establishment Clause as a “federalism” rather than a rights-conferring provision).

<sup>170</sup> The structural aspect manifests itself, for example, in cases holding that civil courts lack the competence to review whether church tribunals act in accord with church law or doctrine. See, e.g., *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 721 (1976) (holding that civil courts may not inquire whether religious governing bodies had power to decide religious disputes); *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church*, 344 U.S. 94 (1952) (invalidating

maintaining the separation of church and state for reasons that include the healthy, autonomous functioning of churches as well as the desirability of a secular government, not entangled in religious debates and jealousies.<sup>171</sup> But it implies no disparagement of the Establishment Clause's structural features to insist that the American constitutional tradition also recognizes the Establishment Clause as a safeguard of individual rights.<sup>172</sup>

Indeed, if the Establishment Clause did not create individual rights, there often would be no one with either standing or a cause of action to sue to enforce its strictures. Although the Supreme Court sometimes distinguishes between a plaintiff's standing and her legal authorization to bring suit, and equates standing with injury,<sup>173</sup> the Court normally insists that no one can sue in federal court, even if she is injured, unless some valid source of law authorizes her action.<sup>174</sup> Almost invariably, moreover, legal authorization to sue depends on the possession of a legal right.<sup>175</sup> As the Supreme Court said in the canonical case of *Marbury v. Madison*, "The province of the court is, solely, to decide on the rights of individuals."<sup>176</sup>

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a New York statute that transferred power over Russian Orthodox churches from the churches' Russian hierarchy to church authorities in the U.S).

<sup>171</sup> See FELDMAN, *supra* note 47, at 24 (noting that for the founder of Providence Plantations, Baptist theologian and preacher Roger Williams, the metaphorical wall of separation between church and state that was later celebrated by Thomas Jefferson protected the "garden" of the church from the "wilderness" of government).

<sup>172</sup> See, e.g., CONKLE, *supra* note 50, at 154-55 (characterizing the Establishment Clause as embodying both structural and rights-based values); Shiffrin, *supra* note 155 (emphasizing the plurality of Establishment Clause purposes and values).

<sup>173</sup> See, e.g., *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153-54 (1970) ("The 'legal interest' test goes to the merits. The question of standing is different. It concerns, apart from the 'case' or 'controversy' test, the question whether the interest sought to be protected by the complaint is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.").

<sup>174</sup> See, e.g., *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1383-84 (2015) (holding that plaintiffs' suit could not proceed because they lacked a cause of action under the Supremacy Clause or any other source of authorizing law); *Alexander v. Sandoval*, 532 U.S. 275 (2001) (dismissing a suit in the absence of a statutorily authorized cause of action).

<sup>175</sup> See Henry Paul Monaghan, *Federal Statutory Review Under Section 1983 and the APA*, 91 COLUM. L. REV. 233, 249-52 (1991) (distinguishing among "primary" rights, causes of action, and remedial rights and describing the confluence that must exist for a party to have a right to sue).

<sup>176</sup> 5 U.S. (1 Cranch) 137, 170 (1803). The dependence of a party's capacity to sue in federal court on the existence of a right is most vividly illustrated in suits alleging constitutional violations by state and local officials. For the most part, the authorization to bring such suits comes from 42 U.S.C. § 1983 (2012), which requires plaintiffs to allege deprivation of constitutional "rights, privileges, or immunities." As the Supreme Court emphasized in *Armstrong*, a mere allegation that state officials have violated the Supremacy Clause by failing to adhere to the dictates of federal law will not give rise to a right to sue in federal court in the absence of an asserted violation of a federally protected right, even if the suing party has unquestionably suffered injury and possesses Article III standing. 135 S. Ct. at 1384; cf. *Aziz Z. Huq, Standing for the Structural Constitution*, 99 VA. L. REV. 1435, 1448-52 (2013) (arguing that private parties lack rights under most structural constitutional provisions and therefore should have no standing to complain of such provisions' violation).

Recognition that the Establishment Clause has both rights-creating and structural aspects finds a close parallel in Article III: the Supreme Court has not only acknowledged, but also emphasized, that Article III functions as both a structural safeguard of judicial power and a guarantee of rights to individuals.<sup>177</sup> We should think similarly about the Establishment Clause. Otherwise we would need either to view the Establishment Clause as unenforceable through the judicial process in many cases or to invent principles for standing that diverge radically from those that govern the rest of constitutional law.<sup>178</sup> No adequate reason exists to embrace either of these options.

Once we recognize that the Establishment Clause creates rights in order to protect a set of underlying interests such as those that subsection A.2 of this Part picked out, the linkage between standing and merits issues becomes unmistakable. The Supreme Court has held recurrently and insistently that standing to sue depends on injury in fact.<sup>179</sup> But whether a party has suffered

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In *Bond v. United States*, which involved a challenge to a criminal conviction under state law, the Supreme Court asserted that a party who satisfies Article III standing requirements can assert a constitutional claim based on structural principles of constitutional federalism as long as the litigant satisfies the Court's "prudential" standing rules. 564 U.S. 211, 225-26 (2011). Normally, however, prudential standing rules govern when one party can assert another's rights, not structural principles of constitutional law. See HART & WECHSLER, *supra* note 45, at 161-68. Moreover, if *Bond* were taken to establish that parties can routinely sue to enjoin governmental practices that violate purely structural principles, its ruling would be hard to square with myriad cases holding that plaintiffs cannot sue in federal court in the absence of a congressionally, constitutionally, or judicially authorized cause of action. By contrast, the result in *Bond* could be easily explained as an application of the longstanding principle that every actual or potential defendant in a criminal enforcement proceeding "has a personal right not to be convicted under a constitutionally invalid law," even if the invalidity depends on structural constitutional norms. *Bond*, 564 U.S. at 226 (Ginsburg, J., concurring). For elaboration and defense of the principle that defendants have a personal right not to be subjected to judicial sanctions unless pursuant to constitutionally valid norms, see Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1331-32 (2000) ("If the statute under which a defendant is convicted is invalid . . . the defendant's conviction must be reversed for the sole and simple reason that there is no constitutionally valid rule of law under which the defendant could be sanctioned . . ."); Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 3 (arguing that the Constitution forbids the imposition of sanctions except pursuant to a valid rule of law).

<sup>177</sup> See, e.g., *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1944 (2015) (affirming that "[t]he entitlement to an Article III adjudicator is 'a personal right'" but that it "also serves a structural purpose" and therefore creates now-waivable limits on congressional power to transfer jurisdiction to non-Article III tribunals); *CFTC v. Schor*, 478 U.S. 833, 848-50 (1986) ("Article III §1 serves both to protect the role of the independent judiciary within the constitutional scheme of the tripartite government and to safeguard litigants' rights to have claims decided before judges who are free from potential domination by other branches of government." (internal citations omitted)).

<sup>178</sup> Although those principles are themselves multifarious, the linkage among standing, rights, and causes of action is a relative constant. See Fallon, *Fragmentation*, *supra* note 46, at 1070-80.

<sup>179</sup> See *supra* note 65 and accompanying text.

injury in the constitutional sense depends on the provision that she seeks to enforce. The Supreme Court so recognized in *Flast v. Cohen*.<sup>180</sup>

*Flast's* insight in linking the injuries that will support standing to the substantive guarantees of a particular constitutional provision finds ample corroboration in non-Establishment Clause cases.<sup>181</sup> The equal protection case of *Heckler v. Mathews* offers a potent analogy.<sup>182</sup> In *Heckler*, a challenged statute gave larger Social Security benefits to women than to men with identical employment records.<sup>183</sup> The statute further provided that if a court should find the disparity unconstitutional, women's benefits would fall to the men's level.<sup>184</sup> Despite the inability of male plaintiffs to achieve any material benefit from a ruling in their favor, the Court held that the mere denial of equal treatment constituted a cognizable injury.<sup>185</sup> In affirmative action cases, the Court has similarly held that the denial to white plaintiffs of the opportunity to compete for jobs or educational opportunities on a race-neutral basis constitutes an actionable injury, even if those plaintiffs would not have received the jobs or educational opportunities anyway.<sup>186</sup> In these cases, as in *Flast*, the standing analysis turns centrally on what the constitutional provision in question protects against—and on the closely related question of whom the Constitution protects against the kind of violation at issue.

In some areas of standing doctrine, the Supreme Court has expressed skepticism of claims of injury shared by large numbers of the public.<sup>187</sup> But where many citizens all possess interests that a rights-conferring provision of

<sup>180</sup> See 392 U.S. 83, 103-04 (1968) (upholding standing based on the historically central Establishment Clause purpose of protecting taxpayers against being coerced to support religion).

<sup>181</sup> See Fallon, *Fragmentation*, *supra* note 46, at 1070-80.

<sup>182</sup> 465 U.S. 728 (1984).

<sup>183</sup> *Id.* at 732-33.

<sup>184</sup> *Id.* at 734, 736-37.

<sup>185</sup> *Id.* at 737 (holding the plaintiff retained standing despite the severability clause “because the right asserted by appellee is the right to receive ‘benefits . . . distributed according to classifications which do not without sufficient justification differentiate among covered [applicants] solely on the basis of sex,’ and not a substantive right to any particular amount of benefits” (alteration and omission in original) (quoting *Weinberger v. Wiesenfeld*, 420 U.S. 636, 647 (1975))); see also *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1698-700 (2017) (reaffirming the holding of *Heckler v. Mathews* that disparity of treatment constitutes actionable injury in cases alleging equal protection violations).

<sup>186</sup> See *Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 281 (1978) (opinion of Powell, J.).

<sup>187</sup> See, e.g., *Allen v. Wright*, 468 U.S. 737, 755-56 (1984) (rejecting a claim of standing based on stigmatic injury that would “extend nationwide to all members of the . . . racial groups” at issue); *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (“[T]he Court has held that when the asserted harm is a ‘generalized grievance’ shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction.”); *United States v. Richardson*, 418 U.S. 166, 176-78 (1974) (describing the problems involved in finding standing for “plainly undifferentiated” harms).

the Constitution protects—as with the Fourteenth Amendment’s one-person, one-vote principle,<sup>188</sup> or the protections that the Establishment Clause affords against being taxed to support a church<sup>189</sup>—the Court has recognized that the broadly shared character of a right or interest does not disqualify it from affording a basis for standing. Insofar as post-*Flast* cases involving standing to enforce the Establishment Clause signal a retreat from that recognition, they deserve to be rethought.

In sum, any suggestion that the Establishment Clause might violate individual rights, but that no one would have standing to vindicate those rights, would not identify a constitutional anomaly, but assert a constitutional contradiction in terms. In *United States v. Richardson*,<sup>190</sup> the Supreme Court affirmed that there may be some provisions of the Constitution that literally no one has standing to enforce. *Richardson* involved the Statement and Account Clause, which requires Congress to provide regular accounts of federal spending.<sup>191</sup> Some have characterized this clause as not creating individual rights.<sup>192</sup> As I have argued, however, it is not plausible to make that claim about the Establishment Clause.

Acknowledgment that the recognition of constitutional rights also implies the existence of standing to enforce those rights does not entail that anyone or everyone always has standing to sue to enforce the Establishment Clause, any more than any other provision of the Constitution. Among other considerations, although what counts as an injury for standing purposes depends on the rights or interests that particular constitutional provisions protect, the reciprocal relationship also holds: sound constitutional interpretation may find no judicially enforceable constitutional rights in the absence of plausible claims of individual injury.<sup>193</sup> Nevertheless, the Supreme Court should recognize that infringements of constitutionally protected interests under the Establishment Clause—such as those that I provisionally identified in subsection A.2 of this Part—will normally support standing.

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<sup>188</sup> See *Baker v. Carr*, 369 U.S. 186, 208 (1962) (finding standing and distinguishing between interests in voting without arbitrary impairment and interests in having the government act according to law).

<sup>189</sup> See *Flast v. Cohen*, 392 U.S. 83, 103-04 (1968).

<sup>190</sup> 418 U.S. 166, 179 (1974).

<sup>191</sup> See U.S. CONST. art. I, § 9, cl. 7 (“[A] regular statement and account of the receipts and expenditures of all public money shall be published from time to time.”).

<sup>192</sup> See, e.g., *Fletcher*, *supra* note 44, at 270 (“The Court’s decision in *Richardson* makes sense only if the statement and account clause should be read not to permit a member of the body politic—whether a federal taxpayer, a voter, or a citizen—to require, through judicial process, the production of the CIA’s secret accounts.” (footnote omitted)).

<sup>193</sup> *Id.* at 232 (acknowledging that “nature and degree of injury are critical issues in deciding whether to provide legal protection”).

Conversely, the absence of a judicially cognizable injury should often signal that no constitutional violation has occurred.

### III. APPLYING A TIERED-SCRUTINY FRAMEWORK ACROSS DIVERSE CATEGORIES OF CASES

The burden of this Part is to demonstrate that the analytically sequenced, tiered-scrutiny framework that I advocated in Part II would clarify substantive issues and improve analysis in the categories of Establishment Clause cases that Parts I and II outlined. My argument in this Part follows a category-by-category approach, with careful attention to the varieties of cases that arise within each.

Admittedly, the categories that structure my analysis partly overlap. Every case involving financial support or accommodation for religion could also be categorized as involving symbolic support: when the government provides financial support, it signals its solicitude for religious institutions or practitioners.<sup>194</sup> Nevertheless, paradigmatic cases within the various categories present sufficiently distinctive issues to merit separate discussion.<sup>195</sup> Nor should overlap lead to confusion. Constitutionally protected rights and interests are as familiarly overlapping as they are diverse.<sup>196</sup> With regard to any challenged law or practice that might occupy multiple categories, we can always ask first whether it violates constitutional tests applicable to financial support for or accommodation of religion. If not, we can then ask, residually, whether forbidden symbolic support for religion has occurred.

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<sup>194</sup> *But see* Andrew Koppelman, *And I Don't Care What It Is: Religious Neutrality in American Law*, 39 PEPP. L. REV. 1115, 1121 (2013) (arguing that “the state can abstain from endorsing any specification of the best or truest religion while treating religion as such, understood very abstractly, as valuable” and thus “can accommodate religion as such while remaining religiously neutral”); Laycock, *supra* note 156, at 1796 (finding “virtually no evidence” at the time of the Founding “that anyone thought [religious accommodations] were constitutionally prohibited or that they were part of an establishment of religion”).

<sup>195</sup> Questions can also arise regarding possible overlap between the first two categories. For example, one can dispute whether tax exemptions for religious institutions fall into the category of financial support or that of accommodations. I argue below that the concept of accommodation properly applies only to the lifting of regulatory burdens that specifically forbid or penalize religiously required conduct or mandate religiously forbidden conduct. *See infra* notes 254–61.

<sup>196</sup> *See, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015) (discussing the “interlocking nature” of the Due Process and Equal Protection Clauses); *Engel v. Vitale*, 370 U.S. 421, 430 (1962) (“Although [the Religion Clauses] may in certain instances overlap, they forbid two quite different kinds of governmental encroachment upon religious freedom.”).



### A. Cases Involving Financial Aid to Religion

In cases involving nonincidental financial expenditures that benefit churches or religious institutions,<sup>197</sup> we need not tarry over the stage-one inquiry into whether challenged statutes or programs come within the Establishment Clause's coverage and thus trigger some form of elevated judicial scrutiny. In light of the general, background right of citizens not to be taxed to support religion, the answer should be yes.

At the second stage, when a level of scrutiny needs to be determined, it will prove helpful to distinguish cases involving provisions of benefits solely to religious institutions from cases involving distributions to religious and nonreligious institutions on a nondiscriminatory basis (as current doctrine does already). In light of the historical foundations of the Establishment Clause, a tax specifically levied for the support of a particular church would furnish the paradigm case of constitutional impermissibility. Within a strict scrutiny framework, it seems impossible to imagine any compelling governmental interest that such a tax and expenditure scheme would be necessary to promote.<sup>198</sup>

Although no modern cases involve such blatant support for an establishment of religion, statutes that provide material benefits exclusively to religious entities remain close enough to the historically forbidden paradigm to merit strict scrutiny. Though the cases are few, they generally accord with this analysis and should be conceptualized as implicitly reflecting it. Perhaps the closest modern decision is *Texas Monthly, Inc. v. Bullock*,<sup>199</sup> which struck down sales tax exemptions for religious periodicals alone. The so-called "parsonage exemption" from the federal income tax, which allows clergy not to count the provision of a house or a housing allowance as taxable income, should also be tested under, and should fail, strict scrutiny.<sup>200</sup>

Programs that distribute benefits to religious and nonreligious organizations on a formally neutral basis have understandably proved more

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<sup>197</sup> Some government actions that are best thought of as symbolic support will inescapably involve incidental costs. If the symbolic support is constitutionally impermissible for reasons unrelated to taxation and financial support, any relevant action or practice should be invalidated for those reasons.

<sup>198</sup> It is characteristic of strict scrutiny regimes to leave open the question whether there are any extraordinary circumstances under which practices that are highly suspect might nevertheless be justified. *See supra* note 18.

<sup>199</sup> 489 U.S. 1, 26 (1989).

<sup>200</sup> For discussion and citations to literature espousing competing viewpoints, see GREENAWALT, *supra* note 49, at 295-96 & n.70. For now, I put aside questions of who would or should have standing to challenge the exemption. In doing so, I assume unapologetically that conscientious legislators should not enact or reenact legislation that they know to be unconstitutional, even if no one has standing to sue to challenge that legislation. *See generally* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1227-28 (1978) (arguing that judicially underenforced constitutional norms nevertheless impose obligations on nonjudicial actors).

vexing and have recurrently divided liberals from conservatives. Such statutes may have the effect of directing tax dollars into religious treasuries, but that is not their sole consequence, nor is it necessarily their aim. Statutes that distribute benefits to religious among other organizations are also familiar and diverse: churches typically benefit on a neutral basis from police and fire protection, street paving, snow removal, and a variety of other municipal services. Under constitutional provisions other than the Establishment Clause, the Supreme Court has often subjected statutes that have the incidental effect but not the transparent purpose of substantially infringing on constitutionally protected interests to elevated judicial tests, but ones less exacting than strict scrutiny.<sup>201</sup> In the case of programs that provide tax-supported material benefits to religious and nonreligious entities on a nondiscriminatory basis, I would suggest the intermediate scrutiny formula first articulated in *Craig v. Boren*.<sup>202</sup> Under it, a statute will survive review if it is substantially related to an important governmental interest.<sup>203</sup>

In controversial cases that have divided the Supreme Court, this form of intermediate scrutiny would clarify central issues, not least by distinguishing the questions of whether the government has important interests in providing benefits to religious as well as secular organizations and of whether challenged policies are sufficiently closely tailored to those interests. Consider, for example, the programs in *Mitchell* and *Zelman*. The one in *Mitchell* promoted an important governmental interest in ensuring effective education of children who attend private, including parochial, as well as public schools. Similarly, the voucher regime in *Zelman* contributed to the provision of individual choice among diverse opportunities for effective education, also an important governmental interest.<sup>204</sup>

Nevertheless, when we come, separately, to the “substantial relationship” inquiry, courts should insist that governmental expenditures further secular interests without gratuitously supporting religious activities, such as expressly religious teaching. In light of this consideration, Justices O’Connor and Breyer—who concurred in the judgment in *Mitchell* but did not join Justice Thomas’s plurality opinion—rightly insisted that government

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<sup>201</sup> See Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175 (1996). Examples include incidental burdens on freedom of speech, see *United States v. O’Brien*, 391 U.S. 367, 376-77 (1968), freedom of association, see *Brown v. Socialist Workers ‘74 Campaign Comm. (Ohio)*, 459 U.S. 87, 93-94 (1982), and on the right to vote, see *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 189-91 (2008) (plurality opinion).

<sup>202</sup> 429 U.S. 190 (1976).

<sup>203</sup> *Id.* at 197.

<sup>204</sup> See *Mueller v. Allen*, 463 U.S. 388, 395 (1983) (“[A] State’s efforts to assist parents in meeting the rising cost of educational expenses plainly serve[] [the] secular purpose of ensuring that the state’s citizenry is well-educated” and lift a burden on “public schools . . . to the benefit of all taxpayers.”).

resources that are provided directly to religious institutions should not be diverted for use in teaching religious dogma.<sup>205</sup> In this respect, current doctrine is correct, and a tiered-scrutiny approach explains why: a program that allowed such diversion would not be sufficiently substantially related to the government's justifying interest in providing effective secular education. By contrast, provision of police and fire protection to churches on a nondiscriminatory basis is substantially related to important governmental interests in avoiding crime and conflagration. That fit extends to specifically religious places and activities, even if some taxpayers would rather see churches vandalized or burned to the ground than fund provision for their aid.

Voucher cases such as *Zelman* raise slightly different questions. On the surface, the facilitation of private choice among effective educational opportunities may constitute an important governmental interest in its own right, partly independent of the interest in ensuring effective education to all children. If so, a voucher program will look substantially related to the interest in enabling private choice. Nevertheless, at least two questions may arise within an intermediate scrutiny framework.

The first is whether a program should fail the substantial tailoring requirement if a disproportionate number of beneficiaries enroll either in religious schools generally or in the schools of a particular denomination. Absent deliberate skews in administration, I would find intermediate scrutiny's tailoring requirement to be satisfied if a program straightforwardly promotes educational diversity and private choice. Religion Clause jurisprudence once pursued a more multifaceted approach in appraising governmental support for education in parochial schools and fell into near unintelligibility.<sup>206</sup>

Vouchers and similar aid to individuals can also present a second question, involving whether the requirement of "substantially" close tailoring entails a limitation of government subsidies to the dollar value of the secular benefits that a program provides.<sup>207</sup> In practice, most school voucher programs probably fund less than the full costs of a private-school education. But the question of an adequate secular return on governmental dollars expended arose in *Witters v. Washington Department of Services for the Blind*, which upheld a vocational scholarship program that provided tuition aid to a blind student

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<sup>205</sup> See *Mitchell v. Helms*, 530 U.S. 793, 840 (2000) (O'Connor, J., concurring in the judgment).

<sup>206</sup> See, e.g., GREENAWALT, *supra* note 49, at 404 (noting that "[o]pinions of dissenting justices and scholarly writings have expressed dismay over the arbitrariness of distinctions between what the Court upheld and what it struck down" in school aid cases during the 1970s and early 1980s).

<sup>207</sup> See Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 CAL. L. REV. 260, 265-66 (1968) ("[M]y proposal is that government financial aid may be extended directly or indirectly to support parochial schools without violation of the establishment clause so long as such aid does not exceed the value of the secular educational service rendered by the school.").

studying at a religious institution to become a pastor.<sup>208</sup> *Zobrest v. Catalina Foothills School District*, which rejected a challenge to a funding program that permitted sign-language interpreters to assist deaf children in religious schools, presented a similar issue.<sup>209</sup> These cases seem to me to have been rightly decided based on the government interests involved. The funding in *Witters* was substantially related to an important interest in providing adequate assistance to blind students to pursue post-secondary education in the fields and schools of their choice, on a basis that was not overtly hostile to religion. A similar analysis should apply to cases involving veterans who used the G.I. Bill to pursue religious education.<sup>210</sup> *Zobrest* also seems to me to involve a substantial government interest that goes beyond furnishing basic secular education—one in providing deaf students with life opportunities comparable to those of young people who are not hearing-impaired.

It is possible to imagine an ostensibly neutral scheme of voucher-type funding that is not substantially tailored to an important governmental interest in diversity or choice. A funding program might fail intermediate scrutiny if, for example, a state or local government shut down its public schools or so drastically underfunded them that it left parents with no practical choice but to cash their vouchers at parochial schools. If so, intermediate judicial scrutiny would better define the proper inquiry than the multifarious tests that judicial liberals have proposed and that conservatives have eschewed.

I would similarly analyze programs under which governments provide voucher-based funding for social services other than education.<sup>211</sup> The hardest cases involve situations in which religion is integral to the way in which a service provider performs its mission—of treating drug or alcohol dependency, for example.<sup>212</sup> But in these cases as in those involving educational vouchers, we need to consider whether the government has a substantial interest in enabling private choice from among a menu of service providers. Often, I believe, the answer should be yes, as it frequently is under current law. In cases in which the funding occurs through vouchers, the reasoning that underlies *Witters* (and some uses of the G.I. Bill) should control.

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<sup>208</sup> 474 U.S. 481 (1986).

<sup>209</sup> 509 U.S. 1 (1993).

<sup>210</sup> See GREENAWALT, *supra* note 49, at 408.

<sup>211</sup> This, roughly, was the approach of *Bowen v. Kendrick*, which involved federal aid for “educational services relating to family life and problems associated with adolescent premarital sexual relations.” 487 U.S. 589, 594 (1988) (quoting 42 U.S.C. § 300z-1(a)(4) (1984)). Rejecting a facial challenge, the Court remanded the case to the district court for a determination of whether the statute was being improperly administered in ways that would include expenditures of money expressly to promote religion. *Id.* at 620-21.

<sup>212</sup> See, e.g., GREENAWALT, *supra* note 49, at 378.

Contracting schemes under which the government directly funds religiously affiliated service providers, such as programs to combat drug and alcohol dependency, raise distinctive issues. On their faces, they seem less closely tailored to facilitating private choice than voucher schemes. Under these circumstances, the government should, at a minimum, bear a burden of showing that “there are alternative secular providers of comparable quality available for any citizen who objects to receiving services in a religious setting.”<sup>213</sup>

Tax exemptions pose yet further problems that a tiered-scrutiny framework would also help to illuminate. As I have indicated, exemptions exclusively for religious believers should elicit strict scrutiny that they almost certainly could not survive.<sup>214</sup> But the Supreme Court rightly noticed the distinction between specifically targeted and more broadly based schemes of exemption in *Walz v. Tax Commission*,<sup>215</sup> which upheld an exemption for “real or personal property used exclusively for religious, educational, or charitable purposes.”<sup>216</sup> Although the challenged statute required a classificatory distinction between religious and nonreligious entities, when religious organizations share their exemptions with a wide range of other charitable institutions, there is a significant analogy to other cases in which material benefits are distributed to religious and secular institutions on a nondiscriminatory basis. Accordingly, and contrary to the Supreme Court’s intimations in *Walz*, the most plausible justification for tax exemptions and deductions that benefit churches would be that religious institutions, like a variety of other nonprofit organizations, provide benefits that are cognizable in secular terms.<sup>217</sup> For this rationale to apply, the government should need to afford comparable exemptions to some range of other nonprofit organizations, though not necessarily to all.<sup>218</sup>

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<sup>213</sup> Cole, *supra* note 158, at 595-96. See generally Ira C. Lupu & Robert Tuttle, *Sites of Redemption: A Wide-Angle Look at Government Vouchers and Sectarian Service Providers*, 18 J.L. & POL. 539, 583 (2002) (emphasizing diversity and complexity in appraising government programs). Douglas Nejaime & Reva B. Siegel raise the related issue that “[c]oncerns with complicity may lead not only to the refusal to provide goods or services, but also to the refusal to provide information that would lead the patient to obtain those goods or services elsewhere,” with the result that patients are effectively “denied the opportunity to seek services from an alternative provider.” *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2569-74 (2015).

<sup>214</sup> See *supra* note 198 and accompanying text.

<sup>215</sup> 397 U.S. 664, 672-73 (1970).

<sup>216</sup> *Id.* at 666-67 (quoting N.Y. CONST. art. 16, § 1).

<sup>217</sup> Although the Court took note of this characteristic function of churches, *id.* at 673 (“The State has an affirmative policy that considers these groups as beneficial and stabilizing influences in community life and finds this classification useful, desirable, and in the public interest.”), only Justice Brennan relied on it. *Id.* at 687-89 (Brennan, J., concurring).

<sup>218</sup> It should not, however, need to engage in monitoring to determine whether particular churches advance these ends—an approach that would lead to an unhealthy entanglement between the state and religion. *Cf. id.* at 674 (majority opinion) (“To give emphasis to so variable an aspect of the work of religious bodies would introduce an element of governmental evaluation and

It is also arguable that tax exemptions for churches, even if exclusive to churches, might be narrowly tailored to a compelling governmental interest in lifting burdens that impede the free exercise of religion. I shall discuss the possibly compelling governmental interest in accommodating free exercise below.<sup>219</sup> But tax exemptions exclusively for churches would differ from other burden-lifting statutes because of their distinctive similarity to the historically forbidden paradigm of taxes exclusively to support religion.

Cases involving government expenditures to pay chaplains present additional complications.<sup>220</sup> Military chaplains raise one set of issues. The government's administration of the military is distinctive in many respects, including under the Religion Clauses.<sup>221</sup> When the government removes people from the opportunities that they otherwise would have for religious worship for periods of more than relatively brief duration, it acquires an important interest in responding to and satisfying felt needs and preferences, including religious preferences, that people who are so removed could not satisfy otherwise.<sup>222</sup> Absent denominational favoritism, provision for military chaplains should therefore survive a form of intermediate scrutiny, crafted to the distinctive needs of the military.

Paid legislative chaplains occupy a different category. If the issue were one of first impression, I would conclude that expenditures to pay legislative chaplains violate the Establishment Clause, historical practice notwithstanding. The payment of legislative chaplains is not narrowly tailored to a compelling interest or even substantially related to an important secular interest. But the Supreme Court upheld the payment of legislative chaplains, by a 6-3 vote, in *Marsh v. Chambers*.<sup>223</sup> With *Marsh* now having been decided, and in light of the support that historical practice provides for

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standards as to the worth of particular social welfare programs, thus producing a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize.”).

<sup>219</sup> See *infra* notes 236–261 and accompanying text.

<sup>220</sup> The leading Supreme Court case on chaplains is *Marsh v. Chambers*, which upheld payment of legislative chaplains. 463 U.S. 783, 794 (1983). The Second Circuit similarly upheld the practice of maintaining Army chaplains. *Katcoff v. Marsh*, 755 F.2d 223 (2d Cir. 1985). For valuable discussion of employment of military chaplains, including historical overviews and policy recommendations, see GREENAWALT, *supra* note 49, at 207–20; and Ira C. Lupu & Robert W. Tuttle, *Instruments of Accommodation: The Military Chaplaincy and the Constitution*, 110 W. VA. L. REV. 89, 126–31 (2007). Although these authors conclude that military chaplaincies are constitutionally permissible, they have reservations about specific features of the current program. The payment of prison chaplains has less of a historical pedigree and raises additional distinctive issues. See GREENAWALT, *supra* note 49, at 219–20.

<sup>221</sup> See, e.g., *Goldman v. Weinberger*, 475 U.S. 503, 504, 510 (1986) (holding that the First Amendment did not prohibit an Air Force regulation that prevented service members from wearing yarmulkes while on duty and in uniform).

<sup>222</sup> See GREENAWALT, *supra* note 49, at 208 (“The crucial premise in a defense of army chaplains is that the military withdraws soldiers and sailors from ordinary life.”).

<sup>223</sup> 463 U.S. 783, 794 (1983).

its conclusion,<sup>224</sup> it seems to me a close question whether stare decisis should now control. Even if so, in the absence of any significant secular justification for paying legislative chaplains, it is hard to rationalize the non-neutral expenditures to promote religion that paying chaplains from government coffers entails.<sup>225</sup> Accordingly, even if *Marsh* stands on its facts, the Court should not accord that precedent any further, generative significance.<sup>226</sup>

### B. Cases Involving Accommodation

The paradigmatic cases of governmental accommodation of religion that Section I.B discussed all require classification based on religion for the purpose of granting religious exemptions or preferences. In *Amos*, the Court held that while “laws discriminating *among* religions are subject to strict scrutiny . . . laws ‘affording a uniform benefit to *all* religions’” should not be, if they are otherwise acceptable under *Lemon*.<sup>227</sup> As I have emphasized, however, religiously-based classification and discrimination are highly dangerous,<sup>228</sup> as is reflected in cases grouping religion-based classifications with race-based classifications under the Equal Protection Clause.<sup>229</sup> Under the Establishment Clause as under other constitutional provisions, a strict scrutiny framework would systematize an appropriately wary judicial analysis.

Although all religious classifications should trigger strict scrutiny, religiously-based exemptions from otherwise applicable regulatory duties and prohibitions should sometimes (although surely not always) survive that test. An analogy comes from the approach that the Supreme Court has adopted in scrutinizing race-based affirmative action under the Equal Protection Clause.<sup>230</sup> The Court regards race-based classification as suspect, even when

<sup>224</sup> *Id.* at 786-90.

<sup>225</sup> See Christopher C. Lund, *Legislative Prayer and the Secret Costs of Religious Endorsements*, 94 MINN. L. REV. 972, 1049 (2010) (arguing that “legislative prayer requires the government to make” religious choices, each of which “marginalizes the religious segment that disagrees with it” and “furthers religious division”).

<sup>226</sup> This seems to be roughly the approach of Justice Kagan’s dissenting opinion in *Town of Greece v. Galloway*. 134 S. Ct. 1811, 1841-42 (2014) (“The practice at issue here differs from the one sustained in *Marsh* because Greece’s town meetings involve participation by ordinary citizens, and the invocations given—directly to those citizens—were predominantly sectarian in content. Still more, Greece’s Board did nothing to recognize religious diversity.”).

<sup>227</sup> 483 U.S. 327, 339 (1987) (quoting *Larson v. Valente*, 456 U.S. 228, 252 (1982)).

<sup>228</sup> See, e.g., *Cole*, *supra* note 158, at 577 (“Religious division is renowned throughout history, from the Crusades to the Spanish Inquisition.”).

<sup>229</sup> See *supra* note 14 and accompanying text.

<sup>230</sup> Just as one might think that preferences for racial minorities in university admissions should be viewed as less suspect than policies of race-based exclusion, one might conclude that accommodation statutes merit different analysis from laws that affirmatively exclude religious minorities from benefits or opportunities. See, e.g., *Abner S. Greene, Kiryas Joel and Two Mistakes About Equality*, 96 COLUM. L. REV. 1, 67-68 (1996) (“When whites act to the detriment of African

implemented for non-invidious purposes, but not as categorically forbidden in light of compelling governmental interests.<sup>231</sup>

The government's compelling interest in creating religiously-based exemptions from otherwise applicable obligations and prohibitions derives from the Free Exercise Clause. In *Employment Division v. Smith*,<sup>232</sup> the Supreme Court interpreted the Free Exercise Clause exceedingly narrowly. A number of prior cases had found that the Clause requires exemptions from otherwise applicable statutory mandates that interfere with religious duties, absent proof by the government that across-the-board enforcement is necessary to promote a compelling governmental interest.<sup>233</sup> Rejecting that approach, *Smith* ruled that the Free Exercise Clause does not require exemptions from generally applicable legal obligations.<sup>234</sup> As construed in *Smith*, the Free Exercise Clause provides judicially enforceable protection only against statutes that single out religiously motivated conduct for disfavored treatment.<sup>235</sup>

*Smith's* narrow framing of the Free Exercise Clause's protective reach does not define the outer limit of the government's compelling interest in accommodating religious practice. Much of the analysis in *Smith* depends on the practical incapacity of the judiciary to develop a scheme of ad hoc

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Americans, there is good reason for stepped-up judicial review. But when a majority acts to lift a burden on a minority, regardless of the justification, there is no good reason for stepped-up judicial review."); Tseming Yang, *Race, Religion, and Cultural Identity: Reconciling the Jurisprudence of Race and Religion*, 73 IND. L.J. 119, 179 (1997) (discussing the role of affirmative action and legislative accommodations as "validat[ing] and affirm[ing] the importance and value of [an] individual's sense of self as equal to that of the majority members"). More in the case of religious preferences than of race-based affirmative action, however, I think that any differences are best accounted for within a strict scrutiny framework.

<sup>231</sup> See *supra* note 18.

<sup>232</sup> 494 U.S. 872, 882, 888-90 (1990).

<sup>233</sup> See, e.g., *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 141, 146 (1987); *Thomas v. Review Bd.*, 450 U.S. 707, 718-19 (1981); *Wisconsin v. Yoder*, 406 U.S. 205, 221, 235-36 (1972); *Sherbert v. Verner*, 374 U.S. 398, 407-09 (1963).

<sup>234</sup> 494 U.S. at 878-79.

<sup>235</sup> After *Smith*, the Court found such intentional singling out in a city ordinance banning animal sacrifice that targeted practitioners of Santería in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 524 (1993). In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, the Court unanimously distinguished *Smith* and found that the First Amendment required a "ministerial exception" to otherwise generally applicable prohibitions against employment discrimination. 132 S. Ct. 694, 706-07 (2012). In contrast with the statute in *Smith*, which "involved governmental regulation of only outward physical acts," the antidiscrimination statute threatened "government interference with an internal church decision that affects the faith and mission of the church itself." *Id.* at 707. For discussion of the relationship between *Smith* and *Hosanna-Tabor* and of the many questions that the latter left open, see Michael W. McConnell, *Reflections on Hosanna-Tabor*, 35 HARV. J.L. & PUB. POL'Y 821 (2012).



exemptions to generally applicable laws.<sup>236</sup> If based substantially on the practical difficulties of judicial enforcement, *Smith* converts the Free Exercise Clause into a “judicially underenforced constitutional norm[.]”<sup>237</sup> When *Smith* is so read, it should follow that Congress and the state legislatures have important and even compelling interests in affording greater protection to free exercise values than *Smith* mandates.<sup>238</sup>

If analysis of statutes that provide exceptions for religious objectors proceeded pursuant to the strict scrutiny formula, and if the government has a compelling interest in lifting burdens on the free exercise of religion, the question of narrow tailoring would prove crucial. In cases under the Equal Protection Clause, the Supreme Court has treated the narrow tailoring inquiry as subsuming questions involving acceptable burdens on third parties.<sup>239</sup> It should do likewise under the Establishment Clause.<sup>240</sup>

Professors Lupu and Tuttle, among others, question why any third-party burden should be acceptable.<sup>241</sup> As they point out, accommodations that benefit religious objectors but impose burdens on third parties bear similarities to forbidden taxes exclusively to support religion. In that context, they maintain, any tax burden, no matter how trifling, would result in unconstitutionality. Although that conclusion is likely correct in any practically imaginable instance, a strict scrutiny framework asks us to rethink the grounds on which the judgment that a tax would be impermissible rests. Under strict scrutiny, we would need to ask whether the government has a

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<sup>236</sup> See *Smith*, 494 U.S. at 888-89 (observing that a rule requiring judges to recognize exemptions to generally applicable laws would “court[] anarchy”).

<sup>237</sup> See Sager, *supra* note 200 at 1227 (distinguishing between fully enforced and underenforced constitutional norms). Douglas Laycock and Luke W. Goodrich also find judicial underenforcement of statutory mandates for religious exemptions, based on the belief of some courts, “as a matter of institutional competence,” that “judges should not be in the business of drawing a line between religious accommodations and government interests.” *RLUIPA: Necessary, Modest, and Under-Enforced*, 39 FORDHAM URBAN L.J. 1021, 1053 (2012).

<sup>238</sup> Cf. Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1469 (1999) (proposing a “common-law exemption model” that would “let courts decide in the first instance whether an exemption is to be granted” but allow legislative revision of the courts’ decisions).

<sup>239</sup> See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 315-20 (1978) (opinion of Powell, J.) (discussing burdens on third-party applicants as part of the tailoring analysis).

<sup>240</sup> See, e.g., *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) (recognizing, albeit not as an aspect of a narrow tailoring inquiry, that religious exemptions must “take adequate account of the burdens . . . impose[d] on nonbeneficiaries”).

<sup>241</sup> See LUPU & TUTTLE, *supra* note 169, at 232-36. Frederick Mark Gedicks and Rebecca G. Van Tassell argue that “the Establishment Clause precludes permissive accommodations that shift the material costs of practicing a religion from the accommodated believers to those who believe and practice differently,” because “forcing those who do not belong to a religion to bear the material costs of practicing it is functionally equivalent to taxing nonadherents to support the accommodated faith.” See *RFRAs Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343, 362-63 (2014).

compelling interest in imposing a tax for the distinctive benefit of churches. Virtually without exception, the answer will be no. Whether a statute that lifts governmentally imposed burdens on religious institutions and practices is narrowly tailored to a compelling interest in alleviating direct burdens on the free exercise of religion is a different question.

In considering narrow tailoring and the permissibility of third-party burdens, it may help to have concrete examples in view. One involves Congress's provision, via the Religious Freedom Restoration Act (RFRA), of exemptions from the Affordable Care Act's (ACA) mandate to employers to provide their employees with health insurance coverage that includes contraception.<sup>242</sup> Under RFRA, the government must exempt religious objectors whose religious exercise is substantially burdened by a regulation unless it can demonstrate that refusing an exemption is "the least restrictive" means of promoting a "compelling" interest.<sup>243</sup> Another currently debated issue arises from state statutes that exempt religious objectors from state-law antidiscrimination rules, including provisions that otherwise would require service providers to furnish services for same-sex marriage celebrations.<sup>244</sup>

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<sup>242</sup> See Gedicks & Van Tassel, *supra* note 241, at 350 (noting that the ACA mandate provides an example of cost shifting to nonadherents).

<sup>243</sup> 42 U.S.C. § 2000bb-1(b) (2012). *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), held that some for-profit corporations can qualify as "persons" entitled to religious exemptions under RFRA. The scope of required accommodations remained in doubt, however, after *Zubik v. Burwell*, 136 S. Ct. 1557 (2016), vacated and remanded a court of appeals' decision without squarely resolving disputed issues. On October 6, 2017, the Trump Administration issued interim final rules allowing employers to decline to provide contraception coverage based on either a religious or a moral objection. See Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,792 (Oct. 13, 2017) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, and 45 C.F.R. pt. 147) (concerning religious exemptions); Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,838 (Oct. 13, 2017) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, and 45 C.F.R. pt. 147) (moral exemptions). Various parties immediately filed suit to challenge the validity of the new regulations under the Establishment Clause as well as the Administrative Procedure Act and the Fifth Amendment's equal protection mandate. See Robert Pear et al., *Trump Administration Rolls Back Birth Control Mandate*, N.Y. TIMES (Oct. 6, 2017), <https://www.nytimes.com/2017/10/06/us/politics/trump-contraception-birth-control.html> [<https://perma.cc/UJY2-JB6Q>] (describing lawsuits by Massachusetts and California); see also Ema O'Connor, *The Trump Administration is Already Facing Several Lawsuits over its New Birth Control Rules*, BUZZFEED NEWS (Oct. 6, 2017), <https://www.buzzfeed.com/emaconnor/four-groups-have-already-said-theyll-sue-the-trump> [<https://perma.cc/G7E4-LZEA>] (describing additional lawsuits by Washington, Pennsylvania, the ACLU, the Center for Reproductive Rights, and others).

<sup>244</sup> See, e.g., Christopher C. Lund, *Keeping Hobby Lobby in Perspective*, in THE RISE OF CORPORATE RELIGIOUS LIBERTY 285-89, 303-04 (Micah Schwartzman, Chad Flanders, and Zoë Robinson eds., 2016) (discussing such claims by religiously objecting photographers and florists); Andrew Koppelman, *A Zombie in the Supreme Court: The Elane Photography Cert Denial*, 7 ALA. C.R. & C.L. L. REV. 77, 78-79 (2015) (discussing a case involving potential conflict between religious liberty and gay rights).

In *Incorporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, the Court upheld an exemption from Title VII's antidiscrimination requirements that resulted in an employee losing his job.<sup>245</sup> *Amos*, however, possesses only limited relevance to most questions arising under RFRA and parallel state statutes. *Amos* involved a compelling interest in avoiding governmental interference in the religion-based choices made by religious organizations in the conduct of nonprofit, religiously inflected activities.<sup>246</sup> In *Amos*, the religiously inflected nature of the discharged employee's work as a janitor might reasonably be questioned. But if we credit the government's interest in being able to draw a clean line that groups all employees of religious organizations' nonprofit affiliates into a single category, then imposing the loss of a job on a third party may reasonably count as narrowly tailored to a compelling interest in avoiding interference with the internal structure and operations of churches and closely affiliated charitable institutions.<sup>247</sup> By contrast, the demand for narrow tailoring appropriately bites more sharply when the government asks one citizen to suffer a burden in order to facilitate another citizen's personal religious practice. Consistent with this distinction, the Court held in *Estate of Thornton v. Caldor*,<sup>248</sup> and more recently reaffirmed in *Cutter v. Wilkinson*, that excessively large burdens on third parties can result in constitutional invalidity under the Establishment Clause.<sup>249</sup>

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<sup>245</sup> 483 U.S. 327, 330 (1987).

<sup>246</sup> *Id.* at 335-36. Douglas NeJaime catalogues state antidiscrimination laws that "permit religious employers to use religion as a factor in employment, but . . . limit the use of religion to employment positions that concern the religious purpose of the organization." *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination*, 100 CAL. L. REV. 1169, 1193 (2012).

<sup>247</sup> The Supreme Court more recently identified a constitutional imperative of non-interference in some aspects of the internal structure of religious organizations in *Hosanna-Tabor*. See *supra* text accompanying note 235.

<sup>248</sup> 472 U.S. 703, 708-09 (1985).

<sup>249</sup> 544 U.S. 709, 720 (2005). Although I have emphasized the need for the government to justify religious exemptions as necessary to promote a compelling interest under the Establishment Clause, RFRA appears on the surface to reverse the compelling-interest inquiry: it provides exemptions for religious objectors unless the government can demonstrate a compelling interest in denying an exemption. See 42 U.S.C. § 2000bb-1(b) (2012) (requiring "the least restrictive" means of promoting a "compelling" interest). Against the background of Establishment Clause concerns that religious exemptions should not impose excessive burdens on non-beneficiaries, however, the statute's denial of religious exemptions pursuant to a compelling-interest test serves a constitutionally necessary function. Whether or not Congress so intended, we should view the government as having a compelling interest in avoiding the imposition of constitutionally excessive burdens on third parties. In other words, courts should conduct RFRA-based analysis into whether denying exemptions to religious objectors is narrowly tailored to a compelling governmental interest in a way that ensures that RFRA does not overstep the bounds of constitutional permissibility, and violate the Establishment Clause, by imposing unreasonably large burdens on third parties in its application to particular cases. See Christopher C. Lund, *Religious Exemptions, Third-Party Harms*,

Although tiered scrutiny and the distinction between compelling-interest and narrow-tailoring inquiries would importantly advance analysis of acceptable third-party burdens, any ultimate resolution of the contested issues requires normative judgment. For my own part, I would reject the view that no burdens are permissible, or even that no burden may be more than “*de minimis*.”<sup>250</sup> In particular, I would conclude that the burdens imposed by exemptions from otherwise applicable state antidiscrimination laws are not unreasonable, and are therefore constitutionally acceptable, when alternative providers of services or opportunities are readily available. Exemptions from antidiscrimination mandates can undoubtedly carry negative expressive connotations and empower stigmatization along lines of historic oppression and continuing dignitary vulnerability—for example, when photographers or caterers claim religious exemptions from obligations to provide services in connection with same-sex weddings.<sup>251</sup> I do not mean to trivialize the significance of such actions. But I would hesitate to conclude that any cognizable burden on third-party interests disables the legislature from creating new rights—for example, to health care coverage or to non-discrimination by private providers of services—and, at the same time, making accommodations to alleviate burdens on freedom of religious exercise.<sup>252</sup> Accordingly, while I would deem categorical exemptions impermissible, I would uphold exemptions where alternative services or opportunities are reasonably available.<sup>253</sup>

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*and the Establishment Clause*, 91 NOTRE DAME L. REV. 1375, 1383 (2016) (“Accommodations required by RFRA by definition will not violate the Establishment Clause, because any religious accommodation that would violate the Establishment Clause will not be required by RFRA in the first place.”). *But see* Gedicks & Van Tassell, *supra* note 241, at 363, 373 (arguing that any “significant” or “substantial” burden would violate the Establishment Clause and that RFRA is therefore vulnerable to as-applied challenges).

<sup>250</sup> In *Trans World Airlines, Inc. v. Hardison* the Supreme Court construed the Title VII mandate that employers provide “reasonable accommodation” of their employees’ religious beliefs as not requiring them to bear more than “*de minimis* cost.” 432 U.S. 63, 81, 84 (1977).

<sup>251</sup> See, e.g., Ira C. Lupu, *Moving Targets: Obergefell, Hobby Lobby, and the Future of LGBT Rights*, 7 ALA. C.R. & C.L. REV. 1, 67 (2015) (noting the political symbolism of a “license to discriminate.”).

<sup>252</sup> Compare Robin Fretwell Wilson, *The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes Between Religion and the State*, 53 B.C. L. REV. 1417, 1429 (2012) (arguing that religious exemptions are in the interest of all sides in debates on contentious social issues including same-sex marriage and contraception), with Shannon Gilreath, *Not A Moral Issue: Same-Sex Marriage and Religious Liberty*, 2010 U. ILL. L. REV. 205, 206 (2010) (book review) (rejecting purported compromises as insufficiently respectful of the countervailing third-party interests at stake). Andrew Koppelman argues for a middle position under which religiously owned “[b]usinesses that serve the public, such as wedding photographers, should be exempted” from antidiscrimination laws, “but only if they are willing to bear the cost of publicly identifying themselves as discriminatory.” *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. CAL. L. REV. 619, 620 (2015).

<sup>253</sup> Cf. Nelson Tebbe, Micah Schwartzman, & Richard Schragger, *How Much May Religious Accommodations Burden Others?*, in *LAW, RELIGION, AND HEALTH IN AMERICA* (forthcoming 2017)

So far I have suggested that the government has a compelling interest in lifting governmentally imposed burdens on religiously motivated conduct. Sometimes, however, the term “accommodation” is used more broadly.

Perhaps most importantly, state and federal statutes sometimes require private parties to accommodate the religious beliefs of their employees or clientele. To take the most prominent example, Title VII of the 1964 Civil Rights Act requires private employers to provide reasonable accommodations of the religious practices of employees unless doing so would impose undue hardship.<sup>254</sup> The state of Connecticut established a more stringent accommodation requirement through the statute that the Supreme Court invalidated in *Estate of Thornton v. Caldor*.<sup>255</sup> Although I have referred to cases arising under such statutes in discussing when burdens on third parties violate the Establishment Clause, federal statutes that mandate accommodations by private firms—centrally including Title VII—raise a threshold issue of congressional authority that statutes lifting federally imposed burdens do not. Here, a tiered-scrutiny regime usefully presses us to consider exactly what the government’s interest in mandating private accommodations is and how weighty it should be adjudged. As a general matter, the government has no legitimate, much less a compelling, interest in directing private entities to treat religious believers more generously than they treat others. The mandate of the Free Exercise Clause does not extend to non-governmental actors. Accordingly, the Court cannot derive a compelling interest in forcing private parties to grant religious exemptions from a judicially underenforced Free Exercise Clause. If not, the question becomes whether the government has another, compelling interest in requiring private actors to bear the costs of burdensome religious accommodations that necessarily employ religion-based classifications.

With this question clearly framed, the foundation for permissible governmental mandates of private accommodation that require religion-based classification must lie in the first instance in equality-based or antidiscrimination norms.<sup>256</sup> Unfortunately, the line between prohibitions against religious

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(arguing for the adoption of Title VII’s “undue hardship” standard to weigh the permissibility of burdens on third parties).

<sup>254</sup> See 42 U.S.C. §§ 2000e(j), 2000e-2(a)(1) (2012).

<sup>255</sup> 472 U.S. 703, 709-10 (1985) (invalidating a Connecticut mandate “that those who observe a Sabbath any day of the week as a matter of religious conviction must be relieved of the duty to work on that day, no matter what burden or inconvenience this imposes on the employer or fellow workers”).

<sup>256</sup> See Esbeck, *supra* note 17, at 386-87 (characterizing Title VII and similar federal accommodation mandates as “prohibiting religious discrimination” and as “being pro-religious freedom, which the Establishment Clause permits, as distinct from being pro-religion, which the clause disallows”); cf. *Trans World Airlines*, 432 U.S. at 81 (“The repeated, unequivocal emphasis of both the language and the legislative history of Title VII is on eliminating discrimination in employment . . . . It would be anomalous to conclude that by ‘reasonable accommodation’ Congress

discrimination, on the one hand, and mandated accommodations of religious beliefs and practices, on the other, can frequently prove elusive.<sup>257</sup> Among other things, most employers' pre-existing work rules will likely reflect the assumptions, values, or preferences of those with relatively mainstream religious practices. Accordingly, although accommodation mandates that require explicitly religion-based classification should trigger strict scrutiny, I believe that some such mandates advance a compelling government interest, which Justice O'Connor once characterized as "assuring employment opportunity to all groups in our pluralistic society."<sup>258</sup> Moreover, statutes (such as Title VII) that require only reasonable accommodations and thereby limit the burdens that they impose on third parties should satisfy strict scrutiny's narrow tailoring requirement.

Proponents of other kinds of statutes and policies that benefit religion sometimes also claim the mantle of "accommodation."<sup>259</sup> A familiar example involves prayers on public occasions: supporters sometimes defend them as accommodations for people who want to pray.<sup>260</sup> This argument attempts to press the concept of accommodation, as it currently figures in Establishment Clause doctrine, too far. *Cutter v. Wilkinson* appropriately took care to limit its analysis to cases involving the lifting or relaxation of regulations or requirements—especially those that the government imposes directly.<sup>261</sup>

### C. Symbolic Support Cases

In thinking about symbolic support cases, we should begin at stage one of a scheme of sequenced, tiered scrutiny by asking which policies, statutes, and activities sufficiently impinge on interests that the Establishment Clause protects to call for any form of elevated scrutiny. I foreshadowed my own conclusions in Section II.A. There I described modern doctrine as recognizing a right not to be symbolically demeaned or marginalized by governmental endorsement of religion, and not to be coerced into participating in a religious exercise. But Section II.A did not

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meant that an employer must deny the shift and job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others.").

<sup>257</sup> See generally Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 645 (2001) (arguing that "some aspects of antidiscrimination law . . . are in fact requirements of accommodation" and that other aspects of antidiscrimination law are more similar to accommodation mandates than is generally acknowledged).

<sup>258</sup> *Caldor*, 472 U.S. at 712 (O'Connor, J., concurring).

<sup>259</sup> See generally GREENAWALT, *supra* note 49, at 336-51 (discussing the limits of the concept of accommodation).

<sup>260</sup> See, e.g., *County of Allegheny v. ACLU*, 492 U.S. 573, 659-61 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part) (suggesting that a public display of a crèche and a menorah during holiday season constituted a recognition or accommodation of citizens' religious beliefs).

<sup>261</sup> 544 U.S. 709, 720-24 (2005).

identify any more general, freestanding right or interest in having the government maintain strict neutrality (in any plausible sense of that term) in expression regarding religion.

If it were left to me to write a Constitution and then develop doctrine to implement it, I would insist on broader safeguards against symbolic governmental support for religion than exist under the Constitution and implementing doctrine that we now have. But I have no such prerogative. In light of historical practice, including longstanding judicial failure to uproot many instances of symbolic support for religion, some of which trace nearly to the nation's founding, we should acknowledge that symbolic expressions such as "In God We Trust" on the currency and declarations of national days of prayer and Thanksgiving do not violate any judicially cognizable individual rights.

When entrenched practices are morally odious—as, for example, were those at issue in *Brown v. Board of Education*,<sup>262</sup> which mandated an end to racial discrimination in the public schools, and *Loving v. Virginia*,<sup>263</sup> which invalidated state antimiscegenation law—long history should not prevent their rejection by the courts. Moral judgment is therefore inescapable in Establishment Clause cases on roughly the same terms as under other constitutional provisions, including the Equal Protection Clause.<sup>264</sup> Looking backward, I believe that the effect of school prayer and Bible-reading in marking non-Christians and even some Christians, including Catholics, as disfavored outsiders justified the Court's decisions invalidating those practices in *Engel v. Vitale*<sup>265</sup> and *School District of Abington Township v. Schempp*,<sup>266</sup> especially in light of accreting foundations for those decisions in judicial precedent.

But "mild endorsements"<sup>267</sup> outside the context of the public schools do not, in my judgment, raise issues of comparable moral and constitutional urgency. Taking the acceptability of such endorsements as settled by history, yet seeking to define and rationalize the limits that modern doctrine has imposed, I would urge a threshold test under which symbolic governmental support for religion provokes no special demand for justification under the Establishment Clause unless a law, practice, or display has significant, modern-day effects in promoting religion or stigmatizing religious outsiders.

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<sup>262</sup> 347 U.S. 483, 495 (1954) ("Separate educational facilities are inherently unequal.").

<sup>263</sup> 388 U.S. 1, 11-12 (1967) ("Under our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State.").

<sup>264</sup> See generally David L. Shapiro, *The Role of Precedent in Constitutional Adjudication: An Introspection*, 86 TEX. L. REV. 929, 945 (2008) (discussing when judges and Justices should accept the authority of precedents that they believe to have been wrongly decided in the first instance).

<sup>265</sup> 370 U.S. 421 (1962).

<sup>266</sup> 374 U.S. 203 (1963).

<sup>267</sup> See GREENAWALT, *supra* note 49, at 101.

Admittedly, determining when legislation has significant effects in promoting religion or stigmatizing or demeaning religious minorities would pose delicate problems. But such problems appear unavoidable unless the Supreme Court is prepared either to invalidate all legislation that has the predominant purpose of promoting religion, at one extreme, or to approve all religion-promoting legislation that is not overtly coercive, at the other.<sup>268</sup>

Within the Supreme Court's cases to date, the most sensitive effort to identify legally significant harms that result from the expressive impact of symbolic support for religion has come from the "objective observer" framework that Justice O'Connor developed. Justice O'Connor offered alternative formulations of her proposed test. The most apt, in my view, probes whether a challenged practice or statute conveys an implicit message disapproving some citizens' beliefs and thus stigmatizing them as outsiders to the political community.<sup>269</sup> In pursuing a similar but not identical inquiry, Professor Greenawalt points to "the inclusiveness of the view that is endorsed, historical pedigree, [and] the brevity of references to religion" as considerations that matter to judicial inquiry.<sup>270</sup> In seeking to rationalize the main outlines of a body of doctrine that does not conform perfectly to anyone's normative ideals, but that aims at compromise where I believe that compromise is vital, I, too, would take those considerations into account.

Justice O'Connor's objective observer test has drawn wide criticism as too subjective.<sup>271</sup> This is an undoubted problem, which can be only partly alleviated by specifying that the relevant perspective is that of a reasonable

<sup>268</sup> Cf. *County of Allegheny v. ACLU*, 492 U.S. 573, 659 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part) ("Our cases disclose two limiting principles: government may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact 'establishes a [state] religion or religious faith, or tends to do so.'" (quoting *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984))).

<sup>269</sup> *Id.* at 631 (O'Connor, J., concurring in part and concurring in the judgment) ("The question under endorsement analysis . . . is whether a reasonable observer would view" a challenged practice or statute as expressing "disapproval of his or her particular religious choices."). As Justice O'Connor put it in *Lynch*, "Endorsement sends a message to nonadherents [of a favored religion] that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." 465 U.S. at 687-88.

<sup>270</sup> GREENAWALT, *supra* note 49, at 101.

<sup>271</sup> See, e.g., *County of Allegheny*, 492 at 675-77 (Kennedy, J., concurring in the judgment in part and dissenting in part) (arguing the test lends itself to a subjective inquiry); Jesse H. Choper, *The Endorsement Test: Its Status and Desirability*, 18 J. L. & POL. 499, 510-12 (2002) (discussing the lack of clarity provided by the court regarding the "Reasonable Observer" test); Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 267 (1987) (arguing that Justice O'Connor's "no endorsement" test would introduce more "ambiguities and analytical deficiencies" into the doctrine); see also KOPPELMAN, *supra* note 20, at 45-77 (criticizing the test but then advocating adoption of it in a "modified" form).



religious outsider.<sup>272</sup> In weighing the proper legal conclusion, we should not question the good faith of those who claim to experience marginalization or stigmatization from the presence of “In God We Trust” on the currency, for example.<sup>273</sup> The requisite judgments are legal, informed but not determined by psychological facts.<sup>274</sup> For what it is worth, I would agree with most, but not all, of Justice O’Connor’s controversial judgments—for example, that holiday displays with religious components may frequently convey no religiously marginalizing message, but that standalone crèches typically would.<sup>275</sup>

As Justice Scalia warned, predicating judicial analysis on disputable assessments of stigma and marginalization could imaginably “inflare religious passions by” inviting “endless litigation.”<sup>276</sup> But a few guideposts should alleviate worries about uncertainty in many cases. If statutes’ expressive effects should instigate elevated judicial scrutiny when they substantially marginalize or stigmatize nonadherents to a favored creed, then a distinction between newly enacted and older statutes should often prove decisive.<sup>277</sup> Overall, the Supreme Court has exhibited a greater toleration for long-ensconced practices that symbolically support religion—such as inscribing “In God We Trust” on the currency—than for newly initiated

<sup>272</sup> See Caroline Mala Corbin, *Ceremonial Deism and the Reasonable Religious Outsider*, 57 UCLA L. REV. 1545, 1574 (2010) (calling for a “reasonable religious outsider’s perspective” in evaluating the constitutionality of ceremonial deism); *Developments in the Law—Religion and the State*, 100 HARV. L. REV. 1606, 1648 (1987) (“If the establishment clause is to prohibit [the] government from sending the message to religious minorities or nonadherents that the state favors certain beliefs and that as nonadherents they are not fully members of the political community, its application must turn on the message received by the minority or nonadherent.”).

<sup>273</sup> Cf. Shiffrin, *supra* note 155, at 67 (arguing that “the children of atheists, agnostics, and Buddhists to name a few, are . . . overwhelmingly likely to think that” recitations of the Pledge of Allegiance mark them as “outsiders, not full members of the political community,” even though Justice O’Connor concluded otherwise).

<sup>274</sup> See B. Jessie Hill, *Anatomy of the Reasonable Observer*, 79 BROOKLYN L. REV. 1407, 1409-10 (2014) (arguing that the reasonable observer framework does not “capture the way real people actually view a religious display” but instead should be understood as “an accurate model for making sense of the process of interpreting social meaning”). For a perceptive discussion of analogous issues under the Equal Protection Clause, see DEBORAH HELLMAN, *WHEN IS DISCRIMINATION WRONG?* 59-85 (2008).

<sup>275</sup> See *County of Allegheny*, 492 at 624-27 (O’Connor, J., concurring in part and concurring in the judgment) (concluding that “placement of the central religious symbol of the Christmas holiday season at the Allegheny County Courthouse has the unconstitutional effect of conveying a government endorsement of Christianity”).

<sup>276</sup> *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 908 (2005) (Scalia, J., dissenting).

<sup>277</sup> Cf. Douglas Laycock, *Government-Sponsored Religious Displays: Transparent Rationalizations and Expedient Post-Modernism*, 61 CASE W. RES. L. REV. 1211, 1251-52 (2011) (“Even a Court composed of nine aggressive secular liberals would not order the demolition or sandblasting of every religious symbol on any government property in America . . . . If the Court is determined to permit some longstanding religious displays to remain just because they have been there a long time, it would do better to announce a rule explicitly about time—a grandfather clause, a statute of limitations, or a laches bar—rather than absurdly trying to secularize symbols that are plainly religious.”).

practices, such as the introduction of displays of the Ten Commandments in public buildings.<sup>278</sup> In my view, the expressive effects of legislation in supporting religion or marginalizing religious minorities are frequently greater at the time of the legislature's initial action than when original purposes are widely forgotten. The Court's analysis in *McGowan v. Maryland*,<sup>279</sup> which upheld the constitutionality of a set of Maryland statutes that barred many retail establishments from opening on Sunday, is instructive in this respect. The Court acknowledged that the legislature that originally enacted at least one of the challenged laws had a purpose, and presumably achieved the effect, of promoting religion.<sup>280</sup> But the Court concluded that such provisions had a "present purpose and effect" that stood "wholly apart from their original purposes or connotations"—one of "provid[ing] a uniform day of rest for all citizens."<sup>281</sup> In other words, the challenged statutes had ceased to communicate a message that marked some citizens as outsiders to the community's approved religious practices.

Recognizing that the expressive effects of religion-supporting practices can diminish over time makes sense of the Court's failure to require the chiseling out of religious symbols and exercises (such as "In God We Trust" on the currency and possibly legislative prayer) that it should not allow to be initiated today.<sup>282</sup> I also think it fair to say—however harsh it will sound in some ears—that the reasonable observer that we can construct or reconstruct from the case law sometimes requires religious minorities or outsiders to accept or acclimatize themselves to practices that are now largely woven into the culture and that convey no fresh, marginalizing message delivered by modern political decisionmakers. I do not, however, exclude the possibility that the expressively stigmatizing effects of a statute might grow, rather than recede, over time.<sup>283</sup>

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<sup>278</sup> See, e.g., *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 859 (2005).

<sup>279</sup> 366 U.S. 420 (1961).

<sup>280</sup> See *id.* at 431 ("There is no dispute that the original laws which dealt with Sunday labor were motivated by religious forces. But what we must decide is whether present Sunday legislation, having undergone extensive changes from the earliest forms, still retains its religious character.").

<sup>281</sup> *Id.* at 445.

<sup>282</sup> This, roughly, is what I take to be the approach of Justice Breyer's controlling concurring opinion in *Van Orden v. Perry*, 545 U.S. 677, 699 (2005). See Richard H. Fallon, Jr., *A Salute to Justice Breyer's Concurring Opinion in Van Orden v. Perry*, 128 HARV. L. REV. 429, 431-33 (2014) (arguing Justice Breyer's concurrence "suggests a narrow prescription that embodies pragmatic good sense"); see also *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 303-04 (1963) (Brennan, J., concurring) (noting that some practices that "no longer have a religious purpose or meaning" might be "insulate[d]" from judicial scrutiny).

<sup>283</sup> A possible example may lie in school prayer. According to Michael J. Klarman, "Under the 'Protestant consensus' that was dominant until at least the late nineteenth century—in many places much longer—public school displays of (Protestant) religiosity, such as prayer, Bible reading (from the King James, not the Douay, Bible), and religious hymn singing were unobjectionable on the

If a statute or policy—such as one of sectarian public prayer—has significant religiously marginalizing effects, then strict judicial scrutiny ought to apply. Once the threshold that triggers elevated scrutiny is crossed, the government has no substantial interest in facilitating religious exercise by, for example, organizing public prayers. Under these premises, the Supreme Court’s decision in *Town of Greece v. Galloway* to uphold a town government body’s practice of commencing its sessions with often-sectarian prayers seems to me to have been mistaken. The Court erred, first in failing to see the need for an elevated standard of judicial review and then in failing to invalidate a practice that could not possibly have satisfied strict scrutiny.

#### D. Religion in the Public Schools

In finding that the government violates the Establishment Clause by offering endorsements of religion within the public schools, the Supreme Court has not insisted on evidence of coercion (beyond the coercive pressure to attend public schools) or religious stigmatization. But if the Court renounces the position that a religious purpose can violate the Establishment Clause even in the absence of significant religious effects—as I have argued that it should—then it needs to formulate a threshold standard to signal the need for strict judicial scrutiny. Largely consistent with the case law to date, the operative question in cases challenging religious displays and practices in the public schools should be whether a reasonable observer would perceive governmental endorsement of religion.<sup>284</sup>

So recognizing would call for a reconceptualization of some leading cases, but not necessarily for a change of result in many of them. If endorsement became the touchstone in cases involving religion in the public schools, statutes requiring school prayers would register as suspect, but provision for moments of silence ordinarily would not. In *Wallace v. Jaffree*, plaintiffs successfully challenged a statute authorizing a moment of silence “for meditation or voluntary prayer” that the Alabama legislature enacted to supplant a prior statute that already permitted schools to observe a daily

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ground that the United States was a ‘Christian nation.’” *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 47 (1996). Professor Klarman suggests that it was not until the societal changes wrought by mass immigration of religious minorities (Catholics and Jews in particular) that the popular “connot[ation]” of church-state separation changed to render these practices objectionable and oppressive. *Id.* at 47-49.

<sup>284</sup> Although a forbidden legislative intent should not constitute a per se Establishment Clause violation, evidence that the legislature acted with a forbidden intent could play an indirect role in constitutional analysis, as evidence that would inform a reasonable observer’s perception or non-perception of a governmental endorsement of religion. *Cf.* Fallon, *supra* note 13, at 585 (noting that legislators’ known intentions can contribute to a statute’s expressive effects).

moment of silence “for meditation.”<sup>285</sup> Under the circumstances, the second moment-of-silence statute conveyed a message of endorsement.

In *Edwards v. Aguillard*, the Supreme Court invalidated a statute providing that if public school teachers taught evolution, they must also present the alternative theory of “creation science.”<sup>286</sup> Justice Brennan’s Court opinion rested on the ground that the statute had a forbidden purpose of promoting religion.<sup>287</sup> The Court should have asked instead whether the statute, as viewed through the eyes of an objective observer, conveyed a message of endorsement. Although that question seems to me to be an arguable one, I believe that the Court reached the correct result.

If endorsement exists, then strict scrutiny should apply. We could still ask whether the endorsement is necessary to promote a compelling governmental interest. But it is hard to imagine cases in which endorsing religion in the public schools would satisfy that test.

#### E. *Concluding Methodological Note: The Establishment Clause in Context*

The views that I have expressed in this Part will frustrate many Establishment Clause conservatives and Establishment Clause liberals alike—and especially those who train their attention on the Establishment Clause in relative abstraction from the remainder of constitutional law. Before concluding this Part, I should offer a response.

The proper judicial role under the Establishment Clause almost necessarily requires the integration of Religion Clause theory with more general constitutional theory. Many conservatives maintain that the Supreme Court should revamp Establishment Clause doctrine pursuant to predominantly if not exclusively originalist premises.<sup>288</sup> As I have recognized, original meanings matter to constitutional law. But they should not matter more to the Establishment Clause than to federalism or separation-of-powers doctrine, the Free Speech Clause, or the Equal Protection Clause.<sup>289</sup> Anyone

<sup>285</sup> 472 U.S. 38, 58-59 (1985).

<sup>286</sup> 482 U.S. 578, 581 (1987).

<sup>287</sup> See *id.* at 594 (“Because the primary purpose of the Creationsim Act is to endorse a particular religious doctrine, the Act furthers religion in violation of the Establishment Clause.”).

<sup>288</sup> See, e.g., *Wallace*, 472 U.S. at 92-104 (Rehnquist, J., dissenting) (arguing that Establishment Clause jurisprudence was built upon a “mistaken understanding of constitutional history”); see also *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 49 (2002) (Thomas, J., concurring in the judgment) (arguing prior Establishment Clause cases were wrongly decided because they departed from the original enacting intent of the Clause).

<sup>289</sup> See DAVID STRAUSS, *THE LIVING CONSTITUTION* 12-18 (2010) (arguing that “if originalism were to prevail,” racially segregated public schooling would be permitted, the government could discriminate against women, “[t]he Bill of Rights would not apply to the states,” states could violate “one-person, one-vote” principles, and “[m]any federal labor, environmental, and consumer protection laws would be unconstitutional”).

who believes that the Court should set aside more than a half-century of precedent and the values that underlie it should have to explain why practice and precedent matter less in Establishment Clause than in other constitutional cases. Especially given the contestability of historical understandings,<sup>290</sup> I see no adequate reason.

My analysis and conclusions will also have disappointed, and possibly outraged, those liberals who advance a normative vision of the Establishment Clause that would forbid any material or symbolic support for religion whatsoever. My response and challenge to them partly track what I have said in response to those constitutional originalists who would accord no weight to longstanding practice and precedent. Yes, we can imagine the Supreme Court ordering the removal of “In God We Trust” from the currency and forbidding all religious displays in public places. But anyone disposed to demand the uprooting of these practices should also think carefully about how such a stance would relate to principles of stare decisis and judicial restraint that govern, or should govern, in the rest of constitutional law.<sup>291</sup> If confronted with a partly analogous situation in which judicial conservatives prepared to overturn longstanding practices of congressional economic regulation under the Commerce Clause, most liberals would, I suspect, recoil with horror at what they would characterize as intolerable judicial activism.

To summarize: As I have emphasized repeatedly in calling for a wide-angle appraisal of Establishment Clause doctrine, it is a deep if familiar mistake to argue about Establishment Clause issues in isolation from the remainder of constitutional law. Adaptation of the sequenced, tiered-scrutiny approach that has worked well elsewhere could produce significant, rationalizing improvements in Establishment Clause doctrine. At the same time, reformist impulses within the domain of the Establishment Clause should often yield to transdoctrinal principles of judicial caution and restraint.

#### IV. STANDING TO SUE TO ENFORCE THE ESTABLISHMENT CLAUSE

This Part examines, and proposes frameworks for resolving, currently controverted issues involving standing to enforce the Establishment Clause. A central, organizing insight involves the conceptual connection between the rights or interests that the Establishment Clause substantively protects and the interests any infringement of which should suffice to create standing. Accordingly, this Part draws heavily on subsection II.A.2’s analysis of substantive rights.

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<sup>290</sup> See *supra* note 47 and accompanying text.

<sup>291</sup> For an unusually thoughtful effort to distill and apply those principles, see Shapiro, *supra* note 264.

With the connection between substantive constitutional guarantees and harms to cognizable interests in mind, we can distinguish three possible bases for standing that subsequent Sections of this Part will discuss in turn: (a) financial and material burdens of a kind that would support standing under a variety of constitutional provisions besides the Establishment Clause; (b) injury incurred in the capacity of a taxpayer whose tax dollars are used to support religious institutions or activities; and (c) other harms suffered as a result of symbolic governmental support for religion. The largest payoff from looking simultaneously at standing and merits issues will come in the third, most disputed category. But clarifying and occasionally surprising implications will emerge in the other categories as well.

In all cases, it will prove illuminating to compare the Supreme Court's standing analyses, which are sometimes highly restrictive, with cases in which the Court has assumed standing under the Establishment Clause without comment and rendered decisions on the merits. In *Arizona Christian School Tuition Organization v. Winn*, a narrow majority of the Justices brushed aside previous cases that had assumed the existence of standing as lacking constitutional consequence.<sup>292</sup> A more fruitful approach would look back at cases decided on the merits with the aim of inferring the Court's implicit prior standards for recognizing standing. If we can identify the implicit theories that would be both necessary and sufficient to support standing, we can then ask whether those theories stand up to critical scrutiny. If so, we should hold the Court to the bases for standing that it has implicitly embraced in the past.

#### A. *Financial and Material Burdens Adequate for Standing Outside the Establishment Clause*

Most cases involving governmentally mandated religious accommodations present no distinctive standing issues. When a defendant refuses to afford an accommodation and the plaintiff is a person denied a claimed entitlement, the injury is plain.<sup>293</sup> By any account, denial of an exemption imposes costs.

When a plaintiff brings suit to enforce a statutory mandate, the defendant will also have unquestionable standing to challenge the mandate as unconstitutional under the Establishment Clause.<sup>294</sup> Or, without waiting to be sued, an institution that is subject to a statutory duty to accommodate will

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<sup>292</sup> 563 U.S. 125, 144-45 (2011) ("When a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed.").

<sup>293</sup> See, e.g., *Cutter v. Wilkinson*, 544 U.S. 709, 713 (2005) (emphasizing that a facial challenge was raised by prisoners who claimed they were denied religious accommodations).

<sup>294</sup> HART & WECHSLER, *supra* note 45, at 167-68 & n.7.

face a threat of financial or other loss if forced to comply and will thus have standing to bring an anticipatory challenge.<sup>295</sup>

In yet another set of unproblematic cases, mandates to provide accommodations to some religious believers or religious conduct may impose corresponding burdens on those who receive no exemptions. For example, if Congress enacted draft exemptions for religious believers, then non-exempted individuals should be able to sue if their likelihood of being drafted increased as a result. Indeed, because draft exemptions would require religiously-based classifications, those who are assigned to a disadvantaged category as a result of their religious views could claim an analogy to white plaintiffs in affirmative action cases. In that context, “[t]he ‘injury in fact’ . . . is the denial of equal treatment resulting from the imposition of [a] barrier, not the ultimate inability to obtain the benefit.”<sup>296</sup> Analogously, draft-eligible citizens might complain of the imposition of a religion-based barrier to their escaping conscription.

A fraught set of standing issues has arisen when statutes mandating religious accommodations for religiously motivated individuals result in harms to third parties who are not themselves classified on the basis of religion—for example, women who lose access to health benefits under the ACA as a result of exemptions from ACA mandates for religiously motivated employers. Some have argued that parties disadvantaged in this way have no standing to complain of “burdens” because they have no “right” to health care or contraceptive coverage except on such terms as the government may choose.<sup>297</sup> This argument fails. When women receive no contraceptive coverage as a result of religious exemptions, the structure of their complaints precisely tracks the legal analysis in *Amos*. In *Amos*, the plaintiff was allowed to argue that a statutory exemption from an antidiscrimination mandate violated the Establishment Clause due to the burden that it imposed on third-party interests.<sup>298</sup> Although the plaintiff lost on the merits, no member of the Supreme Court doubted his entitlement to mount an Establishment Clause challenge when Congress stripped him of a statutory right that he

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<sup>295</sup> The availability of antisuit injunctions to assert and protect constitutional rights is often associated with the Supreme Court’s decision in *Ex parte Young*, 209 U.S. 123 (1908). For discussion of *Young* and relevant surrounding history, see HART & WECHSLER, *supra* note 45, at 927-35.

<sup>296</sup> Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 666 (1993).

<sup>297</sup> See, e.g., Carl H. Esbeck, *When Religious Exemptions Cause Third-Party Harms: Is the Establishment Clause Violated?*, 58 J. CHURCH & STATE 1, 15 (2016) (“If we are to assume a world where the default position is comprehensive healthcare coverage, then it is a mere tautology that departure from that baseline because of a RFRA accommodation for Hobby Lobby Stores and Conestoga Wood Specialties is a loss or ‘burden’ for their employees . . .”).

<sup>298</sup> Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 333 (1987) (arguing the exemption “burdens the free exercise rights of employees of religious institutions who work in nonreligious jobs”).

otherwise would have had. Women who lose valuable health benefits as a result of RFRA-mandated exceptions to rights under the ACA should be able to sue on the same basis, even if they should not always win.

### B. Taxpayer Standing

Taxpayer standing presents distinctive issues. In an influential dissenting opinion in *Flast*, Justice Harlan mocked the majority's double-nexus test as "entirely unrelated" to the purportedly controlling issue of whether the plaintiff had a sufficient personal stake to justify standing.<sup>299</sup> But taxpayer challengers to expenditures to support religious institutions have no less a personal stake than individual voters in one-person, one-vote cases or the males in *Heckler v. Mathews* who could realize no financial gain from a ruling in their favor.<sup>300</sup> Moreover, taxpayer standing to enforce the Establishment Clause, which has existed since *Flast*, possesses an inherent doctrinal logic that taxpayer standing to enforce limits on Congress's Spending Power under Article I<sup>301</sup>—or even the Free Speech or the Equal Protection Clause—would not: the Establishment Clause was distinctively intended to protect against taxation in support of religion.

Imagine a case involving governmental financial support exclusively for religious education. Or imagine that Congress levied a specific tax for support of a newly designated National Church. Would the conservative Justices who have expressed skepticism of taxpayer standing say that no one had standing to challenge the appropriation? If they would allow other churches or institutions to sue, perhaps the denial of taxpayer standing would occasion no grave harm. It is far from clear, however, what harm a competitor church would suffer<sup>302</sup>—unless stigmatic harm that one would expect the conservatives to view with independent skepticism. In any event, if we think about fitting plaintiffs in light of the purposes of the Establishment Clause, the most appropriate would be the taxpayers whose money was extracted to support an Establishment of Religion.<sup>303</sup> *Mitchell* and *Zelman* implicitly

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299 See *Flast v. Cohen*, 392 U.S. 83, 122 (1968) (Harlan, J., dissenting).

300 See *supra* notes 182–88 and accompanying text.

301 See *Frothingham v. Mellon*, 262 U.S. 447, 479–80 (1923) (holding a taxpayer suit challenging congressional spending as unconstitutional under Article I and the Tenth Amendment to be nonjusticiable).

302 See, e.g., HART & WECHSLER, *supra* note 45, at 145 ("The traditional rule was that the proprietor of a business lacks standing to object to the government's support of competing activities, because the common law does not recognize an interest in freedom from competition.").

303 Cf. Richard M. Re, *Relative Standing*, 102 GEO. L.J. 1191, 1197 (2014) (arguing that the Supreme Court's standing cases are best understood as upholding standing by "those claimants with the greatest stake in obtaining legal relief in any particular case" and as denying standing to those with lesser stakes). *But see* Garnett, *supra* note 36, at 664 (arguing that "[t]he claim that the no-



recognize as much. Against the background of the Court's having rendered merits rulings in those cases, it would be deeply incongruous not to have taxpayer standing in cases involving public financial support for religious activities and institutions.

If this analysis holds water, then the Court's taxpayer standing decisions in *Valley Forge*, *Hein*, and *Winn* warrant reappraisal in light of the substantive merits of the claims that the challengers presented. When thus reconsidered, the result in *Hein*—sculpting executive action out of the *Flast* rule—emerges as indefensible. *Flast* might appear on the surface to be distinguishable because *Hein* involved executive, not congressional, action,<sup>304</sup> and because the language of the Establishment Clause refers only to Congress, not the President.<sup>305</sup> But if we take a wide-angle look at the parallel areas of Free Exercise and Free Speech Clause jurisprudence, we see that the Court has treated all three branches of government as capable of violating the First Amendment.<sup>306</sup> The premises of its decisions imply that executive provision of financial and related benefits to religious institutions could also violate the Establishment Clause.

The Court's reasoning in *Valley Forge* looks similarly misguided. If the federal government cannot tax and spend directly to support religion without violating the Establishment Clause, then it ought not be able to tax, use the tax proceeds to acquire property, and then transfer the acquired property to religious institutions. The protective purposes of the Establishment Clause should extend as much to the latter case as to the former. As I have argued, moreover, the same protective purposes that would forbid a transfer of property as a matter of substantive constitutional law should ground a claim of taxpayer standing.

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establishment rule protects the liberty of conscience by regulating the disbursement of public funds is . . . mistaken" and that standing rules predicated on this claim are therefore also unpersuasive).

<sup>304</sup> See *Hein v. Freedom from Religion Found.*, 551 U.S. 587, 605 (2007) ("[T]he expenditures at issue here were not made pursuant to any Act of Congress. Rather, Congress provided general appropriations to the Executive Branch to fund its day-to-day activities.").

<sup>305</sup> See U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion").

<sup>306</sup> See, e.g., *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 441-42, 451 (1988) (subjecting the conduct of the U.S. Forest Service to scrutiny under the Free Exercise Clause); *Sherbert v. Verner*, 374 U.S. 398, 407-09 (1963) (reviewing the denial of unemployment compensation by a state employment security commission for consistency with the First and Fourteenth Amendments); see also *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 420 (1971) (invalidating a prior restraint issued by an Illinois state court); *Carroll v. President & Comm'rs*, 393 U.S. 175, 185 (1968) (invalidating a prior restraint ordered by a state court). For further discussion of the Supreme Court's application of the First Amendment to branches other than Congress, see Curtis A. Bradley & Neil S. Siegel, *Constructed Constraint and the Constitutional Text*, 64 DUKE L.J. 1213, 1243-46 (2015); David A. Strauss, *Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1, 30-34 (2015).

A similarly functional analysis would point to the conclusion that *Winn*, too, was wrongly decided. The Court should have decided the case on the merits. In a merits ruling, the Court could plausibly have held that a scheme of tax credits for donations to both religious and nonreligious tuition assistance organizations was substantially related to an important governmental interest in promoting educational diversity. But the wedge that the majority drove between constitutional rights under the Establishment Clause and standing to enforce those rights was regrettable. In Justice Kagan's terms, the Court "offer[ed] a roadmap . . . to any government that wishes to insulate its financing of religious activity from legal challenge."<sup>307</sup> She elaborated: "Structure the funding as a tax expenditure . . . . No taxpayer will have standing to object. However blatantly the government may violate the Establishment Clause, taxpayers cannot gain access to the federal courts."<sup>308</sup> No sound approach to the interpretation of rights-conferring constitutional provisions such as the Establishment Clause would countenance this anomaly.<sup>309</sup>

### C. Injury Resulting from Symbolic Support

As we begin to reappraise standing to challenge symbolic governmental support for religion, it bears noting once more that in almost none of the central cases decided to date—including *crèche* and Ten Commandments cases—has the Supreme Court paused over standing issues.<sup>310</sup> Its failure to do so has perplexed the lower courts, which have had to guess at the basis on which the Justices thought they could reach the merits.<sup>311</sup> Some of the cases may have involved taxpayer standing, even though the Court did not say so.<sup>312</sup>

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<sup>307</sup> *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 168 (2011) (Kagan, J., dissenting).

<sup>308</sup> *Id.* Justice Kennedy's Court opinion noted the abstract possibility that some tax credits might directly disadvantage "a particular religious group," whose members then could sue to allege constitutional violation, *id.* at 145 (majority opinion). But he appeared also to contemplate that no one might have standing in the aftermath of *Winn* to challenge some schemes that at least one earlier Court opinion, in *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), would mark as unconstitutional. *See id.* at 144.

<sup>309</sup> Although there may frequently not be a constitutional right to pre-enforcement injunctive remedies when other remedies are available to the victim of a constitutional rights violation, the non-availability of any remedy whatsoever would be distinctively anomalous and problematic in any case not presenting an otherwise non-justiciable political question. On the importance of the distinction between non-availability of particular remedies and the denial of any remedy for a constitutional violation whatsoever, see HART & WECHSLER, *supra* note 45, at 328-35.

<sup>310</sup> *See supra* note 41 and accompanying text.

<sup>311</sup> *See, e.g.,* Spencer, *supra* note 42.

<sup>312</sup> *See id.* at 1081 (observing that of the Supreme Court's "four religious display cases from the past three decades," in all but *Van Orden v. Perry*, 545 U.S. 677 (2005), "the lower court opinions either expressly found municipal taxpayer standing or did not address standing but plausibly can be read as predicated standing on the plaintiffs' municipal taxpayer status").

But it seems unlikely that they all did. If not, we confront the puzzle of how standing to challenge symbolic support for religion might be rationalized.

In *Allen v. Wright*,<sup>313</sup> which involved an alleged failure by federal officials to deny tax exemptions to racially discriminatory private schools, the Supreme Court held that an allegation of stigmatization did not suffice for standing. With specific reference to the Establishment Clause, the Court said in *Valley Forge* that “the psychological consequence presumably produced by observation of conduct with which one disagrees . . . is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms.”<sup>314</sup> In gauging standing to enforce the Establishment Clause, however, we need to think once more about what the Clause protects against. For this purpose, the example of sustained one-sect proselytization that the conservative Justices said in *County of Allegheny* would violate the Establishment Clause—epitomized by a large Latin cross affixed to city hall—will serve amply.<sup>315</sup> What harm would it visit upon whom?

As Part III’s merits analysis may have intimated, the best answer emerges from the objective observer test that Justice O’Connor introduced as a substantive measure of constitutional impermissibility in *Lynch v. Donnelly*. Under that test, the court asks whether an objective observer would understand a religious symbol as “send[ing] a message to nonadherents [of a favored creed] that they are outsiders, not full members of the political community,”<sup>316</sup> and as “making adherence to a religion relevant in any way to a person’s standing in the political community.”<sup>317</sup> Adapting that test, I would find standing to object to symbolic support when a reasonable observer would conclude that a governmental action or display sends a message that marks nonadherents to the favored religion as less than fully valued members of the community that they inhabit.<sup>318</sup> In order to claim standing on this basis, a plaintiff should need to allege that she is a member of the stigmatized or marginalized group and that her ordinary course of life—not action taken

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<sup>313</sup> 468 U.S. 737, 755-56 (1984).

<sup>314</sup> *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 485-86 (1982).

<sup>315</sup> See *County of Allegheny v. ACLU*, 492 U.S. 573, 661 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part).

<sup>316</sup> *Lynch v. Donnelly*, 465 U.S. 668, 688 (O’Connor, J., concurring).

<sup>317</sup> *Id.* at 687-88.

<sup>318</sup> See Steven D. Smith, *Nonestablishment, Standing, and the Soft Constitution*, 85 ST. JOHN’S L. REV. 407, 439-40 (2011) (“When . . . the Supreme Court began to regard governmental endorsement of religion as a violation of the Establishment Clause . . . it came to be supposed that the offense suffered by observers was sufficient to confer standing.”); see also Lupu & Tuttle, *supra* note 36, at 135 & n.99 (equating a standing injury of “religious alienation” with “Justice O’Connor’s ‘no endorsement’ theory”).

solely to create standing to bring a lawsuit—brings her or will bring her into contact with the challenged activity or display.<sup>319</sup>

As Part III emphasized, the objective observer test admittedly requires judgment in administration. As a test for standing, however, the objective observer formula is not significantly more open-textured than other standing tests that depend on the identification of noneconomic injury. In the case of symbolic speech of the kind involved in displays of crèches and the Ten Commandments, there is a powerful, broadly shared constitutional intuition that some challengers come sufficiently within the zone of interests that the Establishment Clause protects to deserve a ruling on the merits of their claims, presumably because they suffer a harm of some kind. All of the Justices appear to have credited this intuition in reaching the merits in the Court's leading cases.

Alternative efforts to explain standing in cases involving crèches or Ten Commandments displays—or, one should bear in mind, in a case involving the erection of a large Latin cross atop a city hall—are all less convincing. We should agree that mere feelings of offense do not furnish a plausible basis for standing. Some more objective measure seems necessary.<sup>320</sup> Mere unwanted exposure to religious images or expression should not suffice unless a further, more objective test is satisfied.<sup>321</sup> Sometimes the harm issuing from unwanted exposure to symbolic support for religion should not rise to the level of judicial cognizability—as in the case of “In God We Trust” on the currency. Nor does it make sense to uphold standing based on the costs that particular challengers may incur in order to avoid exposure to displays that they do not want to see.<sup>322</sup> This approach would allow anyone to manufacture standing through the expedient of making a few even slightly costly detours (or by making all purchases with checks or credit cards in order not to encounter “In God We Trust”).

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319 Under this standard, many if not most residents of Allegheny County would have had standing to challenge the crèche and menorah displays in *County of Allegheny*, 492 U.S. 573, 578. Similarly, a lawyer who regularly used the law library in the Texas State Capitol would have had standing to challenge the Ten Commandments display in *Van Orden v. Perry*, 545 U.S. 677, 682 (2005). But a Massachusetts resident who happened to hear of the exhibits would not have standing absent further facts that I have not stipulated. The question of exactly who would have standing to challenge the erection of a memorial cross at a national monument might be a more difficult one, but a regular visitor ought to qualify. Cf. *Salazar v. Buono*, 559 U.S. 700, 711 (2010) (upholding the standing of a former National Park Service employee to object to a display on federal land but dividing about the grounds for standing).

320 See, e.g., Spencer, *supra* note 42, at 1083 (critically discussing this asserted basis for standing).

321 See *id.* at 1090-91 (“[I]nvoluntary exposure requirements do nothing to redeem a naked ‘direct personal contact’ test from its absolute incompatibility with the Supreme Court’s standing precedents because they do not alter the nature of the alleged harm.”).

322 See *id.* at 1091-92 (noting the limits of such an approach).

A final alternative would be to hold that no one has standing in symbolic speech cases in the absence of either coercion or taxpayer standing.<sup>323</sup> But this approach should satisfy no one. It would put some actual or imaginable cases of what nearly everyone—liberal and conservative alike—would regard as plain violations of a rights-conferring provision of the Constitution beyond the jurisdiction of the federal courts to rectify.

The same analysis largely holds in cases involving religion in the public schools. If the Establishment Clause prohibits the government from using its role in furnishing public education to endorse religious dogma, and creates rights against endorsement, then the harms occasioned by coerced exposure to unwanted proselytization should suffice to support standing.

### CONCLUSION

When compared with other constitutional doctrines, Establishment Clause doctrine is an outlier with respect both to the merits and to standing. Although the Supreme Court should maintain the outlines of the largely category-based approach that currently prevails in Establishment Clause litigation, the Justices could, and should, clarify a number of issues and resolve some persistent confusions by pulling Establishment Clause doctrine more nearly into the constitutional mainstream. In particular, the Court should adopt a regime of sequenced, tiered merits analysis and, regardless of category, should apply elevated scrutiny to statutes that impinge on interests that the Establishment Clause protects. Within such a regime, the Court should apply strict scrutiny to any statute that classifies or requires classifications based on religion. It should prescribe intermediate scrutiny for statutes that expend tax revenues to provide material benefits to churches or religiously affiliated organizations on a nondiscriminatory, nonpreferential basis. And it should clarify its approach to determining which symbolic supports for religion rise to the level of Establishment Clause violations, even when honesty requires acknowledging that promoting religion is their predominant purpose. Correspondingly, the Court should realign standing doctrine to equate the injuries needed for standing more closely with those against which the Establishment Clause furnishes substantive protection.

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<sup>323</sup> For a defense of this approach, rooted both in concerns about the separation of powers and in prudential interests in avoiding judicial involvement in “the culture wars,” see *id.* at 1092-97. Both lines of argument rely on without expressly defending the premise—which I have argued is mistaken—that the Establishment Clause confers few if any individual rights in cases not involving coercion.

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