"PLAY IN THE JOINTS" AMONG THE RELIGION CLAUSES: REBUILDING THE STRONG JOINTS THE FRAMERS FORMED

Falco Anthony Muscante II[†]

TABLE OF CONTENTS

[†] Falco Anthony Muscante II earned his J.D. in 2023 from the Duquesne University School of Law, where he served on the executive boards for the Law Review and Appellate Moot Court Board. Falco is an alumnus of Grove City College, where he graduated summa cum laude with a B.S. in Management, minor in Pre-Law, and concentration in Human Resources. Falco is a litigation associate at a big law firm in Pittsburgh, Pennsylvania.

Falco would like to thank Judge Thomas M. Hardiman of the United States Court of Appeals for the Third Circuit for advising the initial draft of this Article written in Judge Hardiman's course, Advanced Constitutional Law: Current Issues. Falco would also like to thank his wife and family. The views expressed in this Article are solely those of the author, as are any errors or omissions.

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[1]

I. INTRODUCTION

Supreme Court Justices and political scholars alike have often held the Establishment and Free Exercise Clauses in tension. But that tension did not exist for the Framers. Beginning in the 1970s, nearly two centuries after the Constitutional Convention, the Supreme Court developed the "play in the joints" doctrine in response to dual concerns of neutrality and the "wall of separation" between government and religion.

Although the phrase may be a clever quip, neither the Constitution, the Bill of Rights, nor any Founding Era debate discuss any "play in the joints." Only ten cases in the Court's history discuss the doctrine.[2] To the extent that the earlier use of the phrase reflects the original public meaning of the Religion Clauses, the doctrine simply represents a constitutional reality. But as the Court cautioned in *Walz v. Tax Commissioner of New York*—the case that first established the doctrine—it must be careful to avoid "[t]he hazards of placing too much weight on a few words or phrases of the Court [.]"[3] Those hazards seem to have come to bear in the years that followed *Walz*, at least until recently in *Kennedy v. Bremerton School District* and *Carson v. Makin*.[4] This Paper will outline the original public meaning of the Religion Clauses, discuss the origins of the judicially-created "play in the joints" doctrine, and then trace the doctrine's use in Supreme Court jurisprudence to understand its slow drift and detachment from the Religion Clauses. Ultimately, the Court should depart from using the doctrine entirely and recognize that the Religion Clauses are complementary, not contradictory.

---

1. U.S. CONST. amend. I.

2. Those cases are: (1) Walz v. Tax Comm'n of N.Y., 397 U.S. 664 (1970); (2) Norwood v. Harrison, 413 U.S. 455 (1973); (3) Sloan v. Lemon, 413 U.S. 825 (1973); (4) County of Allegheny v. ACLU, 492 U.S. 573, 591 (1989); (5) Bd. of Educ. v. Grumet, 512 U.S. 687 (1994); (6) Locke v. Davey, 540 U.S. 712 (2004); (7) Cutter v. Wilkinson, 544 U.S. 709 (2005); (8) Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U. S. 449 (2017); (9) Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2020); and (10) Carson v. Makin, 596 U.S. 767 (2022).

3. *Walz*, 397 U.S. at 670.

4. *See generally Carson*, 596 U.S. 767 (holding that Maine's nonsectarian requirement for its tuition assistance program violated the Free Exercise Clause); Kennedy v. Bremerton Sch. Dist., 597 U.S. 507 (2022) (holding that a public school district violated a football coach's First Amendment rights under the Free Speech and Free Exercise Clauses by retaliating against him for praying on the football field).

II. THE ROAD TO RIGHTS

During the summer of 1787, a group of delegates met in Philadelphia, Pennsylvania, to fix the inadequacies that surfaced in the newly formed nation under the Articles of Confederation. This Constitutional Convention ultimately abandoned the Articles of Confederation to start fresh with a new guiding document—the Constitution—that would set up a strong central government with both enumerated and limited powers. Because the Constitution is structural and did not recognize individual rights like many state constitutions, some delegates and citizens—who came to be known as the Anti-Federalists—refused to support the Constitution unless the rest of the delegates and citizens—the Federalists—promised a bill of rights.[5] On that promise, the delegates signed the Constitution on September 17, 1787,[6] and the first session of Congress ratified the Bill of Rights on December 15, 1791.[7]

Although the First Amendment in the Bill of Rights is but one of ten, it recognizes five distinct freedoms that have since been incorporated and recognized by the states *vis-à-vis* the Fourteenth Amendment.[8] The Framers, having formed the government on the heels of religious pressure and persecution, sought to protect against both government establishment of religion and government suppression of citizens' rights to exercise religious beliefs. These protections are recognized in the Religion Clauses.

A. *Establishment Clause*

> "Congress shall make no law respecting an establishment of religion . . . ."[9]

At the time of the Founding, the Establishment Clause meant that the federal government could not promote and inculcate a common set of beliefs through governmental mandate, like Great Britain did with the Church of

---

5. *See generally* HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR (1981) (explaining the creation of Bill of Rights).

6. *Id.*

7. *Id.*

8. Those five freedoms include speech, religion, press, assembly, and the right to petition the government. The Court incorporated the Establishment Clause in *Cantwell v. Connecticut*, 310 U.S. 296, 303, 305 (1940) and the Free Exercise Clause in *Everson v. Board of Education*, 330 U.S. 1, 15 (1947). Because of incorporation, the protections recognized by these clauses now apply in both federal and state contexts.

9. U.S. CONST. amend. I.

England.[10] For James Madison and others, the purpose of no establishment was *not* to avoid religion even touching government, but rather, to protect individuals' rights to freely exercise their beliefs.[11] The Establishment Clause "'is best understood as a federalism provision' that 'protects state establishments from federal interference.'"[12] This understanding of establishment was not novel in colonial America or when Congress adopted the Bill of Rights.[13] But over the years, the Court tried to parse a more bright-line separationist definition that sought to divorce religion from government.[14]

---

10. Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2107, 2131 (2003) [hereinafter *Establishment and Disestablishment at the Founding*]; Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 668 (describing the original understanding of the Religion Clauses); Wallace v. Jaffree, 472 U.S. 38, 106 (1985) (Rehnquist, J., dissenting) (writing that, since the time of the founding, "[the Establishment Clause] forbade establishment of a national religion, and forbade preference among religious sects or denominations"); *see also* Gerard V. Bradley, *The Death and Resurrection of Establishment Doctrine*, 61 DUQ. L. REV. 1, 34–37 (2023); John S. Baker, Jr. & Daniel Dreisbach, *Establishment of Religion*, *in* THE HERITAGE GUIDE TO THE CONSTITUTION 393, 394 (David F. Forte & Mathew Spalding eds., 2d ed. 2014); County of Allegheny v. ACLU, 492 U.S. 573, 662 (1989) (Kennedy, J., concurring in part and dissenting in part).

11. In James Madison's *Memorial and Remonstrance Against Religious Assessments*, he wrote that:

> Religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence. The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man *to exercise it* as these may dictate.

Nat'l Archives, *Memorial and Remonstrance Against Religious Assessments, [ca. June 20] 1785*, FOUNDERS ONLINE, (quoting Va. Decl. of Rights of 1776, art. XVI), https://founders.archives.gov/documents/Madison/01-08-02-0163 (last visited Feb. 6, 2023) (emphasis added). *Contra* Wilson Huhn, *Analysis of* Carson v. Makin, 61 DUQ. L. REV. 50, 51 (2023) (arguing that the Establishment Clause means that "Congress may not enact any laws involving or having anything to do with an establishment of religion").

12. Cutter v. Wilkinson, 544 U.S. 709, 727–28 (2005) (Thomas, J., concurring) (quoting Zelman v. Simmons-Harris, 536 U.S. 639, 677-80 (2002) (Thomas, J., concurring)); *see also* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 50 (2004) (Thomas, J., concurring) (citing AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 32–42 (1998)).

13. *See, e.g.*, *Establishment and Disestablishment at the Founding*, *supra* note 10, at 2107 ("The Church of England was established by law in Great Britain, nine of the thirteen colonies had established churches on the eve of the Revolution, and about half the states continued to have some form of official religious establishment when the First Amendment was adopted. Other Americans had first-hand experience of establishment of religion on the Continent—of the Lutheran establishments of Germany and Scandinavia, the Reformed establishment of Holland, or the Gallican Catholic establishment of France.").

14. In *Everson v. Board of Education*, which upheld a generally-applicable state spending program that allocated public funds for bus fares of students, including those attending religious schools, the Court provided this often-repeated summary of the Establishment Clause:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to

Eventually, the Court entrenched that separationist approach in a multifactor balancing test under the 1971 *Lemon v. Kurtzman* decision.[15] Under the *Lemon* test, a statute or practice does not violate the Establishment Clause so long as: (1) the primary purpose is secular, (2) it neither promotes nor inhibits religion, and (3) there is no excessive entanglement between church and state.[16] In *Lemon*, the Court applied that test to hold that the government violated the Establishment Clause by funding teachers' salaries and materials at religious schools, even if the funding was used for secular courses, due to excessive entanglement.[17] For fifty years, the Court left the *Lemon* test—which had no basis in the history, structure, or text of the Constitution—on life-support until *Kennedy v. Bremerton School District*, where the Court finally laid it to rest.[18]

B. *Free Exercise Clause*

> "Congress shall make no law . . . prohibiting the free exercise [of religion]."[19]

During the Founding Era, religious freedom was an important issue, with different colonies adopting different approaches to the relationship between religion and government. Some colonies, such as the Massachusetts Bay Colony, had established churches or religious tests for public office, while others, like Rhode Island, did not.[20] Before the Fourteenth Amendment incorporated the First Amendment, the Free Exercise Clause was intended to

---

> profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*.

330 U.S. 1, 15–16 (1947), *quoted in* Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 216 (1963); *ACLU*, 492 U.S. at 591; Lee v. Weisman, 505 U.S. 577, 600 n.2 (1992); *see also* Bradley, *supra* note 10, at 15.

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

16. *Id.* at 612–13.

17. *Id.* at 624–25.

18. Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 534-36 (2022); *see also* Groff v. DeJoy, 600 U.S. 447, 460 (2023) (noting in a unanimous opinion that *Lemon* is "now abrogated").

19. U.S. CONST. amend. I.

20. John R. Vile, *Established Churches in Early America*, FREE SPEECH CTR. AT MIDDLE TENN. ST. UNIV. (Jan. 1, 2009), https://www.mtsu.edu/first-amendment/article/801/established-churches-in-early-america.

work in tandem with the Establishment Clause to prevent the federal government from imposing a national religion or otherwise interfering with individuals' religious practices.[21]

But even post-incorporation, the Free Exercise Clause meant to protect not only the freedom for Americans to believe what they want, but also the freedom to act on that belief.[22] Sometimes, indeed, the Court has stopped at mere belief.[23] But the general word "exercise"—especially at the time of the Founding—has never meant passive internal belief.[24] The same was true of the word in the Free Exercise Clause during the era when Congress passed the Bill of Rights.[25] The Court has regularly recognized this more encompassing protection for religious exercise because "belief and action cannot be neatly confined in logic-tight compartments."[26] This means that

---

21. *See infra* Part III.

22. Indeed, the Framers broadly intended the First Amendment to protect not only internal beliefs and thought, but also external actions and expressive activities. *See, e.g.*, Falco A. Muscante II, *Talk Should Be Cheap: The Supreme Court Has Spoken on Compelled Fees, But Universities Are Not Listening*, 61 DUQ. L. REV. 124, 133 (2023) (noting that in the context of public unions and the First Amendment, "forced contribution is forced speech; no public employee who resigns from a union can be forced to pay either agency fees for chargeable expenses or fees directed toward political or ideological projects."); Thomas C. Berg, *Free Exercise of Religion*, *in* THE HERITAGE GUIDE TO THE CONSTITUTION 399, 400 (David F. Forte & Mathew Spalding eds., 2d ed. 2014); Nat'l Archives, *V. To the Danbury Baptist Association, 1 January 1802*, FOUNDERS ONLINE, https://founders.archives.gov/documents/Jefferson/01-36-02-0152-0006 (last visited Apr. 6, 2023) [hereinafter *Jefferson's Letter to the Danbury Baptists*] (quoting U.S. CONST. amend. I) (writing about the Establishment Clause more than a decade after Congress passed the Bill of Rights).

23. *Contra* Reynolds v. United States, 98 U.S. 145, 166–67 (1878) (holding that the Free Exercise Clause did not protect polygamy from governmental regulation by distinguishing between belief and action); Emp. Div. v. Smith, 494 U.S. 872, 878-79 (1990) ("We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.").

24. *Smith*, 494 U.S. at 893 (O'Connor, J., concurring) (quoting 3 A NEW ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 401–02 (J. Murray ed. 1897) (defining "exercise" to include "[t]he practice and performance of rites and ceremonies, worship, etc.; the right or permission to celebrate the observances (of a religion)" and religious observances such as acts of public and private worship, preaching, and prophesying)).

25. To emphasize a different portion of James Madison's *Memorial and Remonstrance Against Religious Assessments*, "Religion . . . and the *manner of discharging* it, can be directed only by reason and conviction, . . . [and] must be left to the conviction and conscience of every man . . . to *exercise it* as these may dictate." Nat'l Archives, *supra* note 11 (emphasis added).

26. Wisconsin v. Yoder, 406 U.S. 205, 220 (1972) (holding that a law requiring all children to attend public school until the age of 16 violated the free exercise rights of Amish parents who believed that higher education was contrary to their religious beliefs), *quoted in Smith*, 494 U.S. at 893 (O'Connor, J., concurring) (noting that the government may regulate religiously motivated actions or conduct—even those motivated by sincere religious belief—as long as the regulation is not targeted at the belief itself); *see, e.g.*, Kennedy v. Bremerton Sch. Dist., 597 U.S. 507 (2022) (holding that a high school football coach could pray publicly on the field after the game); Church of Lukumi Babalu Aye v. City of Hialeah, 508

individuals have the right to engage in religious practices, rituals, and observances, as long as they do not violate other laws or infringe on the rights of others.[27]

III. "PLAY IN THE JOINTS" AMONG THE RELIGION CLAUSES

Some Justices and scholars believe there is tension between the Religion Clauses that can be resolved by recognizing the "play in the joints" between them.[28] Others, however, understand that the Religion Clauses were designed deliberately as complements to each other, in an effort to protect individuals' abilities to practice religion as they choose.[29] For a time, the Court viewed the principles in the Religion Clauses as running in opposite directions—free exercise as pro-religion and no establishment as anti-religion.[30] But as Justice Gorsuch wrote, in his opinion for the Court in *Kennedy v. Bremerton School District*, "[i]n truth, there is no conflict between the constitutional commands before us. There is only the 'mere shadow' of a conflict, a false choice premised on a misconstruction of the Establishment Clause."[31]

Initially, the phrase "play in the joints" may have recognized the historical and constitutional context of the Religion Clauses, but throughout the confusing and contradictory line of cases mentioning the doctrine, the phrase's meaning has shifted more toward a "relentless extirpation of all contact between government and religion."[32]

U.S. 520 (1993) (holding that a law prohibiting the ritual sacrifice of animals in a religious service was unconstitutional); Sherbert v. Verner, 374 U.S. 398 (1963) (holding that a law violated the Free Exercise Clause by denying unemployment benefits to individuals who refused to work on their Sabbath day); Cantwell v. Connecticut, 310 U.S. 296 (1940) (holding law violated the Free Exercise Clause by requiring individuals to obtain a permit before soliciting money for religious purposes because it imposed a prior restraint on the exercise of religion).

27. One important example of this tension is the case of *Reynolds v. United States*, in which the Supreme Court upheld a federal law banning polygamy, even though it was practiced by members of the Mormon religion. Reynolds v. United States, 98 U.S. 145, 166–67 (1878). The Court held that religious belief was protected, but that the practice of polygamy was not, because it violated other important legal principles. *Id.*

28. *See generally* Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 669 (1970); Huhn, *supra* note 11, at 57–59.

29. *Kennedy*, 597 U.S. at 532–33.

30. *See* Carl H. Esbeck, *"Play in the Joints between the Religion Clauses" and Other Supreme Court Catachreses*, 34 HOFSTRA L. REV. 1331, 1333 (2006).

31. *Kennedy*, 597 U.S. at 543 (2022) (quoting Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 308 (Goldberg, J., concurring)).

32. County of Allegheny v. ACLU, 492 U.S. 573, 657 (1989) (Kennedy, J., concurring in part and dissenting in part).

A. *Walz: There is Some "Play in the Joints"*

The Supreme Court first coined the phrase "play in the joints" in a 1970 case, *Walz v. Tax Commission of New York*, that dealt with real estate tax exemptions for religious houses of worship.[33] The Court held that the tax exemption was not unconstitutional as either an attempt to establish, sponsor, or support religion, or as an interference with the free exercise of religion.[34] Writing for the Court, Chief Justice Burger recognized the general principles inherent in the Religion Clauses: the fact that the religious activity should neither be sponsored, commanded, nor inhibited.[35] With those principles in mind, he wrote that "there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference."[36] In this case specifically, the government funding was not an attempt at establishing religion; it was "simply sparing the exercise of religion from the burden of [government]."[37]

B. *Misconceptions of Neutrality and the "Wall of Separation"*

Dual concerns of neutrality and a "wall of separation" may have fueled the fire that led to applications of the "play in the joints" doctrine that limited religious practice, but at the time of the Founding, most Framers supported religion—at the very least—to promote a republican form of civic virtue.[38] Since then, however, courts and commentators have read the Religion Clauses as a collective directive for the government to remain neutral regarding religion and erect a "wall of separation."[39] But those interpretations not only misunderstand the text and history of the Religion Clauses as discussed above, but more fundamentally, flout the notion that neutrality as applied is never *actually* neutral. And practically, there can never be a "wall of separation."

33. *See Walz*, 397 U.S. 664.
34. *Id.* at 680.
35. *Id.* at 669.
36. *Id.* at 668-69.
37. *Id.* at 673.
38. Baker & Dreisbach, *supra* note 10, at 395.
39. Huhn, *supra* note 11, at 56.

1. "Neutrality" is Never Neutral

In 1963, the Court in *School District of Abington Township v. Schempp* struck down a Pennsylvania law mandating the practice of reading the Bible in public school before classes because "the First Amendment [commands] that the Government maintain strict neutrality, neither aiding nor opposing religion."[40] Aiding religion would certainly not be neutral toward non-religious people. But similarly, requiring both a secular purpose and a primary secular effect would also not be neutral toward religious people.[41]

As Justice Stewart recognized in his dissent, the principle of neutrality is less clear than the majority suggests.[42] Stewart's framing is perhaps more apt: neutrality in its proper form "is the extension of evenhanded treatment to all who believe, doubt, or disbelieve."[43] The difference is subtle but important. Whereas the majority required secularism to prevail, the dissent would have only required "even handed treatment."[44] This non-neutral preference toward secularism has spread like wildfire among Court precedent.[45]

The idea of neutrality is often used to justify policies or practices that in fact discriminate against religious individuals or groups. For example, in Justice Kennedy's dissent in *County of Allegheny v. ACLU*, he wrote that "[j]udicial invalidation of government's attempts to recognize the religious underpinnings of the holiday would signal not neutrality but a pervasive intent to insulate government from all things religious."[46] Later, in *Employment Division v. Smith*, the Court held that a generally applicable law that incidentally burdens religious practice does not violate the Free Exercise Clause, as long as the law does not specifically target religion.[47] This approach allows laws to burden religious practice with little or no justification, so long as they apply to everyone equally.[48]

---

40. Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 225 (1963).

41. *See id.* at 222.

42. *See id.* at 313 (Stewart, J., dissenting) ("What these cases compel, rather, is an analysis of just what the 'neutrality' is which is required by the interplay of the Establishment and Free Exercise Clauses of the First Amendment, as imbedded in the Fourteenth.").

43. *Id.* at 317.

44. *See id.*; *see also* Carson v. Makin, 596 U.S. at 792 (2022) (Breyer, J., dissenting).

45. *See, e.g.*, Everson v. Bd. of Educ., 330 U.S. 1, 15–16 (1947); Lemon v. Kurtzman, 403 U.S. 602, 612–13, 625 (1971); Lee v. Weisman, 505 U.S. 577, 599 (1992).

46. County of Allegheny v. ACLU, 492 U.S. 573, 664 (1989) (Kennedy, J., dissenting).

47. Emp. Div. v. Smith, 494 U.S. 872, 878-79 (1990).

48. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1466–73 (1990) (noting that an original understanding of the Free

More recently, in *Carson v. Makin*, the Court criticized Justice Breyer's dissent where he wrote that, taken "[t]ogether [the Religion Clauses] attempt to chart a 'course of constitutional neutrality' with respect to government and religion."[49] But the "neutrality" for which Justice Breyer and others advocate is not neutral—it is a systematic approach to eliminate religion from the American marketplace of ideas. As Chief Justice Roberts alluded in his opinion for the Court: "there is nothing neutral about Maine's program. The State pays tuition for certain students at private schools—so long as the schools are not religious. That is discrimination against religion."[50]

2. The "Wall of Separation" Protected Religion

Thomas Jefferson used the phrase "wall of separation" (coined by colonial leader Roger Williams[51]) in a response letter to the Danbury Baptist Association in 1802.[52] The Danbury Baptists had written to President Jefferson expressing their concern that their state constitution lacked protections for religious freedom.[53] They wrote, "what religious privileges we enjoy (as a minor part of the State) we enjoy as favors granted, and not as inalienable rights: and these favors we receive at the expense of such degrading acknowledgments, as are inconsistent with the rights of freemen."[54] Jefferson responded by quoting the Religion Clauses: "I contemplate with sovereign reverence that act of the whole American people which declared that *their* legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between Church and State."[55]

Exercise clause required exemptions for religiously-motivated conduct); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1 (1990) (noting that *Smith* burdens religious individuals to conform to laws that conflict with their beliefs, rather than burdening the government to accommodate those beliefs).

49. *Carson*, 596 U.S. at 791 (Breyer, J., dissenting).

50. *Id.* at 781 (majority opinion).

51. *See* Roger Williams, *Mr. Cottons Letter Lately Printed, Examined and Answered*, 45 (1644), https://quod.lib.umich.edu/e/eebo2/A96614.0001.001 ("[W]hen they have opened a gap in the hedge or wall of Separation between the Garden of the Church and the Wildernes [sic] of the world, God hath ever broke down the wall it selfe, . . . and made his Garden a Wildernesse, as at this day.").

52. *Jefferson's Letter to the Danbury Baptists*, *supra* note 22 (quoting U.S. CONST. amend. I).

53. Nat'l Archives, *To Thomas Jefferson from the Danbury Baptist Association, [After 7 October 1801]*, FOUNDERS ONLINE, https://founders.archives.gov/documents/Jefferson/01-35-02-0331 (last visited Apr. 6, 2023).

54. *Id.*

55. *Jefferson's Letter to the Danbury Baptists*, *supra* note 22 (quoting U.S. CONST. amend. I).

In context, Jefferson's letter affirmed the freedom of citizens—in this case the Danbury Baptists—to practice their religion. The correspondence had nothing to do with either secular citizens complaining about religion's impact on government or limiting religion's influence on government and politics. The phrase has never meant the absence of all contact between government and religion.[56] Nonetheless, beginning with *Reynolds v. United States*, the Court incorporated the "wall of separation" language from Jefferson's letter into the Court's jurisprudence to do just that, limit religion.[57] The Court continued to promote an out-of-context reading of that nonjudicial, nonlegislative phrase—as it did with "play in the joints"—until recently in *Carson v. Makin*.[58]

C. *Post-Walz: Three Decades of Conflict*

In the thirty-four years that followed *Walz*, the Court decided many cases implicating the Religion Clauses and the Court's desire to seek neutrality and maintain a "wall of separation." Five mentioned the "play in the joints" doctrine; some of those recognized the broad protections afforded to religion under the clauses, while others found that the government violated the Establishment Clause.

In the first post-*Walz* "play in the joints" case, *Norwood v. Harrison*, the Court prohibited government funding to racially-segregated schools. The Court drew a distinction between religious schools and discriminatory schools, noting that, "in the context of this case the legitimate educational function cannot be isolated from discriminatory practices."[59] The Court permitted state assistance of religious schools, just not racially-segregated ones.[60] Although Chief Justice Burger, again writing for the Court, restated the scope of the "play in the joints" doctrine in dicta, the case ultimately turned on principles of racial discrimination and the Equal Protection Clause.[61]

That same term, however, Justice Powell wrote for the Court in *Sloan v. Lemon* and hijacked Chief Justice Burger's "play in the joints" doctrine to strike down a state tuition reimbursement program that reimbursed families

---

56. *See* Walz v. Tax Comm'n of New York, 397 U.S. 664, 676 (1970).

57. Reynolds v. United States, 98 U.S. 145, 164 (1878).

58. Carson v. Makin, 596 U.S. 767, 809 (2022) (Sotomayor, J., dissenting).

59. Norwood v. Harrison, 413 U.S. 455, 468–69 (1973).

60. *Id.* at 469 (quoting Tilton v. Richardson, 403 U.S. 672, 677 (1971)) (emphasis added) (internal citations omitted).

61. *See id.*

whose children attended nonpublic schools, including religious ones.[62] The Court noted that "while there is 'room for play in the joints,' the [Fourteenth] Amendment's proscription clearly forecloses [the tuition grant scheme]."[63] In his dissent, Chief Justice Burger recognized that the Establishment Clause does not prohibit the government from establishing programs that are generally applicable, even if they provide funding to religious organizations.[64]

Sixteen years later, in *County of Allegheny v. ACLU*, the Court ruled that a Christian crèche in a county courthouse violated the Establishment Clause, but not a Jewish menorah in front of a government building.[65] Justice Kennedy, along with Chief Justice Rehnquist and Justices White and Scalia, concurred that a menorah is constitutionally permissible but dissented as to the Court's reasoning and subsequent holding that the créche violated the Establishment Clause.[66]

Justice Kennedy defended the original public meaning of the Religion Clauses, noted that the Establishment Clause allows the government to accommodate the "central role religion plays in our society," and rejected any view that would categorically require the government to avoid all assistance to religion.[67] He noted that "[s]peech may coerce in some circumstances, but this does not justify a ban on all government recognition of religion," because of the "play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference."[68]

Then, five years later in *Board of Education v. Grumet*, the Court invalidated a statute that created special school district boundaries for the Satmar Hasidim, practitioners of a strict form of Judaism, based on an

62. Sloan v. Lemon, 413 U.S. 825, 835 (1973) (holding that a Pennsylvania tuition reimbursement program that provided state funding to reimburse parents whose children attended nonpublic schools violated the Establishment Clause and could not be saved under the Equal Protection Clause).

63. *Id.*

64. Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 799 (1973) (Burger, C.J., dissenting in both *Nyquist* and *Sloan*) ("[T]he Establishment Clause does not forbid governments, state or federal, to enact a program of general welfare under which benefits are distributed to private individuals, even though many of those individuals may elect to use those benefits in ways that 'aid' religious instruction or worship.").

65. County of Allegheny v. ACLU, 492 U.S. 573, 578–79 (1989).

66. *Id.* at 661 (Kennedy, J., concurring in part and dissenting in part).

67. *Id.* at 656–58.

68. *Id.* at 661–62 (quoting Walz v. Tax Comm'n of New York, 397 U.S. 664, 669 (1970)).

Establishment Clause violation.[69] In dissent, however, Justice Scalia cautioned that "[o]nce this Court has abandoned text and history as guides, nothing prevents it from calling religious toleration the establishment of religion."[70] A historical understanding of religion and establishment in America leaves "'ample room for accommodation of religion under the Establishment Clause,' and for 'play in the joints.'"[71] Here, the minority religious practitioners came to America simply to practice their religion freely after facing brutal persecution, not to establish a national church.[72]

Although the Court misunderstood the Religion Clauses in both *Sloan* and *ACLU*—and misused the "play in the joints" doctrine explicitly in *Sloan*—it was not until *Locke v. Davey* a decade later that it weaponized the doctrine against religious exercise. In *Locke*, the Court held that a state did not violate the Free Exercise Clause by prohibiting otherwise available state aid to college students pursuing a theology degree.[73] Chief Justice Rehnquist explained the "play in the joints" between the Religion Clauses: "[T]here are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause."[74] Although the state could choose whether to fund theology degrees under the Establishment Clause, according to the Court, it is not required by the Free Exercise Clause.[75] Therefore, in this case, the publicly-funded state scholarship program could prohibit a student from using his scholarship to study theology.

Justices Scalia and Thomas dissented, noting that the majority's use of "play in the joints" doctrine is actually a "refusal to apply *any* principle when faced with competing constitutional directives."[76] A state cannot "discriminate a little each way and then plead 'play in the joints'" if the Religion Clauses demand actual neutrality.[77] The Court in *Locke*—by denying otherwise generally-available funds for college education to a

69. Bd. of Educ. v. Grumet, 512 U.S. 687 (1994) (holding that a New York law designating the village of Kiryas Joel—a community of people practicing a sect of the Orthodox Jewish faith known as Satmar Hasidim—as its own separate school district violated the Establishment Clause because the government cannot single out one religious sect for special treatment).

70. *Id.* at 732 (Scalia, J., dissenting).

71. *Id.* at 743 (first quoting Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 338 (1987); and then quoting *Walz*, 397 U.S. at 669).

72. *Id.* at 732.

73. Locke v. Davey, 540 U.S. 712, 715 (2004).

74. *Id.* at 718–19.

75. *Id.* at 719.

76. *Id.* at 728 (Scalia, J., dissenting).

77. *Id.*

student who chooses to pursue a theology degree—is not neutral. It discriminates based on religion.

D. *Dueling Opinions*

Beginning with *Locke*, Justices in both the majority and dissent of other cases have justified their disparate positions on the Religion Clauses using the same "play in the joints" doctrine. In these dueling opinions, some Justices have attempted to reign in the doctrine and limit *Locke*,[78] while others have latched onto the doctrine in such a way that is near-opposite from what *Walz* intended.[79] Justice Breyer seems to have won the battle on the "play in the joints" doctrine. But because the Court is well on its way to winning the larger war on the proper meaning of the Religion Clauses, it should strike the "play in the joints" doctrine from its jurisprudence entirely to avoid confusion and continue to move in a direction that recognizes the complementary—not contradictory—function of the Religion Clauses.

The first set of dueling opinions after *Locke* came from *Cutter v. Wilkinson*, where the Court unanimously held that the Religious Land Use and Institutionalized Persons Act of 2000, which increased protection of religious rights for incarcerated persons, is constitutional under the Establishment Clause.[80] The Court reached the right result for the wrong reasons.[81] Justice Ginsburg, writing for the Court, grounded the decision on modern case law interpreting the Establishment Clause when she noted that it "'has long [been] recognized that the government may . . . accommodate religious practices . . . without violating the Establishment Clause' [because] 'there is room for play in the joints between' [the Religion Clauses]."[82] Justice Thomas wrote a concurring opinion to justify the Court's ultimate

78. *See, e.g.*, Cutter v. Wilkinson, 544 U.S. 709, 726–27 (2005) (Thomas, J., concurring); Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 467–68 (2017) (Thomas, J., concurring in part).

79. Carson v. Makin, 596 U.S. 767, 790 (2022) (Breyer, J., dissenting); Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2288 (2020) (Breyer, J., dissenting); *Trinity Lutheran*, 582 U.S. at 476, 479 (Sotomayor, J., dissenting).

80. *Cutter*, 544 U.S. at 713–14 (majority opinion) (holding that, under the Religious Land Use and Institutionalized Persons Act, the government may reasonably accommodate religious practice for inmates practicing unorthodox religions without violating the Establishment Clause).

81. *See* Esbeck, *supra* note 30, at 1331.

82. *Cutter*, 544 U.S. at 713 (first quoting Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 144–45 (1987); and then quoting Locke v. Davey, 540 U.S. 712, 718 (2004)).

holding on federalism grounds, noting that a proper historical understanding of the Religion Clauses better protects religious rights.[83]

Twelve years later, Chief Justice Roberts in *Trinity Lutheran Church v. Comer* was careful to invoke the "play in the joints" doctrine in a way that appeared to respect the original meaning of the Religion Clauses to hold that a government grant program denying general funding to a church violated the Free Exercise Clause.[84] Justice Thomas concurred to note that while the majority's narrow reading of *Locke* is appropriate, any broader reading based on the "play in the joints" doctrine would permit even a minimal discrimination against religion and would therefore be improper.[85]

Justice Sotomayor, however, wrote a dissenting opinion that would have denied rubber playground mulch to a church-affiliated daycare because "the funding the Church seeks would impermissibly advance religion" and violate the free exercise rights of taxpayers who do not want their taxes to fund religion.[86] The dissent would have invoked the "play in the joints" doctrine in the exact way Justice Thomas criticized because, as Justice Sotomayor wrote, "[i]f there is any 'room for play in the joints' between the Religion Clauses, it is here."[87]

The two most recent cases to discuss the "play in the joints" doctrine are *Espinoza v. Montana Department of Revenue* and *Carson v. Makin*.[88] The outcomes of both cases are consistent with the original meaning of the Religion Clauses, however Justice Breyer's discussion of the "play in the joints" doctrine in each dissent sealed the fate of the doctrine as one that contravenes the constitutional protections guaranteed by the Religion Clauses.[89]

In *Espinoza*, the Court held that a state scholarship program that excluded religious schools violated the Free Exercise Clause.[90] In his opinion for the Court, Chief Justice Roberts cited the "play in the joints" doctrine to recognize that once a state decides to subsidize private education, it cannot

---

83. *Id.* at 726–27 (Thomas, J., concurring).

84. *See Trinity Lutheran*, 582 U.S. at 466 (holding that excluding churches from a grant program that provides public funds to other qualifying nonprofit organizations for resurfacing playgrounds violates the Free Exercise Clause).

85. *Id.* at 468 (Thomas, J., concurring in part).

86. *Id.* at 475 (Sotomayor, J., dissenting).

87. *Id.* at 487 (cleaned up) (citing *Locke*, 540 U.S. at 718).

88. Carson v. Makin, 596 U.S. 767 (2022); Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2020).

89. *See Espinoza*, 596 U.S. at 789–90 (Breyer, J., dissenting); *Carson*, 142 S. Ct. at 2002 (Breyer, J., dissenting).

90. *Espinoza*, 140 S. Ct. at 2260–63.

invoke the Establishment Clause to exclude religious schools.[91] Justice Breyer, in a scathing dissent, wrote that "an overly rigid application of the [Religion] Clauses could bring the mandates into conflict and defeat their basic purpose."[92] To avoid that clash, according to Justice Breyer, the Court had created the "play in the joints" doctrine to balance "what the Establishment Clause permits and the Free Exercise Clause compels."[93]

Two years later in *Carson v. Makin*, the Court held that a state's nonsectarian requirement for a tuition assistance program violated the Free Exercise Clause. The program paid the tuition of certain students at private schools, but excluded students at religious private schools that otherwise met the criteria.[94] Here, the majority made no mention of the "play in the joints" doctrine. Justice Breyer, in one of his last dissents before he retired from the bench, noted that the majority failed to recognize the "play in the joints" between the Religion Clauses and gave "almost exclusive attention" to the Free Exercise Clause while paying "almost no attention" to the Establishment Clause.[95] A correct view of the "play in the joints" doctrine, according to Justice Breyer, would have led the Court to find that the state's nonsectarian requirement struck the correct balance between the Religion Clauses.[96]

IV. CONCLUSION

Justice Breyer's view in both *Espinoza* and *Carson* not only contravenes the initial meaning of the "play in the joints" doctrine as established by Justice Burger in *Walz*, but also flies in the face of the Free Exercise and Establishment Clauses. In *Walz*, the Court created the "play in the joints" doctrine as a clever expression describing the constitutional reality of the Religion Clauses, described in Part II of this Paper. Religious expression is—and always was—an important stitch in the fabric of America. In the years following *Walz*, the Court attempted to morph the "play in the joints" doctrine to limit the complementary protections of the Religion Clauses on the basis of neutrality and "wall of separation" concerns.

In the last few terms, the Court began to remedy its overzealous pursuit of secularism and return to a standard that properly understands the Religion

91. *Id.* at 2261.
92. *Id.* at 2281 (Breyer, J., dissenting).
93. *Id.* (citing Trinity Lutheran Church v. Comer, 582 U.S. 449, 458 (2017)).
94. *Carson*, 596 U.S. at 771–78.
95. *Id.* at 789 (Breyer, J., dissenting).
96. *Id.* at 802.

Clauses for what they are—broad protections of a person's right to practice (or not to practice) a religion consistent with her deeply-held convictions and absent state compulsion.[97] To the extent that the Court has imagined the "play in the joints" doctrine as "two bones grinding one upon the other at an arthritic joint that has lost its 'play,'" it should—as it has begun to do recently—strike any discussion of the doctrine from its jurisprudence.[98]

97. *See* Richard Garnett, *Symposium: Religious Freedom and the Roberts Court's Doctrinal Clean-Up*, SCOTUSBLOG (Aug. 7, 2020, 9:57 AM), https://www.scotusblog.com/2020/08/symposium-religious-freedom-and-the-roberts-courts-doctrinal-clean-up/, *cited in* Ann L. Schiavone, *A "Mere Shadow" of a Conflict: Obscuring the Establishment Clause in* Kennedy v. Bremerton, 61 DUQ. L. REV. 40, 40 (2023).

98. Esbeck, *supra* note 30, at 1336.