Loyola University Chicago Law Journal

Volume 54
Issue 2 *Winter 2022*

Article 4

2023

Constructing the Establishment Clause

Vincent Phillip Muñoz
University of Notre Dame

Kate Hardiman Rhodes
Georgetown University Law Center

Constructing the Establishment Clause

Vincent Phillip Muñoz[*] *and Kate Hardiman Rhodes*[†]

In this Article, we attempt to document how the history of the Supreme Court's Establishment Clause jurisprudence is a history of constructionism, much of it—though not all—originalist in flavor. We use "construction" in a technical sense and in contradistinction to "interpretation." Construction is the act of importing meaning into the constitutional text.

To document and explain how leading Supreme Court justices have engaged in originalist constructionism, we employ the interpretation-construction distinction as well as two additional analytical concepts recently discussed by leading legal scholars: Sam Bray's recovery of "the mischief rule" and Jack Balkin's textual typology of principles, standards, and rules. These tools help us set forth the component parts—or, perhaps we should say, the "raw materials"—of constitutional constructions, at least as they have been performed by Supreme Court Justices in the context of the Establishment Clause.

Seeing that justices have constructed the Establishment Clause and appreciating how they have done so contributes to our understanding of church-state jurisprudence in particular, and to the concept of constitutional construction more generally. For Establishment Clause jurisprudence, we identify and pinpoint the specific moments of judicial creativity that animate the principles, standards, and rules that justices have read into the First Amendment's text. Identifying this jurisprudential scaffolding sheds new light on and facilitates evaluations of competing church-state doctrines. It also allows us to speculate about the next phase of the "tradition and history" construction that the Court's new originalist majority is currently building.

---

* Tocqueville Associate Professor of Political Science and Concurrent Associate Professor of Law, University of Notre Dame.

† J.D., Georgetown University Law Center, 2022; B.A., University of Notre Dame, 2017.

INTRODUCTION

In *Kennedy v. Bremerton School District* (2022), a six-member Supreme Court majority announced that "*Lemon* and its endorsement test offshoot" have been "abandoned"[1] and, henceforth, "the Establishment Clause must be interpreted by 'reference to historical practices and understandings.'"[2] *Kennedy* may be the most consequential Establishment Clause opinion since Justice Sandra Day O'Connor's concurrence in *Lynch v. Donnelly* (1984),[3] which announced her "endorsement test," and Chief Justice Warren Burger's majority opinion in *Lemon v. Kurtzman* (1971), which established the "*Lemon* test."[4] *Kennedy* appears to complete the Establishment Clause demolition project that then-Associate Justice William Rehnquist and Justice Antonin Scalia started in the 1980s and 1990s.[5] Their focus on "history and tradition" was and is intended to tear down the "wall of separation" between church and state that Justices Hugo Black and Wiley Rutledge initially built in *Everson v. Board of Education* (1947).

Kennedy is not, however, simply a case in which the Court's now-ascendant originalists overturned years of non-originalist justices' work. Justices Black and Rutledge, one might recall, presented the "wall of separation" as a faithful interpretation of the Establishment Clause's original meaning.[6] Even Justice William Brennan, the Court's most forceful twentieth century critic of originalism, said of the Establishment Clause, "I believe that the line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers."[7] Establishment Clause originalism, it turns out, is of a particular kind. We call it "constructed originalism" or, perhaps more accurately, "originalist constructionism."

---

1. 142 S. Ct. 2407, 2427 (2022).
2. *Id.* at 2428 (quoting Town of Greece v. Galloway, 572 U.S. 565, 576 (2022)).
3. Lynch v. Donnelly, 465 U.S. 668 (1984).
4. Lemon v. Kurtzman, 403 U.S. 602 (1971).
5. *See generally* Wallace v. Jaffree, 472 U.S. 38, 91–115 (1985) (Rehnquist, J., dissenting); Cnty. of Allegheny v. Am. C.L. Union, 492 U.S. 573, 655–79 (1989) (Scalia, J., concurring in the judgment in part and dissenting in part); Lee v. Weisman, 505 U.S. 577, 631–46 (1992) (Scalia, J., dissenting).
6. *Compare* Everson v. Bd. of Educ., 330 U.S. 1, 1–18 (1947) ("In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'"), *with id.* at 28–63 (Rutledge, J., dissenting) ("Neither so high nor so impregnable today as yesterday is the wall between church and state . . . .).
7. Abington Sch. Dist. v. Schempp, 374 U.S. 203, 294 (1963). *See also* Rodney A. Grunes & Jon Veen, *Justice Brennan, Catholicism, and the Establishment Clause*, 35 U. SAN FRAN. L. REV. 527, 541 (2001) ("[P]ractices which might have been acceptable during the time of Madison and Jefferson might be highly offensive . . . in today's more pluralistic society.").

Originalist constructionism creates constitutional meaning using, to various degrees, historical evidence.

In this Article, we attempt to document how the history of the Supreme Court's Establishment Clause jurisprudence is a history of constructionism, much of it—though not all—originalist in flavor. We use "construction" in a technical sense and in contradistinction to "interpretation." Construction is the act of importing meaning into the constitutional text.[8] The idea of constitutional construction, set forth by Keith Whittington and refined by Professors Lawrence Solum and Randy Barnett, recognizes that, in some instances, a jurist's analysis of a constitutional text will not yield meaning.[9] Because some provisions are underdetermined, indeterminate, or excessively vague, the meaning of these constitutional provisions *cannot* be determined.[10] When the text's meaning "runs out," interpretation ceases, and construction begins.[11] When constructing a text, jurists bring something external to give it meaning and to resolve a concrete case.[12] As Whittington explains, "[u]nlike jurisprudential interpretation, construction provides for an element of creativity in construing constitutional meaning."[13]

The Establishment Clause is a quintessential example of a constitutional provision that requires construction. Its meaning has not been determined "by relatively technical and traditional interpretative instruments, such as text and structure,"[14] because, to make a long story short, there appears to be no clear original public meaning of what

---

8. *See, e.g.*, Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 14, 34 (2018) [hereinafter Barnett & Bernick, *Unified Theory*] (contrasting the meaning of the words "construe" and "construct," where the former means to interpret and the latter means to build).

9. *See, e.g.*, KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 5 (1999) [hereinafter WHITTINGTON, CONSTITUTIONAL CONSTRUCTION] ("In such cases, the interpretive task is to limit the possibilities of textual meaning, even as some indeterminacies remain."); Barnett & Bernick, *Unified Theory*, *supra* note 8, at 14, 34 (noting the interpretation-construction distinction permits judges to use their discretion).

10. Barnett & Bernick, *Unified* Theory, *supra* note 8, at 14, 34 (finding that constitutional construction does not provide everything required to resolve all cases).

11. *Id.* at 14.

12. *See* WHITTINGTON, CONSTITUTIONAL CONSTRUCTION, *supra* note 9, at 6 ("As a result [of external perspectives], constitutional constructions are often made in the context of political debate, but to the degree that they are successful they constrain future political debate."); *see also* VINCENT PHILLIP MUÑOZ, RELIGIOUS LIBERTY & THE AMERICAN FOUNDING: NATURAL RIGHTS AND THE ORIGINAL MEANINGS OF THE FIRST AMENDMENT RELIGION CLAUSES 138 (2022) [hereinafter MUÑOZ, RELIGIOUS LIBERTY & THE FOUNDING] (describing the process of constitutional construction).

13. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION, *supra* note 9, at 5.

14. *Id.* at 1.

constitutes a law "respecting an establishment of religion."[15] Supreme Court justices engage in Establishment Clause constructionism because they must give the text meaning and legal effect to resolve cases and controversies.[16]

This Article shows that justices have constructed the Establishment Clause, explains how they have done it, and suggests a framework by which non-originalists and originalists alike might evaluate church-state constructions. It also briefly speculates about the next phase of the "tradition and history" construction that the Court's new originalist majority is currently building.

In emphasizing construction, we disagree with those who deny that the concept is analytically useful or that its practice even exists. Justice Antonin Scalia and Bryan Garner decry the "*supposed* distinction between interpretation and construction."[17] They say it is the theoretical foundation for problematic "[m]odern nontextualism," and they contend that the distinction "has never reflected the courts' actual usage."[18] Other scholars claim that the "construction zone" lies outside the domain of

---

15. *See, e.g.*, MUÑOZ, RELIGIOUS LIBERTY & THE FOUNDING, *supra* note 12, at 125–26 (arguing that the Framers "drafted text prohibiting a national establishment and national interference with state establishments without precisely defining what constitutes an establishment of religion"); Joel Alicea & Donald L. Drakeman, *The Limits of the New Originalism*, 15 U. PA. J. CONST. L. 1161, 1169, 1218 (2013) (explaining that the objective evidence for the original meaning of "establishment" "points in two opposite directions" and "[t]here is no particular reason . . . to choose one meaning of establishment over the other"); Donald L. Drakeman, *Which Original Meaning of the Establishment Clause Is the Right One*, *in* THE CAMBRIDGE COMPANION TO THE FIRST AMENDMENT AND RELIGIOUS LIBERTY 378 (Michael D. Breidenbach & Owen Anderson eds., 2019) (describing the different original meanings of the Establishment Clause advanced by scholars). This is not to say that some scholars have not confidently asserted that they have discovered the original meaning (or intent) of the Establishment Clause. Particularly influential examples include Gerard Bradley, Robert Cord, Thomas Curry, Carl Esbeck, Doug Laycock, Leonard Levy, Michael Malbin, Michael McConnell, and others.

16. *See, e.g.*, Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 458 (2013) [hereinafter Solum, *Originalism and Constitutional Construction*] (claiming construction of the Constitution in concrete constitutional cases is necessary because the text is "general, abstract and vague"). Of course, some scholars contend that if a judge cannot uncover a text's meaning, she should cease the process of interpretation and defer to the legislature's decisions about its meaning. *See, e.g.*, John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 775 (2009) ("[U]nder both original intent and original public meaning, the meaning of the Constitution should be interpreted based on the applicable interpretive rules of the time."). Such arguments take the understanding of originalism as a theory of constraint to an extreme.

17. ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 14–15 (2012) (emphasis added).

18. *Id.* at 13, 15 (alteration in original) ("But this supposed distinction between *interpretation* and *construction* has never reflected the courts' actual usage. As a scholar accurately wrote in 1914: 'Some authors have attempted to introduce a distinction between *interpretation* and *construction* . . . but it has not been accepted by the profession. For practical purposes any such distinction may be ignored, in view of the real object of both interpretation and construction, which is merely to ascertain the meaning and will of the lawmaking body, in order that it may be enforced.'").

originalism and that originalism cannot inform constitutional constructions.[19] As we will show in Part III, however, Establishment Clause jurisprudence is one big originalist construction zone with many competing architects building, remodeling, and tearing down each other's walls, lines, and concepts. Constitutional constructions happen and, at least in the case of the Establishment Clause, they have happened repeatedly under the banner of originalism.[20]

To document and explain how leading Supreme Court justices have engaged in originalist constructionism, we employ the interpretation-construction distinction as well as two additional analytical concepts recently discussed by leading legal scholars: Sam Bray's recovery of "the mischief rule"[21] and Jack Balkin's textual typology of principles, standards or rules.[22] These tools help us set forth the component parts—or, perhaps we should say, the "raw materials"—of constitutional constructions, at least as they have been performed by Supreme Court Justices in the context of the Establishment Clause.

This Article proceeds in three parts. Part I reviews the concept of constitutional construction. Part II employs a mischief rule framework to identify and dissect several leading Supreme Court Establishment Clause constructions. Part III proposes a template for evaluating non-originalist and originalist constructions. We conclude by briefly speculating on the future of the "history and tradition" construction adopted in *Kennedy*.

Seeing that justices have constructed the Establishment Clause and appreciating how they have done so contributes to our understanding of church-state jurisprudence in particular, and to the concept of constitutional construction more generally. For Establishment Clause jurisprudence, we identify and pinpoint the specific moments of judicial creativity that animate the principles, standards, and rules justices have

---

19. *See, e.g.*, McGinnis & Rappaport, *supra* note 16, at 783–84 (providing two reasons why the original methods approach is superior from a normative perspective to the constructionist originalist approach: (1) original methods applies interpretive rules "deemed applicable to the Constitution by the constitutional enactors" and (2) since "these interpretive rules are fixed at the time of the Constitution, they are easier to discover than interpretive methods that are not predetermined"). Still others claim that construction requires originalists to cede normative theoretical commitments such as constraint. *See, e.g.*, Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 715 (2011) (arguing that the new theoretical advances of New Originalism have benefits which come at the cost of judicial constraint).

20. See *infra* Part III.

21. *See* Samuel L. Bray, *The Mischief Rule*, 109 GEO. L.J. 967, 973 (2021) ("[T]he mischief is the problem that precedes the statute and the legal deficiency that allowed it; the mischief is what the statute responds to. The purpose imputed to the legislature is an aim going forward.").

22. *See* JACK M. BALKIN, LIVING ORIGINALISM 6 (2011) (listing examples of the different languages included in our Constitution).

read into the First Amendment's text.[23] Identifying this jurisprudential scaffolding sheds new light on and facilitates evaluation of competing church-state doctrines. As we will show in Part III, Establishment Clause jurisprudence offers a fascinating case study for scholars interested in constitutional constructions. While the idea of constitutional construction has received much scholarly attention, the actual method of constitutional constructions has been addressed only in general terms.[24] This Article disaggregates and explains what constructions look like in practice, at least in the context of the Establishment Clause jurisprudence. Doing so allows us to better understand the process of constitutional construction, to propose a framework for evaluating past constructions from non-originalist and originalist perspectives, and to suggest how the "history and tradition" Establishment Clause construction may develop in the future.

I. THE INTERPRETATION-CONSTRUCTION DISTINCTION

The interpretation-construction distinction has been called "one of the most interesting developments in the constitutional theory"[25] of originalism. Professor Keith Whittington first advanced the idea that "[r]egardless of the extent of judicial interpretation of certain aspects of the Constitution, there will remain an impenetrable sphere of meaning that cannot be simply discovered."[26] Though "[c]onstitutional meaning can be partially determined by relatively technical and traditional interpretative instruments, such as text and structure . . . ," he continues, "such 'modalities' elucidate only a portion of the Constitution's meaning."[27] In other words, "[t]he text may specify a principle that is itself identifiable but is nonetheless indeterminate in its application to a

23. See *infra* Part II.B.

24. *See, e.g.*, Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 95 (2010) [hereinafter Solum, *I-C Distinction*] ("The interpretation-construction distinction, which marks the difference between linguistic meaning and legal effect, is much discussed these days."); Solum, *Originalism and Constitutional Construction*, *supra* note 16, at 457 (limiting analysis to "two central claims about constitutional construction"); Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65 (2011) [hereinafter Barnett, *Interpretation and Construction*] (discussing the difference between semantic meaning and legal meaning). To be sure, Barnett and Bernick do give examples of how their theory of "good-faith" constitutional construction *should* be applied in the Second Amendment and Commerce Clause contexts. *See* Barnett & Bernick, *Unified Theory*, *supra* note 8, at 38–45 (separating constitutional construction and practice).

25. Amy C. Barrett, *The Interpretation/Construction Distinction in Constitutional Law: Annual Meeting of the AALS Section on Constitutional Law*, 27 CONST. COMMENT. 1 (2010) (recognizing recent developments in the field differentiating constitutional interpretation and construction).

26. KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 7 (1999).

27. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION, *supra* note 9, at 1.

particular situation."[28] When it comes to indeterminate or vague constitutional provisions, Whittington argues that "construction helps transform constitutional theory into constitutional practice."[29]

Professors Lawrence Solum and Randy Barnett have refined Whittington's distinction and incorporated it into originalist theory, though they diverge on the particulars.[30] Professor Solum explains that interpretation is sufficient to resolve constitutional meaning when there is but one determinate answer.[31] A legal question has a single determinate answer "if and only if the set of results that can be squared with the legal materials contains one and only one result."[32] For example, "[t]he Senate of the United States shall be composed of two Senators from each State."[33] How many Senators must each state have? Two.

Obviously, not every constitutional provision is determinate. Solum identifies two other categories of text: indeterminate and underdeterminate language.[34] Text is indeterminate (or "unbound") "if and only if the law does not place any limit on the range of possible results."[35] For example, these include "rules that are open textured on their face, such as the equal protection and due process clauses of the Constitution" when considered in isolation.[36] Text is underdeterminate (or "rule-guided") "if and only if the outcome must be chosen on grounds other than the law itself [such as history, policy, etc.] . . . from a range of

---

28. *Id.* at 8; *see also id.* at 26 (discussing the vagueness of certain constitutional provisions, Whittington notes: "The space for construction is further expanded by the limited possibility of decisive interpretation.").

29. *Id.* at 8.

30. Originalists who endorse constitutional construction relate it to interpretation in two ways. For Whittington, construction is necessary only when interpretation fails to yield determinate answers. *See id.* at 5 (identifying construction to fill the holes interpretation cannot by means of creativity and employing the "'imaginative vision' of politics rather than the 'discerning wit' of judicial judgment"). For Solum, construction is inevitable even when the communicative content permits only one answer. *See, e.g.*, Solum, *I-C Distinction*, *supra* note 24, at 95 (arguing that the distinction between semantic meaning and legal effect is fundamental); Solum, *Originalism and Constitutional Construction*, *supra* note 16, at 453 (arguing that constitutional construction (1) is ubiquitous in practice and (2) often does not provide determinate answers to constitutional questions).

31. Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 463 (1987) [hereinafter Solum, *Indeterminacy Crisis*] (exploring the topic of indeterminant theory in legal scholarship).

32. *Id*. at 473 (drawing a distinction between determinate theory and indeterminate theory).

33. U.S. CONST. art. I, § 3.

34. Solum, *Indeterminacy Crisis*, *supra* note 31, at 465 (defining determinate and indeterminate interpretations).

35. *Id*.

36. *Id.* at 466.

possible results that are consistent with and limited by the law."[37] For example, the meaning of the Fourth Amendment's prohibition on unreasonable searches could be cabined by a historical analysis of what has traditionally been protected from government searches.[38]

Barnett describes the determinacy problem in terms of vagueness and ambiguity.[39] Ambiguous language, Barnett explains, has "more than one sense," whereas vague language "admits of *borderline* cases that cannot definitively be ruled in or out of its meaning."[40] Vague terms become the subject of construction, as they "have paradigmatic applications lying clearly within the core of their semantic meaning . . . they are not wholly indeterminate. Instead, they are *under*determinate."[41]

Due to the texts' underdeterminacy, constitutional "construction [] is ineliminable."[42] Pure interpretation of, say, the Due Process Clause or the Search and Seizure Clause will not get a judge very far in resolving whether a litigant received a fair trial or was improperly arrested. As Solum explains, "the actual text of the U.S. Constitution contains general, abstract, and vague provisions that require constitutional construction for their application to concrete constitutional cases."[43] Indeed, courts have implicitly recognized this conundrum, creating "decision rules" to effectuate the text "when the information conveyed by the text itself is insufficient to decide an issue, but the issue still must somehow be decided."[44] *Lemon v. Kurtzman*'s "purpose, effect, and entanglement" test[45] is but one example, as are "time, place, and manner" considerations for free speech.[46] The use of decision rules usually means that a jurist is in the "construction zone."[47]

Though the interpretation-construction distinction only recently gained traction in constitutional law scholarship,[48] some argue the distinction "is an old one, with deep historical roots in American

37. *Id.* at 473.
38. *See generally* Carpenter v. United States, 138 S. Ct. 2206, 2235 (2018) (Thomas, J., dissenting).
39. Barnett, *Interpretation and Construction*, *supra* note 24, at 68.
40. *Id.* at 67.
41. *Id.* at 68.
42. Solum, *Originalism and Constitutional Construction*, *supra* note 16, at 524.
43. *Id.* at 458.
44. Barnett, *Interpretation and Construction*, *supra* note 24, at 68.
45. Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).
46. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (holding that government may impose restrictions on the "time, place, or manner" of protected free speech, so long as the means chosen are narrowly tailored to serve the government's content-neutral interest).
47. Lawrence B. Solum, *The Unity of Interpretation*, 90 B.U. L. REV. 551, 572 (2010).
48. Whittington developed the theory in the late 1990s, and Barnett and Solum refined it in the 2010s. *See generally* WHITTINGTON, CONSTITUTIONAL CONSTRUCTION, *supra* note 9.

jurisprudence."[49] Recent scholarship finds evidence of the interpretation-construction distinction as far back as the debate over the First Bank of the United States.[50]

The interpretation-construction distinction also has its fair share of critics among originalists[51] and non-originalists.[52] Scholars debate whether a difference between interpretation and construction exists,[53] whether such a distinction appears in judicial opinions,[54] whether construction is necessary at all,[55] whether construction is inconsistent with originalism historically understood,[56] and whether one political branch is best poised to engage in construction.[57]

---

49. Solum, *Originalism and Constitutional Construction*, *supra* note 16, at 492; *see also* Lee J. Strang, *An Evaluation of Historical Evidence for Constitutional Construction From the First Congress' Debate Over the Constitutionality of the First Bank of the United States*, 14 U. ST. THOMAS L.J. 193, 194 (2018) (examining "whether, to what extent, and how Americans utilized constitutional construction in the early Republic").

50. *See generally* Strang, *Historical Evidence of Construction*, *supra* note 49. Strang finds evidence that the national bank debate participants (1) believed that the Constitution was underdetermined and (2) explained their rules of interpretation before offering their position on constitutional meaning. *Id.* at 200–02. And due to the inherent underdeterminacy of some constitutional provisions, advocates for and against the national bank explained their "rule[s] of interpretation" before opining on constitutional meaning. *Id.* at 202–03. Barnett and Bernick similarly locate explicit discussions of the interpretation-construction distinction as early as the 1830s. They find that influential legal scholars Francis Lieber and Thomas M. Cooley incorporated the language of interpretation and construction into 1839 and 1868 treatises, respectively. *See* Barnett & Bernick, *Unified Theory*, *supra* note 8, at 11.

51. *See* Barrett, *supra* note 25, at 3 (collecting scholarship from other originalists critical of the distinction).

52. *See, e.g.*, Colby, *supra* note 19, at 747 (arguing that the interpretation-construction distinction "afford[s] judges substantial wiggle room in which to engage in constitutional construction").

53. *See* SCALIA & GARNER, *supra* note 17, at 14–15 (discussing both the interchangeable approaches and the proposed distinctions between interpretation and construction).

54. *See id.* (arguing that the supposed distinction between interpretation and construction is not reflected in the courts).

55. *See generally* JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION (2013). John McGinnis and Michael Rappaport contend that other tools—specifically "original methods originalism"—can eliminate the under and indeterminacy problem of constitutional language. Original methods originalism looks to the technical, legal meaning of terms. Addressing the merits of their critique is outside the scope of this Article.

56. *See generally* Colby, *supra* note 19.

57. Whittington originally argued that construction is an inherently "political and hence non-judicial enterprise." Lee J. Strang, *Originalism and the Aristotelian Tradition: Virtue's Home in* Originalism, 80 FORDHAM L. REV. 1997, 2010–11 & n.99 (citing WHITTINGTON, CONSTITUTIONAL CONSTRUCTION, *supra* note 9, at 7, 9, 11). Conversely, Barnett and Solum think that judges are the main constructors of underdeterminate constitutional language. *See* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION 122 (2004) ("I do not share Whittington's characterization of the process of construction as 'political.'"); Solum, *I-C Distinction*, *supra* note 24, at 103–05 (2010) (acknowledging "political construction and private construction" but focusing on "judicial construction"). Whittington has since modified his view, noting that "[s]o long as

This Article addresses a number of these issues, including whether the interpretation-construction distinction exists,[58] whether it appears in judicial opinions,[59] whether an originalist construction is possible,[60] and what it (or a competing construction) looks like.[61] Among other things, it challenges Scalia and Garner's contention that "the supposed distinction between interpretation and construction has never reflected the courts' actual usage."[62] As we shall show, the history of Establishment Clause jurisprudence is a history of constitutional construction.[63]

II. CONSTRUCTING THE ESTABLISHMENT CLAUSE

Contrary to what Scalia and Garner argue, judges do construct the constitutional meaning of underdetermined text.[64] In practice,

---

judges are acting as faithful agents to provisionally maintain constitutional understandings widely shared by other political actors, then their role in articulating constitutional constructions *may not be* objectionable." Keith Whittington, *Constructing a New American Constitution*, 27 CONST. COMMENT. 119, 125–29 (2010) (emphasis added).

58. *See infra* Parts II & III.

59. *See id.*

60. *See id.*

61. Scalia and Garner most prominently advanced the argument that the interpretation-construction distinction is a tautology and that it breeds non-textualism. *See* SCALIA & GARNER, *supra* note 17, at 13–14. They write:

> Modern nontextualism is based in part on an equivocal use of the word *construction*, which is the noun corresponding to *construe*. When construing a statute, one engages in *statutory construction*, which has long been used interchangeably with the phrase *statutory interpretation*. When one is construing a constitutional text, one is engaged in *constitutional construction* or, again, *constitutional interpretation*. . . . Oddly enough, though, the noun *construction* answers both to *construe* (meaning "to interpret") and to *construct* (meaning "to build"). . . . [S]cholars have elaborated a supposed distinction between *interpretation* and *construction* . . . . Thus is born, out of false linguistic association, a whole new field of inquiry.

Id. Scalia and Garner therefore rest on the evidence that (1) at least some individuals have thought interpretation and construction to be one and the same, and (2) "*construction*" may incorporate the verb "'to interpret'" within its literal definition." *Id.* at 13, 15.

62. *Id.* at 15.

63. We are by no means the first to register disagreement with Scalia and Garner on this point. *See, e.g.*, Barnett & Bernick, *Unified Theory*, *supra* note 8, at 15 (footnote omitted) ("Justice Cooley was right and Justice Scalia was wrong. Regardless of the labels used, ascertaining the communicative content of a text is a different activity than giving legal effect to that meaning. . . . [H]ad he accepted the distinction, Justice Scalia would have been equipped to explain why textually unspecified doctrines were needed to apply the original meaning of 'the right to keep and bear arms' to particular types of firearms, such as machine guns, or to particular persons, such as convicted felons. As it was, machine guns and convicted felons were presented as ad hoc exceptions to the Second Amendment right without any explanation at all.").

64. Though we do not analyze every possible opinion or every justice, we looked to canonical Establishment Clause cases to study the extent to which construction is present, and how these constructions appear in different justices' opinions over time.

Establishment Clause constructions involve three "building blocks."[65] In this section, we first outline the process of construction abstractly, employing the analytical tools of the "mischief rule" and the typology of rules, standards, and principles to help clarify the steps.[66] We then present leading Establishment Clause constructions made by several justices in significant Supreme Court cases.[67] These examples document how, in practice, constructions have followed the "building blocks" model set forth at the beginning of this Part.

We should make clear that our aim here is not to address the legitimacy of constitutional constructions in general or Establishment Clause constructions in particular—though we do offer frameworks through which such constructions may be evaluated in Part III.[68] We offer a descriptive account of Establishment Clause jurisprudence, attempting to document the reality and process of constitutional constructions.

A. The Building Blocks of Construction: The Mischief Rule Framework

Establishment Clause constructions involve three distinct steps, which

---

65. Judges rarely engage in pure interpretation—i.e., textual analysis—alone, though there are some instances in which they both interpret and construct. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 106–07 (1985) (Rehnquist, J., dissenting) (discussing dictionary definitions of "establishment" as well as historical patterns and the mischief of religious discrimination or preference for a particular sect).

66. See *infra* Part II.A.

67. See *infra* Part II.B.

68. For more about why the Establishment Clause is sufficiently vague and underdetermined to merit construction, see MUÑOZ, RELIGIOUS LIBERTY & THE FOUNDING, *supra* note 12, at 126. In practice, Justice Hugo Black in *Everson v. Board of Education*, 330 U.S. 1 (1947), effectively determined that the Establishment Clause required construction. Black did not use the language of "construction" or even explicitly state that the meaning of the Establishment Clause was unclear. Rather, he suggested that to decide the case before the Court (taxpayer funding of transportation to Catholic schools) required "understanding of the meaning" of the Establishment Clause's language. *Everson*, 330 U.S. at 8. And to understand that meaning, he continued, "it is not inappropriate briefly to review the background and environment of the period in which that constitutional language was fashioned and adopted." *Id.* Black proceeded as if the textual meaning of the Establishment Clause was not clear, thereby admitting that it must be constructed. He then proceeded to construct the text using originalist tools, tools that have played a significant role in Establishment Clause jurisprudence ever since. When turning to the Founding Fathers, Black repeatedly cited the Free Exercise Clause precedent from *Reynolds v. United States*. *See id.* at 12–16 (citing Reynolds v. United States, 98 U.S. 145 (1879)). *Reynolds* also explained that the meaning of the First Amendment church-state provisions was unclear: "The word 'religion' is not defined in the Constitution. We must go elsewhere, therefore, to ascertain its meaning, and nowhere more appropriately, we think, than to the history of the times in the midst of which the provision was adopted." *Reynolds*, 98 U.S. at 162. For a historical account of Black's *Everson* opinion, see DONALD L. DRAKEMAN, CHURCH, STATE, AND ORIGINAL INTENT (2009). Therefore, while aspects of Black's *Everson* opinion have always been controversial, that the Establishment Clause is underdetermined is not. *See, e.g.*, MUÑOZ, RELIGIOUS LIBERTY & THE FOUNDING, *supra* note 12, at 126.

we shall call the "mischief rule" framework. In a given case, the steps do not necessarily proceed in the order presented, but all three steps are needed to provide a complete construction.

> (1) The justice presents an "origin story." At its heart is a "mischief" that precedes the text and clarifies why it came into being.
>
> (2) The justice develops constitutional meaning and a corresponding legal doctrine that includes a test(s) or rule(s).
>
> (3) The justice articulates the general purpose or larger end that is advanced by the constructed constitutional meaning and doctrine.[69]

To help explain these construction "building blocks," two analytical tools recently discussed by leading scholars will prove helpful: the "mischief rule" as presented by Notre Dame law professor Samuel Bray,[70] and Jack Balkin's principle-standard-rule typology of constitutional texts.[71]

1. **Step One**: Present an Origin Story Centered on an Evil or Mischief to Be Addressed

Establishment Clause constructions tend to start with the telling of an origin story centered on an evil or mischief that needs to be addressed.[72] "All lawyers are storytellers," Philip Meyer writes, "[a]nd Supreme Court justices are not exceptions."[73] "Outcomes in constitutional law are typically predicated upon the stories the justices tell—interpretations of foundational 'origin stories' that shape understandings of the law and who we are as a people."[74] Meyer continues, "[c]onstitutional cases are

---

69. As mentioned, these building blocks do not always occur sequentially. Often, step three occurs before step two; a justice announces a purpose and then advances a specific rule that furthers that purpose. Moreover, as we shall discuss below, some committed textualists hesitate to articulate prior mischiefs and/or purposes.

70. *See* Bray, *supra* note 21, at 973 (arguing that a broader understanding of context includes mischief in the setting of legal enactments).

71. *See generally* Balkin, *supra* note 22.

72. Origin stories are in vogue today, especially those that seek to challenge conventional or traditional narratives. *See generally* THE 1619 PROJECT: A NEW ORIGIN STORY (Nikole Hannah-Jones et al. eds., 2021). Justices writing Establishment Clause origin stories also engage with history in a way that challenges the narratives of their colleagues by emphasizing different historical evidence.

73. Philip N. Meyer, *Origin Stories: Do They Define or Help Refine Constitutional Interpretation?*, 107 A.B.A. J. 24, 24 (2021).

74. *Id. See also* ROBERT COVER, NARRATIVE VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER 95–96 (Martha Minnow et al., eds., 1995) (footnotes omitted) ("No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic; for each decalogue a scripture. Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.").

built upon historical creation myths. Without some origin story, the Constitution and Bill of Rights are merely broken shards of language spinning in the ether . . . ."[75]

Whether or not all origin stories are "creation myths," Professor Meyer helpfully labels the usual first step of constitutional constructions.[76] Origin stories explain why constitutional text came into being; they identify an evil to be arrested. This core evil corresponds to what Samuel Bray calls the "mischief."[77] The "mischief" is "the problem that precedes the [constitutional text] and the legal deficiency that allowed it; the mischief is what the [constitutional text] responds to."[78] Bray distinguishes "the mischief" from "the general purpose" of text: "The mischief is the spur, the 'because of.' More technically, for law, the mischief is the problem that precedes the [constitutional text] and the legal deficiency that allowed it; the mischief is what the [constitutional text] responds to. The purpose imputed to the legislature is an aim going forward."[79]

We modify an example from Bray's article to help illustrate the concept of "mischief." An early Tennessee statute required railroad engineers to sound an alarm and employ "every possible means" to "stop the train and prevent an accident" if there was an animal or obstruction on the tracks.[80] As Bray notes, the meaning of the word "animal" in the statute is not clear: it may include larger animals such as cows and horses, but what about squirrels or even smaller animals?[81]

Understanding the mischief underlying the statute can help an interpreter decide which animals are reasonably within the statute's

---

75. Meyer, *supra* note 73, at 24. Meyer points out the presence of an origin story in Justice Scalia's *District of Columbia v. Heller*, 554 U.S. 570 (2008), decision. *See id.*

76. *See id.*

77. Bray articulates the concept of mischief, which is related to the "mischief rule," within the context of statutory interpretation. *See* Bray, *supra* note 21, at 973. We think his conceptualization and reasoning apply to constitutional language, too. In another phrasing, Barnett looks to the "function or functions that the text was designed to perform" in his process of constitutional construction. *See* Barnett & Bernick, *Unified Theory*, *supra* note 8, at 39.

78. Bray, *supra* note 21, at 973. Bray also explains that conceptualizing the mischief "encourages the interpreter to think about what was in the eye of the legislature, not as a means of defeating or overriding the text, but as a way to understand it." *Id.* at 1003.

79. *Id.* at 973.

80. *See id.* at 968 ("If a railroad engineer found an animal or obstruction on the tracks, the statute required 'the alarm whistle to be sounded, and brakes put down, and every possible means employed to stop the train and prevent an accident.'"); *see also* Nashville & K. R. Co. v. Davis, 78 S.W. 1050, 1050 (Tenn. 1902) (deciding whether a goose is an animal or obstruction as protected by the statute which required a train whistle to be blown when there was any obstruction).

81. *See* Bray, *supra* note 21, at 968 (questioning what constituted an animal for purposes of the statute).

purview. If, for example, the underlying mischief is train derailments, then a reasonable construction of "animal" might be limited to large animals that could derail a train. The purpose, on the other hand, is train safety. To remedy the mischief and achieve the law's purpose, it is reasonable to construe "animal" to refer only to those animals of sufficient size that could potentially cause a train to derail. But suppose that train derailments were not the only cause of the statute. If the statute was drafted to prevent train derailments and the killing of endangered species, the term "animal" likely would be construed differently. It might be read to include all animals visible to a train conductor (presuming that train conductors are not well-versed on which animals are on the endangered species list).[82]

As this simple case makes obvious, the mischief a law is designed to remedy can have dramatic implications for how the statute's terms are construed. "Animal" could mean only very large animals or all animals. "The mischief rule," Bray explains, "instructs an interpreter to consider the problem to which the statute was addressed, and also the way in which the statute is a remedy for that problem. Put another way, the generating problem is taken as a part of the context for reading the statute."[83]

Establishment Clause origin stories purport to identify the mischief(s) to be remedied and suggest the underlying purpose(s) served by the provision. As we shall attempt to document below, the origin story is the driving force behind Establishment Clause constructions. It is where one finds much judicial creativity or (depending on one's point of view) judicial mischief.

We should clarify that not every judicial opinion constructing the text includes an origin story. Origin stories are the foundation for a "school" or a distinct "approach" to an underdetermined text. The "separationist" origin story set forth in *Everson v. Board of Education* more or less serves as the origin story for later separationist opinions.[84] As we shall discuss, small changes, differences of emphasis, or additions within an origin story help later justices using the same approach remodel prior justices' constructions without overturning them.[85] Not every opinion develops a novel origin story. New, alternative origin stories, however, mark new,

---

82. *See id.* (explaining the possible issues interpreting the statute).

83. *Id.* at 968 (footnote omitted). Bray reports, "In the real stop-the-train case, the court found the mischief to be (at least especially) the problem of train derailments; the court accordingly held that three domesticated geese were not 'animals' within the meaning of the statute. In the court's view, failing to consider the mischief would have meant that trains had to stop even for '[s]nakes, frogs, and fishing worms.'" *Id.* (alteration in original) (footnotes omitted).

84. *See infra* Part II.B.1 (discussing the influence of *Everson* in the development of separationism); *see generally* Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947).

85. *See infra* Part II.B (discussing the construction and various interpretations of the Establishment Clause).

competing constructions.

2. **Step Two**: Develop Constitutional Meaning and Legal Doctrine

The evil or mischief at the heart of an origin story leads to the second step of Establishment Clause constructions: deriving constitutional meaning and a corresponding legal doctrine. By "constitutional meaning," we mean the work or function the text is said to perform to address the mischief posited in the origin story. By legal doctrine, we mean the corresponding test(s) or rule(s) that judges create to apply the constructed meaning to specific cases.[86]

Jack Balkin's typology of principles, standards, and rules helps categorize created constitutional meanings by level of generality. Balkin writes:

> The text of our Constitution contains different kinds of language. It contains determinate rules (the president must be thirty-five, there are two houses of Congress). It contains standards (no "unreasonable searches and seizures," a right to a "speedy" trial). And it contains principles (no prohibitions of the free exercise of religion, no abridgements of the freedom of speech, no denials of equal protection).[87]

Balkin seems to suggest that the *kind* of language that a particular text contains—a principle, standard, or a rule—lies within the text itself. In Establishment Clause constructions, the process of discovery is reversed. Justices bring meaning to the text, in part by imposing a level of generality onto the text. What drives the level of generality is the justice's origin story. The origin story's mischief corresponds to an assignment of textual generality. As we shall attempt to show below, the more epic the origin story, the higher the level of generality assigned to the text. Sweeping origin stories generate principles; prosaic origin stories generate rules.[88]

After meaning is constructed through the assignment of textual generality, justices apply it to concrete cases. To do so, they craft doctrinal tests and rules. As we explain below, when constructed meaning is itself a rule, a near-perfect overlap exists between constitutional meaning and the constitutional rules. But when meaning is constructed at the more general level of principles or standards, separate tests or rules must be crafted in order to apply that meaning to a

---

86. Here, our contribution goes beyond that of Solum and Barnett. They collapse these two steps and refer to the outcomes of constitutional construction as giving the text "legal effect."

87. Balkin, *supra* note 22, at 6.

88. *See infra* Part II.B (discussing various influential cases in the interpretation of the Establishment Clause).

particular case and controversy. Eventually, all constitutional texts are translated into a meaning capable of having legal effect. Origin stories generate mischiefs and purposes, which, in turn, lead to constitutional meaning, which then must be applied.

Returning to the train case can help us illustrate how the mischiefs and purposes generated in the origin story point to different legal meanings, which, in turn, generate different legal rules. If the mischief is train derailments, the statutory term "animal" might be read to include cattle and other similarly large animals, but not squirrels. The Tennessee statute reasonably would be construed to convey the standard that conductors should proceed cautiously and employ every possible means to stop the train and prevent an accident when he spies a large animal on the tracks. "Large animal" is itself vague, so a further rule might be specified: conductors must blow the horn and try to stop when they see an animal the size of a cow or larger on the tracks. Alternatively, if the statute's mischief is trains killing endangered species, as we suggested above, the statutory term "animal" reasonably would be construed more liberally. The statute's meaning itself could be construed as a rule: conductors must blow the horn or stop the train when *any* animal appears on the tracks.

3. **Step Three**: Articulate the General Purpose Advanced by the Constructed Constitutional Meaning and the Legal Doctrine

The last step in the process of Establishment Clause construction is the articulation of the larger purpose or end that is served by the constructed Establishment Clause. Here, a justice articulates the good that is achieved via the Establishment Clause. We separate out this step to clarify that the purpose usually is not identical to the mischief to be remedied, though they are closely related and, in some cases, are effectively identical. The purpose explains why the mischief is a mischief; the purpose is furthered by remedying the mischief. Distinguishing mischief from purpose is important for two reasons: first, it is descriptively more accurate, and second, each can do independent work in creating the constructed meaning of the Clause (assuming they are distinguishable). The articulation of a text's purpose, we should also note, does not necessarily occur after the articulation of the text's meaning. Mischief, meaning, and purpose arrive in a bundle; the process, as we mentioned before, is not necessarily sequential.

The train case again lends clarity. An interpreter might decide that "animal" includes only large creatures such as cattle to promote the purpose of train safety. Train safety is the purpose; train derailments are the mischief. The mischief and purpose are related but not the same. A rational construction of the text's meaning—in this case, construing

"animal" to include only "large creatures"—remedies the mischief and advances the purpose.

Abstractly expressed, the mischief rule framework of constructions is as follows: Because of the mischief A, the Constitution (or statute) provides the principle, standard, or rule B1, which is applied to the case at hand by rule B2, so that the purpose C is achieved. More simply stated: Because of A, B1, which requires B2, so that C.

If train derailments are the sole mischief to be remedied, the statute might be construed as follows: Because of the mischief of train derailments (A), the law requires that train engineers proceed with caution when large animals might come on the tracks (B1), which means they must blow their whistle and brake when they see on the tracks animals larger than a cow (B2), so train safety (C) is furthered.

Alternatively, if both train derailments and species endangerment are to be remedied, the statute might be construed as follows: Because of the mischiefs of train derailments and killing endangered species (A), the law requires that train engineers proceed with caution when any animal might come on the tracks (B1), which means they must whistle and brake when they see all animals on the tracks (B2), so train safety and the protection of endangered species (C) is furthered.

We attempt to show below that Establishment Clause constructions employ these three steps. Justices craft mischiefs based on their origin story. They then construct the Establishment Clause expressed as a principle, standard, or rule, which, in turn, produces legal doctrine in the form of a rule(s) or a test(s). The meaning and corresponding rules are designed to remedy the mischief and, thereby, further an Establishment Clause purpose stipulated by the justice.

B. Establishment Clause Constructions in Practice

Above, we abstractly explained the process of constitutional construction.[89] In this section, we attempt to document how the Establishment Clause has been constructed in practice. This Article does not catalog every Establishment Clause opinion but rather focuses on leading separationist and non-separationist opinions. For each opinion analyzed, we identify the mischief(s), meaning(s), rule(s), and purpose(s), explicitly or implicitly recognized—a process we call "charting." As we shall attempt to show and as we hope becomes clear, charting opinions is an analytically powerful and efficient way to identify the most essential and creative elements of constitutional constructions.

89. *See supra* Part II.A (outlining the steps necessary for constructing the Establishment Clause).

Charting also facilitates comparative analysis by providing standard measures that clarify how and where justices diverge from one another, including subtle disagreements among justices who generally vote in similar ways and are typically grouped together. Charting, furthermore, can facilitate originalist and non-originalist assessment of Establishment Clause opinions, as we shall discuss in Part III.

1. Separationist Constructions

The idea that the Establishment Clause was designed to separate church and state dominated Establishment Clause jurisprudence from the mid-twentieth century to the 1980s.[90] Separationism remains the approach championed by Justices Sonia Sotomayor and (to a lesser degree), Elena Kagan today.[91]

a. Constructing Separationism: Justices Black & Rutledge in *Everson v. Board of Education*

Everson v. Board of Education remains the Court's most influential separationist Establishment Clause case. Both Justice Hugo Black's majority opinion and Justice Wiley Rutledge's dissent directed Establishment Clause jurisprudence down an originalist path, initiating the process of constructing the text in light of the perceived intentions, principles, and design of the Founding Fathers who, according to Black and Rutledge, created a "wall of separation" between church and state.[92]

Justice Black begins his *Everson* majority opinion with the separationist origin story.[93] "A large proportion of the early settlers of this country," Black contends, "came here from Europe to escape the bondage of laws which compelled them to support and attend government-favored churches."[94] Nonetheless, the "turmoil, civil strife, and persecution" that characterized "old world" European politics infected with established churches was "transplanted to and began to thrive in the soil of the new America."[95] "These practices became so commonplace," Black continues, "as to shock the freedom-loving colonials into a feeling of abhorrence."[96] In particular, "[t]he imposition of taxes to pay ministers' salaries and to build and maintain churches and

90. *See infra* Part II.B.1 (discussing the development of separationism).
91. *See infra* Part II.C.1 (discussing the favoritism that Justices Breyer, Sotomayor, and Kagan have shown for separationism).
92. *See generally* Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947); *see also id.* at 29 (Rutledge, J., dissenting).
93. *See id*. at 8 (explaining that the United States was founded by people who sought to escape a government which imposed a specific form of religion).
94. *Id.*
95. *Id.* at 8–9.
96. *Id.* at 11.

church property aroused their indignation," especially in Virginia, "where the established church had achieved dominant influence" and "where many excesses . . . provided a great stimulus and able leadership for the movement" that led to the adoption of the Bill of Rights.[97] Americans in Virginia and elsewhere, Black concludes, "reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group."[98]

Black presents an epic origin story of American exceptionalism. The First Amendment's drafters, led by Founding Fathers from Virginia, adopted the Establishment Clause to remedy the mischief of government taxation for, support of, and assistance to religion.[99] Black connects two related purposes to these mischiefs: (1) avoiding the "turmoil, civil strife, and persecution"[100] resulting from the integration of church and state as in the "old world" and (2) protecting "individual religious liberty."[101]

Black then develops the Establishment Clause's meaning to remedy these mischiefs and further these purposes.[102] Noting that Court precedents have elaborated the "meaning and scope of the First Amendment . . . in the light of its history and the evils it was designed forever to suppress,"[103] he declares:

> 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

97. *Id.*

98. *Everson*, 330 U.S. at 11. Black identifies a similar group of mischiefs a few pages later in his opinion when he refers to Jefferson's Virginia Statute for Religious Liberty. *Id.* at 12–14. The provisions of the First Amendment, he asserts, "had the same objective and were intended to provide the same protections against governmental intrusion on religious liberty as the Virginia statute." *Id.* at 13.

99. Black also identifies the mischief of governmental interference with the beliefs of any religious group, *see id.* at 11, which would come to fall under the Free Exercise Clause. The issue of taxation of religion evaporates as Black's opinion proceeds, but it, too, would seem to fall under the Free Exercise Clause.

100. *Id.* at 8.

101. *Id.* at 10–11.

102. *See id.* at 14–15 (explaining the importance of the separation of church and state in the development of the United States).

103. *See id.* ("The meaning and scope of the First Amendment, preventing the establishment of religion or prohibiting the free exercise thereof, in the light of its history and the evils it was designed forever to suppress, have been several times elaborated by the decisions of this Court prior to the application of the First Amendment to the states by the Fourteenth.").

> him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."[104]

Black specifies a number of particular rules, summarizing them with the more general standard of a "wall of separation between church and state."[105] The "wall" is Black's constitutional doctrine. His specific rules—"no aid" to one religion or all religions, "no tax in any amount, large or small" to support any religious activities or institutions," etc.—implement that doctrine.[106] The "wall" standard and the various rules it erects remedy the mischiefs of government taxation for, support of, and assistance to religion, which is necessary to achieve the purposes of civic peace—avoiding "turmoil, civil strife, and persecutions" caused by church-state integration—and protecting "individual religious liberty."[107]

We can chart Justice Black's construction in *Everson* as follows: Because of the mischief of government support of and assistance to any and all religions, the Framers adopted the Establishment Clause to build a wall of separation between church and state, thus preventing state actors from setting up a church or aiding one religion or all religions, so as to foster civil peace (avoiding the turmoil, civil strife, and persecutions caused by church-state integration) and protect individual religious liberty.

Mischief	Government taxation for, support of and assistance to any or all religions
Meaning	Standard of a "Wall of Separation"
Rules	National and state governments may not: • Set up a church

104. *Everson*, 330 U.S. at 15–16 (citations omitted).

105. *See e.g.*, *id.* at 16 ("Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.").

106. *See id.* at 15–16 (listing a number of activities that would create a close connection between church and state so as to violate the separation that should exist in every aspect of religion and government).

107. *See id.* at 8–9 (explaining that the previous support of a government which supported a specific church led to violence and issues that the new government attempted to avoid by separating church and state).

	• Aid one religion or all religions[108] • Prefer one religion over others • Force or influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion • Punish an individual for entertaining or professing religious beliefs or disbeliefs, or for church attendance or non-attendance • Levy a tax in any amount, large or small, to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion • Openly or secretly participate in the affairs of any religious organizations or groups and vice versa
Purpose	Civil peace (avoiding "turmoil, civil strife, and persecutions" caused by church-state integration), and protection of "individual religious liberty"[109]

Black's origin story that the Framers erected a "wall of separation" between church and state has arguably become the cornerstone for the separationist construction of the Establishment Clause though, ironically, *Everson* did not actually produce a separationist result. The Court voted five-to-four to uphold the taxpayer subsidy of religious education at issue (the reimbursement of transportation costs parents incurred to send their children to Catholic schools).[110]

This disconnect between Black's reasoning and the case's outcome prompted an incredulous dissent by Justice Rutledge. Like Black, Rutledge turned to the Framers.[111] But Rutledge authored an even more

108. We note that some rules may not seem sufficiently rule-like—for example, what constitutes unconstitutional "aid" or preference for religion may not be clear by the rules "no government aid to one religion or all religions" and "no government preference for one religion over other religions." The framework we propose facilitates analysis of whether a justice's "rules" are rules as such. Our framework, therefore, is useful in pinpointing the weakness of various constructions, as we will explain in Part III.

109. *See Everson*, 330 U.S. at 8 (explaining the civil uprising caused by a government which favored a specific church).

110. *See id.* at 17–18 ("[W]e cannot say that the First Amendment prohibits New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools. . . . State power is no more to be used so as to handicap religions, than it is to favor them.").

111. *See id.* at 33–42 (Rutledge, J., dissenting) (explaining the importance of religious freedom to the Framers when they wrote the Constitution).

sweeping origin story, positing a broader mischief and, consequently, a more sweeping separationist construction of the Establishment Clause.[112]

Whereas Black's mischief focuses on a specific type of policy—government support of religion—Rutledge identifies a broader relationship to be prevented:

> The Amendment's purpose was not to strike merely at the official establishment of a single sect, creed or religion . . . . [T]he object was broader than separating church and state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.[113]

Rutledge traces this separation of spheres to the "generating history" of the First Amendment, which includes "the long and intensive struggle for religious freedom in America," especially the battle for religious freedom in Virginia.[114] After Thomas Jefferson left for Paris, Rutledge explains, the "unyielding" James Madison led the charge.[115] And Madison "opposed every form and degree of official relation between religion and civil authority,"[116] because, for Madison, "religion was a wholly private matter beyond the scope of civil power either to restrain or to support."[117]

According to Rutledge, the mischief that Madison and the Framers sought to remedy is not just government support of religion, though it includes that,[118] but more generally the intrusion of religious authority

---

112. *See id.* at 31–32 (Rutledge, J., dissenting) ("Necessarily [the purpose of the First Amendment] was to uproot all such relationships [of church and state]. But the object was broader than separating church and state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.").

113. *Id.* at 31–32 (Rutledge, J., dissenting).

114. *Everson*, 330 U.S. at 33 (Rutledge, J., dissenting) (discussing the Establishment Clause's close ties to American history).

115. *Id.* at 37 (Rutledge, J., dissenting).

116. *Id.* at 39 (Rutledge, J., dissenting); *see also id.* at 37 (Rutledge, J., dissenting) (discussing Madison's approach to religious liberty as a "broadside attack upon all forms of 'establishment' of religion, both general and particular, nondiscriminatory or selective").

117. *Id.* at 39–40 (Rutledge, J., dissenting). Numerous scholars—including one of the authors of this Article—have disputed whether Justice Rutledge interpreted Madison correctly. *See, e.g.*, VINCENT PHILLIP MUÑOZ, GOD AND THE FOUNDERS: MADISON, WASHINGTON, AND JEFFERSON 12–13 (2009) (quoting *Everson*, 330 U.S. at 39, 41 (Rutledge, J., dissenting)) ("[Justice Wiley Rutledge's] research led him to conclude that 'Madison opposed every form and degree of official relation between religion and civil authority,' and, therefore, that the Establishment Clause 'forbids any appropriation, large or small, from public funds to aid or support any and all religious exercises.'"); *see also* Vincent Phillip Muñoz, *The Original Meaning of the Establishment Clause and the Impossibility of Its Incorporation*, 8 U. PA. J. CONST. L. 585, 591–92 (2006) (quoting *Everson*, 330 U.S. at 40 (Rutledge, J., dissenting)) (alteration in original) ("'Madison believed that to tolerate any fragment of establishment would be by so much to perpetuate restraint upon that [religious] freedom.'").

118. *See Everson*, 330 U.S. at 31–32 (Rutledge, J., dissenting) ("The Amendment's purpose was not to strike merely at the official establishment of a single sect, creed or religion . . . .").

intruding into the sphere of governmental authority.[119] The Establishment Clause establishes the state's exclusive political power, privatizing religion and thus eliminating it from the domain of civil authority.

A total or complete separation of the spheres of civil and religious authority is needed, Rutledge contends, to secure religious freedom and to end the struggle of sect against sect, as "[t]here cannot be freedom of religion, safeguarded by the state, and intervention by the church or its agencies in the state's domain or dependency on its largesse."[120] Receiving taxpayer dollars, Rutledge says, breeds church dependency on the state, which threatens the freedom of churches.[121] More significantly, "[p]ublic money devoted to payment of religious costs, educational or other, brings the quest for more. It brings too the struggle of sect against sect for the larger share or for any."[122] This sect-against-sect competition to dominantly feed at the public trough "is precisely the history of societies which have had an established religion and dissident groups" and "[i]t is the very thing Jefferson and Madison experienced and sought to guard against, whether in its blunt or in its more screened forms."[123]

Compared to Justice Black's *Everson* opinion, Rutledge's broader mischief (intrusion by religious authorities into the sphere of civic authority) leads him to identify a broader constitutional meaning (cabining religion to the private sphere), which in turn leads him to an even more encompassing rule (no official relations between religion and civil authority including a prohibition on all tax support of religion). The two justices do agree, however, that the larger purpose of the Establishment Clause is to secure religious liberty.[124]

We can chart Justice Rutledge's construction of the Establishment Clause in *Everson* as follows: Because of the mischief of the intrusion of

---

119. *See id.* (Rutledge, J., dissenting) ("[T]he object was broader than separating church and state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.").

120. *Id.* at 53 (Rutledge, J., dissenting).

121. *See id.* (Rutledge, J., dissenting) ("The great condition of religious liberty is that it be maintained free from sustenance, as also from other interferences, by the state. For when it comes to rest upon that secular foundation it vanishes with the resting.").

122. *Id.* at 53 (Rutledge, J., dissenting).

123. *Id.* at 53–54 (Rutledge, J., dissenting).

124. *Compare Everson*, 330 U.S. at 11 ("The people there, as elsewhere, reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group."), *with id.* at 39 (Rutledge, J., dissenting) (discussing how the Virginia struggle for religious liberty was used as a model for the United States Constitution).

religion into civil governance and the intermixing and overlapping of the spheres of religion and civil authority, the Framers, led by Madison, adopted the Establishment Clause principle of privatizing religion, thus preventing "every form and degree of official relation between religion and civil authority," including all tax support of religion, so as to end the struggle of sect against sect.[125]

Mischief	Intrusion of religion into civil governance and the intermixing and overlapping of the spheres of religious and civil authority
Meaning	Principle of privatization of religion
Rules	• No official relationship between religious and civil authority • No tax support of religion
Purpose	Civic peace (ending the struggle of sect against sect) and religious freedom through the independence of churches from the state

After *Everson*, the "wall of separation" construction held, even if the metaphor's vagueness did not always yield coherent or consistent results.[126]

b. Separation and Autonomy: Justice Brennan's Establishment Clause Construction

Perhaps because Justice Potter Stewart had recently written a dissenting opinion in *Engel v. Vitale*[127] defending the constitutionality of opening the public school day with a state-composed prayer, Justice William Brennan authored his own separationist construction of the Establishment Clause in *School District of Abington Township v. Schempp*. Justice Brennan's *Schempp* opinion did not include a grand, historical origin story like the one Justice Black presented in *Everson*, though he still invoked John Locke, Jefferson, and Madison.[128] Brennan did not seek a new beginning but rather remodeled separationism, altering

125. *Id.* at 39–40 (Rutledge, J., dissenting).

126. For example, the year after *Everson*, the Court held that a "released time" program through which public schools provided religious education during the school day violated the Establishment Clause. *See* Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 212 (1948). Then, just four years later, the Court held that a different "released time" program—this one allowing students to leave public school during the school day to attend religious education—was constitutional. *See generally* Zorach v. Clauson, 343 U.S. 306 (1952).

127. *See generally* Engel v. Vitale, 370 U.S. 421 (Stewart, J., dissenting).

128. *See generally* Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963).

its constitutional doctrine and refining its primary purpose.[129]

In *Schempp*, Brennan distills the core meaning of the Court's existing Establishment Clause jurisprudence as follows: "[T]he history which our prior decisions have summoned to aid interpretation of the Establishment Clause permits little doubt that its prohibition was designed comprehensively to prevent those official involvements of religion which would tend to foster or discourage religious worship or belief."[130]

Brennan's opinion echoes Rutledge's *Everson* opinion insofar as they both focus on spheres of authority and keeping those spheres distinct.[131] But Brennan emphasizes individual autonomy (sometimes referred to as "voluntarism")[132] in a way that Black and Rutledge do not. The primary reason to prevent church-state integration, Brennan says, is to prevent the state from fostering or discouraging individuals to worship or believe.[133] This deeper purpose of religious autonomy, he suggests, is what it means to leave religious belief and practice to the individual's conscience and thereby secure religious freedom.[134]

Brennan clarifies why the mischief identified by Rutledge is a mischief—the intermixing and overlapping of the spheres of religious and civil authority can lead state authorities to shape or influence an individual's religious choices, thus encroaching on the freedom of conscience.[135] At the same time, he adds substantive content to the meaning of individual religious liberty, which Justices Black and Rutledge had left relatively vague.[136] Religious freedom, Brennan says, is secured when individuals determine for themselves their own religious beliefs and practices without influence or pressure from state authorities.[137]

---

129. *See generally* Ferguson v. Skrupa, 372 U.S. 726 (1963).

130. *Schempp*, 374 U.S. at 234 (Brennan, J., concurring).

131. *Compare id.*, *with* Everson v. Bd. of Educ., 330 U.S. 1, 52 (1947) (Rutledge, J., dissenting) ("For this reason the sphere of religious activity, as distinguished from the secular intellectual liberties, has been given the twofold protection and, as the state cannot forbid, neither can it perform or aid in performing the religious function.").

132. *See, e.g.*, Carl H. Esbeck, *Restatement of the Supreme Court's Law of Religious Freedom: Coherence, Conflict, or Chaos*, 70 NOTRE DAME L. REV. 581, 626 (1995) (defining voluntarism as "freedom from active governmental involvement in religious affairs").

133. *Schempp*, 374 U.S. at 234 (Brennan, J., concurring).

134. *Id.* at 253 (Brennan, J., concurring).

135. *See id.* at 234 (Brennan, J., concurring) ("In sum, the history which our prior decisions have summoned to aid interpretation of the Establishment Clause permits little doubt that its prohibition was designed comprehensively to prevent those official involvements of religion which would tend to foster or discourage religious worship or belief.").

136. *Id.* at 234, 253 (Brennan, J., concurring).

137. Later in his opinion, Brennan formulates this same underlying mischief in terms of religion

Brennan's emphasis on the mischief of state influence of religious beliefs and his elevation of the purpose of individual religious autonomy corresponds to his emphasis on "neutrality" as the Establishment Clause's constitutional meaning.[138] He writes,

> The line between permissible and impermissible forms of involvement between government and religion has already been considered by the lower federal and state courts. I think a brief survey of certain of these forms of accommodation will reveal that the First Amendment commands not official hostility toward religion, but only a strict neutrality in matters of religion.[139]

A state that is "neutral" toward religion neither encourages or discourages religious belief or practice, thereby facilitating the individual's religious autonomy.[140]

To implement the Establishment Clause's command of neutrality, Brennan derives three constitutional rules. State action, he proposes, may not: "(a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends where secular means would suffice."[141] The Court never adopted his three-part test.

We can chart Justice Brennan's construction in *Schempp* as follows: Because of the mischief of official interdependence with religion that tends to foster or discourage religious worship or belief, the Framers adopted the Establishment Clause to impose the principle of state neutrality toward religion, thus preventing state action that (a) serves the essentially religious activities of religious institutions, (b) employs the organs of government for essentially religious purposes, or (c) uses essentially religious means to serve governmental ends where secular means would suffice, so that individuals will remain autonomous in

---

as a corporate institution, writing: "It is not only the nonbeliever who fears the injection of sectarian doctrines and controversies into the civil polity, but in as high degree it is the devout believer who fears the secularization of a creed which becomes too deeply involved with and dependent upon the government." *Id*. at 259 (Brennan, J., concurring). Thus, autonomy for the individual requires religious choices to be free from state influence; autonomy for religious institutions requires independence from the state so as to avoid "secularization of a creed." *Id.* (Brennan, J., concurring).

138. Brennan is not the first justice to state that the Establishment Clause requires state neutrality toward religion. *See, e.g.*, Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947) ("[The First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary."); *see also id.* at 59 (Rutledge, J., dissenting) ("[I]t is only by observing the prohibition rigidly that the state can maintain its neutrality and avoid partisanship in the dissensions inevitable when sect opposes sect over demands for public moneys to further religious education . . . .").

139. *Schempp*, 374 U.S. at 295 (Brennan, J., concurring).

140. Indeed, Brennan uses the word "neutrality" and "neutral" far more in *Schempp* (thirteen references) than do Black and Rutledge combined in *Everson* (five references).

141. *See Schempp*, 374 U.S. at 231 (Brennan, J., concurring).

matters of religious belief and practice.

Mischief	Official interdependence with religious institutions that tends to foster or discourage religious worship or belief
Meaning	Principle of neutrality
Rules	National and state governments may not take action that: • Serves the essentially religious activities of religious institutions • Employs the organs of government for essentially religious purposes • Uses essentially religious means to serve governmental ends where secular means would suffice
Purpose	Securing autonomy in matters of religious belief and practice

In our view, Brennan's *Schempp* opinion is notable for its comprehensive and coherent character. He clearly identifies an Establishment Clause mischief (church-state interdependence that results in state influence over individuals' religious convictions) and corresponding purpose (religious autonomy), and he derives constitutional meaning (neutrality) and rules (his three-pronged test) to remedy his stated mischief and achieve his stated purpose.[142] Brennan would further develop aspects of his jurisprudence in subsequent opinions; notably, in *Lemon v. Kurtzman*, he emphasizes the mischief of the "injection of sectarian doctrines and controversies into the civil polity,"[143] echoing Justice Rutledge's *Everson* dissent.[144] But it was Chief Justice Warren Burger who would more influentially redirect the Court away from Brennan's focus on individual autonomy and toward alleviation of religious divisiveness as the Establishment Clause's primary purpose.[145]

c. Separation and Division: Chief Justice Burger's Establishment

142. Free Exercise Clause jurisprudence lies beyond the scope of this Article, but one might also consider how Justice Brennan's Free Exercise Clause opinion in *Sherbert v. Verner*, 374 U.S. 398 (1963) and its focus on religious autonomy coheres with his Establishment Clause opinion in *Schempp*.

143. Lemon v. Kurtzman, 403 U.S. 602, 649 (1971). Brennan actually used the phrase in his *Schempp* opinion. *See Schempp,* 374 U.S. at 259 (Brennan, J., concurring).

144. *See generally* Everson v. Bd. of Educ., 330 U.S. 1, 39–44 (1947) (Rutledge, J., dissenting).

145. *See infra* Part II.B.1.c (discussing Chief Justice Warren Burger's analysis).

Clause Construction

In a pair of opinions[146] in the early 1970s, culminating with the adoption of the long-employed but much-criticized "*Lemon* test,"[147] Justice Burger both modified and developed the separationist construction of the Establishment Clause. Similar to Justice Brennan, Burger remodeled the existing separationist edifice, so he had no need to begin with a grand origin story.[148]

From the Court's precedents, Burger identifies "three main evils."[149] In *Lemon*, he writes: "In the absence of precisely stated constitutional prohibitions, we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'"[150]

Burger's "evils"—what we are labeling "mischiefs"—were all implicated in *Lemon*, which involved government support to religious schools, including taxpayer funding of Catholic school teachers, textbooks, and educational materials.[151] And Burger explained why these "evils" are evil and need remedy. It is worth quoting him at length:

> Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. The potential divisiveness of such conflict is a threat to the normal political process. To have States or communities

146. *See generally* Walz v. Tax Comm'n of City of N.Y., 397 U.S. 664, 667 (1970); *see generally Lemon*, 403 U.S. at 612.

147. Justice Scalia famously called *Lemon* a "ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried . . . ." Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring). Just last term, the Supreme Court lambasted *Lemon*, calling it an "abstract[] and ahistorical approach to the Establishment Clause" which has been rightly "abandoned." *See* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427 (2022). *See also* Shurtleff v. Boston, 142 S. Ct. 1583, 1604 (2022) (Gorsuch, J., concurring in judgment) ("[I]nstead of bringing clarity to [Establishment Clause jurisprudence], *Lemon* produced only chaos. In time, this Court came to recognize these problems, abandoned *Lemon*, and returned to a more humble jurisprudence centered on the Constitution's original meaning."). But though the Court says *Lemon* has been "abandoned," it has not expressly overruled it. *But see Bremerton*, 142 S. Ct. at 2433 (Sotomayor, J., dissenting) (claiming that the majority decision overruled *Lemon*, even though it did not expressly say so).

148. Instead of an origin story, Burger began by quoting his own opinion in *Walz*, 397 U.S. at 667. Prior opinions of the Court had already discussed the development and historical background of the First Amendment in detail. *See generally Everson*, 330 U.S. at 1; Engel v. Vitale, 370 U.S. 421 (1962). It would therefore serve Burger no useful purpose to review in detail the background of the Establishment and Free Exercise Clauses of the First Amendment or to restate what the Court's opinions have reflected over the years.

149. *Lemon*, 403 U.S. at 612.

150. *Id.* (quoting *Walz*, 397 U.S. at 668).

151. *Id.* at 607.

> divide on the issues presented by state aid to parochial schools would tend to confuse and obscure other issues of great urgency. We have an expanding array of vexing issues, local and national, domestic and international, to debate and divide on. It conflicts with our whole history and tradition to permit questions of the Religion Clauses to assume such importance in our legislatures and in our elections that they could divert attention from the myriad issues and problems that confront every level of government. The highways of church and state relationships are not likely to be one-way streets, and the Constitution's authors sought to protect religious worship from the pervasive power of government. The history of many countries attests to the hazards of religion's intruding into the political arena or of political power intruding into the legitimate and free exercise of religious belief.[152]

In other words, government sponsorship of, financial support to, and active involvement in religion are "evil" because they produce the principal evil of political division along religious lines.

In focusing on political divisiveness, Burger's *Lemon* opinion moves away from Brennan's emphasis on religious autonomy in *Schempp*. Government support of religion is bad not because, as Brennan had contended, it leads to government fostering or discouraging religious worship or belief,[153] but rather because "political division along religious lines" is a "threat to the normal political process."[154] Government funding of religion has the potential to divide communities and thus "to confuse and obscure other issues of great urgency" and "divert attention" away from what Burger suggests are more important issues.[155] Burger replaces individual religious autonomy with the protection of the democratic political process as the Establishment Clause's primary purpose.

Burger's emphasis on safeguarding the democratic process from religious-based division also brings clarity to the mischief of government support of religion originally identified in *Everson*. Both Justices Black and Rutledge said that government support of religion is a mischief that needed remedy to avoid "turmoil, civil strife, and persecutions" caused by church-state integration (Black)[156] and to end "the struggle of sect

---

152. *Id.* at 622–23 (citations omitted).

153. *See* Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 234 (1963) (Brennan, J., concurring) ("In sum, the history which our prior decisions have summoned to aid interpretation of the Establishment Clause permits little doubt that its prohibition was designed comprehensively to prevent those official involvements of religion which would tend to foster or discourage religious worship or belief.").

154. *Lemon*, 403 U.S. at 622.

155. *Id.* at 622–23.

156. *See* Everson v. Bd. of Educ., 330 U.S. 1, 8–9 (1947).

against sect" (Rutledge).[157] Both implicitly posited civic peace as the underlying good that the Establishment Clause helps achieve. But neither clearly explained how civic peace is achieved through separationism. Burger specifies the mechanism by which separationism achieves civic peace: by prohibiting political division along religious lines.[158] His reasoning implies that there is something particularly dangerous to democratic politics when political affiliation correlates with religious identification, and it presumes that such an alignment can be stymied by prohibiting government funding of religious activities, especially religious education.[159]

Corresponding to his emphasis of divisiveness as the Clause's mischief, Burger adds an entanglement prong to the then-existing Establishment Clause rules, producing what is now known as the three-part *Lemon* test.[160] For a state action to pass constitutional muster, Burger wrote that it must: (a) have a secular purpose, (b) neither advance nor inhibit religion, and (c) not cause excessive entanglement between government and religion.[161] In *Lemon*, Burger does not directly connect this three-part test to effectuating a specific meaning of the Establishment Clause.[162] In *Walz v. Tax Commission of New York*, however, he repeatedly invokes "neutrality," sometimes referring to it as "benevolent neutrality," as the Clause's meaning.[163]

We can chart Chief Justice Burger's construction in *Walz* and *Lemon* as follows: Because of the political division along religious lines that results from government sponsorship, financial support, and active involvement in religion, the Establishment Clause imposes the principle of state neutrality toward religion, thus requiring state action that (a) has a secular purpose, (b) neither advances or inhibits religion, or (c) does not cause an excessive entanglement between government and religion, so as to protect the integrity of the democratic political process both from political division along religious lines and from the corresponding political confusion, obfuscations, and diversions such divisions cause.

Mischief	Political division along religious lines that results from government sponsorship, financial support, and active involvement in religion
Meaning	Principle of state neutrality toward religion

157. *Id.* at 53 (Rutledge, J., dissenting).
158. *Lemon*, 403 U.S. at 623.
159. *Id.* at 623.
160. *Id.* at 612.
161. *Id.*
162. *See generally id.*
163. 397 U.S. 664, 669 (1970).

Rules	National and state government action: • must have a secular purpose • may neither advance nor inhibit religion • must not cause an excessive entanglement between government and religion
Purpose	Protection of the integrity of the democratic political process from political division along religious lines and protection against the corresponding political confusion, obfuscations, and diversions that such divisions cause

d. Separation and Endorsement: Justice O'Connor's Establishment Clause Construction

Chief Justice Burger's emphasis on divisiveness would lead to another attempted separationist remodel, this one conducted by Justice Sandra Day O'Connor. Similar to Brennan and Burger before her, O'Connor operated within the realm of the separationists' origin story, offering a "clarification"[164] that reshaped separationist doctrine and rules and recast the Establishment Clause's underlying purpose.

O'Connor began her remodeling project in *Lynch v. Donnelly*, a case involving a government-sponsored Christmas display in a town square that included a crèche.[165] In a concurring opinion, O'Connor posits that, though political divisiveness is a mischief that the Establishment Clause is designed to remedy, divisiveness itself is not an independent standard or test to be used to enforce the Clause's restrictions.[166] She writes:

> Political divisiveness is admittedly an evil addressed by the Establishment Clause. Its existence may be evidence that institutional entanglement is excess or that a governmental practice is perceived as an endorsement of religion. But the constitutional inquiry should focus ultimately on the character of the governmental activity that might cause such divisiveness, not on the divisiveness itself.[167]

Institutional non-entanglement and non-endorsement, O'Connor says, are the constitutional rules the Establishment Clause mandates to remedy divisiveness.[168] And political divisiveness due to religion is not even the primary mischief. "The Establishment Clause," she states, "prohibits

164. Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring).

165. *See id.* at 670–71 (describing the city's erection of a Christian Christmas display situated in a park located in the city's shopping district).

166. *See generally id.* at 689 (O'Connor, J., concurring).

167. *Id.*

168. *See generally id.*

government from making adherence to a religion relevant in any way to a person's standing in the political community."[169] Divisiveness occurs when religion becomes relevant to an individual's political status.[170]

Though she does not employ the term "exclusion," it captures O'Connor's principal Establishment Clause mischief. As she writes in *Lynch*, "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[171]

The mischief of exclusion is connected to the Establishment Clause's principal purpose of fostering inclusion, or what some scholars have labeled "equal regard."[172] Equal regard demands that no one be excluded in any way because of religiosity or lack thereof.[173] In O'Connor's construction, the Establishment Clause remedies exclusion and promotes equal treatment of citizens by prohibiting the state from endorsing religion, which serves as the primary constitutional rule in her approach.[174]

Preventing exclusion and promoting inclusion is consistent with government neutrality toward religion, which, for O'Connor, is the Establishment Clause's meaning.[175] In *County of Allegheny v. American Civil Liberties Union*, O'Connor summarizes the various aspects of her construction as follows:

> We live in a pluralistic society. Our citizens come from diverse religious traditions or adhere to no particular religious beliefs at all. If government is to be neutral in matters of religion, rather than showing either favoritism or disapproval towards citizens based on their personal religious choices, government cannot endorse the religious practices and beliefs of some citizens without sending a clear message to nonadherents that they are outsiders or less than full members of the political community.[176]

---

169. *Id.* at 687.

170. *See generally Lynch*, 465 U.S. at 688 (O'Connor, J., concurring).

171. *Id.*

172. *See generally* CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION (2010); Robin Charlow, *The Elusive Meaning of Religious Equality*, 83 WASH. U. L.Q. 1529 (2005).

173. *See generally* EISGRUBER & SAGER, *supra* note 172; Charlow, *supra* note 172.

174. In *Lynch*, Justice O'Connor initially suggested that non-endorsement and non-entanglement were distinct Establishment Clause rules. *See* 465 U.S. at 689 (O'Connor, J., concurring). Over time, her Establishment Clause jurisprudence centered on endorsement.

175. *See e.g.*, Cnty. of Allegheny v. Am. C.L. Union, 492 U.S. 573, 625 (1989) (O'Connor, J., concurring in part and concurring in the judgment) ("[T]he Establishment Clause 'prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community.'") (citing *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring)).

176. *Id*. at 627.

We can chart Justice O'Connor's construction in *Lynch* and *County of Allegheny* as follows: Because of the exclusion that occurs when state authorities make adherence to a religion relevant to a person's standing in the political community, the Establishment Clause imposes the principle of state neutrality toward religion, thus prohibiting state action that communicates a message of endorsement or causes excessive institutional entanglement with religion, so as to promote an inclusive political community that holds all citizens with equal regard in matters of religion.

Mischief	Exclusion that results from state authorities making adherence to a religion relevant to a person's standing in the political community
Meaning	Principle of state neutrality toward religion
Rules	National and state government action must not: • Communicate a message of endorsement • Cause an excessive institutional entanglement between government and religion
Purpose	To promote an inclusive political community that holds all citizens with equal regard in matters of religion

In *Lynch*, O'Connor voted to uphold the town-square Christmas display at issue.[177] Her endorsement test in some ways moved separationism toward being more accommodating of religion, though it remained within the separationist framework.

e. Separation and Psychological Coercion: Justice Kennedy's Establishment Clause Construction

Similar to Justice O'Connor, Justice Anthony Kennedy sought to remodel separationism to make it more accommodating of religion in *County of Allegheny*[178] and *Lee v. Weisman*[179]. Though he dismissed O'Connor's endorsement test as "flawed in its fundamentals and unworkable in practice,"[180] Kennedy stated that he was willing, "for present purposes," "to remain within the *Lemon* framework."[181] And he

177. *See generally Lynch*, 465 U.S. at 694.
178. *See generally* 492 U.S. 573.
179. *See generally* 505 U.S. 577 (1992).
180. *Cnty. of Allegheny,* 492 U.S. at 669 (Kennedy, J., concurring in part).
181. *Id.* at 655. Kennedy, however, declared that he did not "wish to be seen as advocating [the *Lemon* test], let alone adopting, that test as our primary guide." *Id.*

quoted approvingly Chief Justice Burger's standard in *Walz* of "benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference."[182]

Similar to O'Connor, Justice Kennedy does not present his own origin story to explain why the Establishment Clause came into being.[183] Instead, he interprets a number of Court precedents to have allowed government aid to religion.[184] He writes:

> 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.[185]

The mischief the Establishment Clause precedents have actually remedied, Kennedy says, is government coercion of religion, not government aid to religion or exclusion on account of religion.[186] Government coercion interferes with "the freedom to worship as one pleases without government interference or oppression," which, Kennedy says, "is the great object of both the Establishment and the Free Exercise Clauses."[187]

In his majority opinion in *Lee*, Kennedy further elaborates and expands his construction of the Establishment Clause's mischief, rules, and purposes. He writes:

> [T]he lesson of history that was and is the inspiration for the Establishment Clause [is] . . . that in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce. A state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed.[188]

---

182. *Id.* at 661–62 (quoting Walz v. Tax Comm'n of City of N.Y., 397 U.S. 664, 669 (1970)).

183. *See generally id.* at 655 (Kennedy, J., concurring in part).

184. *See id.* at 657–59 (first citing *Walz*, 397 U.S. at 664 (holding that the Establishment Clause does not bar property-tax exemptions for churches); then citing Zorach v. Clauson, 343 U.S. 306 (1952) (holding that students can leave school during the day for religious instruction); then citing Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen, 392 U.S. 236 (1968) (holding that supplying textbooks to students in parochial schools does not violate the Establishment Clause); and then citing Tilton v. Richardson, 403 U.S. 672 (1971) (holding that grants to church-sponsored educational institutions do not violate the Establishment Clause)).

185. *Cnty. of Allegheny*, 492 U.S. at 659 (Kennedy, J., concurring in part) (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984)).

186. *See id.* ("These two principles, while distinct, are not unrelated, for it would be difficult indeed to establish a religion without some measure of more or less subtle coercion, be it in the form of taxation to supply the substantial benefits that would sustain a state-established faith, direct compulsion to observance, or governmental exhortation to religiosity that amounts in fact to proselytizing.").

187. *Id.* at 660.

188. Lee v. Weisman, 505 U.S. 577, 591–92 (1992).

The Establishment Clause remedies the mischief of state indoctrination of religion, which includes direct and indirect methods of coercion.[189] Prohibiting all manner of religious coercion, he explains, furthers the First Amendment's design to ensure "that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission."[190] While Kennedy does not cite Justice Brennan and proposes a different set of rules than Brennan's, he effectively returns the Establishment Clause's underlying purpose to individual autonomy in religious practice and belief.

We can chart Justice Kennedy's construction in *County of Allegheny* and *Lee* as follows: Because of the mischiefs of indirect and direct government coercion of religion, the Establishment Clause requires government to be benevolently neutral toward religion, prohibiting government benefits to religion to such a degree that they establish a religion and prohibiting direct and indirect coercion of religion, so as to ensure that individuals remain autonomous in their religious beliefs and practices.

Mischief	Direct and indirect governmental coercion of religion
Meaning	Standard of benevolent neutrality
Rules	• No aid to religion that amounts to an establishment • No direct or indirect government coercion of religious belief or practice
Purpose	Securing autonomy in matters of religious belief and practice

Justice Kennedy's movement of separationism toward coercion was not fully embraced by all of his separationist colleagues. Justice David Souter signed on to Kennedy's majority opinion in *Lee* but wrote his own concurrence (signed by Justices Stevens and O'Connor) to announce his "independent resolution of this case."[191] Souter sought to affirm "the settled principle that the Establishment Clause forbids support for

189. In *Lee*, Kennedy explains that a public school indirectly coerced students to participate in a religious exercise when it arranged for an invocation and benediction at their graduation ceremony. *See id.* at 592–93 ("The undeniable fact is that the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion.").

190. *Id.* at 589.

191. *Id.* at 609 (Souter, J., concurring).

religion in general no less than support for one religion or some," and thus to not let separationism drift toward an overly accommodating posture by focusing on coercion.[192] As we shall discuss below, current justices have followed Souter's lead and embraced Justice Burger's and Justice O'Connor's versions of separationism more than Justice Kennedy's.[193] Before discussing contemporary separationism, however, we turn to those justices who have sought to tear down the separationist wall and replace it with an Establishment Clause construction more accommodating to religion in the public square.

2. Non-Separationist Constructions

While several justices had articulated reservations about separationism while it was being developed,[194] then-Associate Justice William Rehnquist offered the first complete alternative Establishment Clause construction in his dissenting opinion in *Wallace*.[195] Seven years later, in *Lee*, Justice Antonin Scalia followed Rehnquist's example (but not his constitutional meaning) and offered his own non-separationist construction.[196] Ten years after that, Justice Clarence Thomas would begin to formulate a federalism construction of the Establishment Clause while also signing on to Justice Scalia's construction.[197] Scalia's emphasis on "history and tradition" and "legal coercion" are particularly influential today, as we shall discuss in Part III. Rehnquist's focus on

192. *Id.* at 616.

193. *See infra* Part II.C.1.

194. *See, e.g.*, Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 309 (1963) (Stewart, J., dissenting) ("We err in the first place if we do not recognize, as a matter of history and as a matter of the imperatives of our free society, that religion and government must necessarily interact in countless ways.").

195. *See, e.g.*, 472 U.S. 38, 92 (Rehnquist, J., dissenting) ("It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly 40 years. Thomas Jefferson was of course in France at the time the constitutional Amendments known as the Bill of Rights were passed by Congress and ratified by the States. His Letter to the Danbury Baptist Association was a short note of courtesy, written 14 years after the Amendments were passed by Congress. He would seem to any detached observer as a less than ideal source of contemporary history as to the meaning of the Religion Clauses of the First Amendment.").

196. *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 631 (Scalia, J., dissenting) ("These views of course prevent me from joining today's opinion, which is conspicuously bereft of any reference to history.").

197. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 676 (2002) (Thomas, J., concurring) (indicating that prior to adopting his federalism construction of the Establishment Clause, Justice Thomas supported Justice Rehnquist's non-preferentialist construction); *see also* Rosenberger v. Rectors & Visitors of Univ. of Va., 515 U.S. 819, 861 (1995) (Thomas, J., concurring) ("Though our Establishment Clause jurisprudence is in hopeless disarray, this case provides an opportunity to reaffirm one basic principle that has enjoyed an uncharacteristic degree of consensus: The Clause does not compel the exclusion of religious groups from government benefits programs that are generally available to a broad class of participants.").

non-preferentialism has also made something of a reappearance in Justice Elena Kagan's jurisprudence.[198]

These non-separationist constructions often fall under the label of "accommodationism," as they are more accommodating of government support of religion than separationism.[199] Accommodation of religion, however, is neither the mischief, meaning, rule, nor purpose of any of these constructions, so it seems inaccurate to label them accommodationist constructions. Instead, we use the term "non-separationism" because these Justices all deny that separation is the core of the Establishment Clause.[200] The absence of a positive label for these constructions also reveals that they suffer from a lacuna of sorts. As we shall discuss in Part III, some non-separationist constructions focus primarily on what the Establishment Clause permits, failing to clearly articulate what mischiefs it is designed to mitigate or to discuss what purposes it is designed to achieve.

a. Preventing Governmental Religious Preference: Justice Rehnquist's Establishment Clause Construction

In his dissenting opinion in *Wallace*, Justice Rehnquist sought to both tear down the entire separationist edifice and, in its place, construct a more accommodating, non-preferential approach to church-state relations.[201]

Rehnquist's origin story begins with an act of demolition. It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history," Rehnquist states, "but unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly 40 years."[202] Starting with *Everson*, Rehnquist contends, the Supreme Court mischaracterized the Establishment Clause's original meaning and the Framers' original intention.[203] Setting the record straight, he suggests, would allow the Court to build a more historically accurate, originalist construction of the

198. *See infra* Part II.C.1.

199. *See generally* Mark Storslee, *Religious Accommodation, the Establishment Clause, and Third-Party Harm*, 86 U. CHI. L. REV. 871 (2019).

200. *See infra* Part II.C.1 (discussing contemporary separationism among Justices Breyer, Sotomayor, and Kagan).

201. *See* Wallace v. Jaffree, 472 U.S. 38, 91–114 (1985) (Rehnquist, J., dissenting) (writing that the Establishment Clause could not be violated by the government unless it stated a clear preference for one religion over another or set up an official religion).

202. *Id.* at 92.

203. *Id.* at 91–92.

text.[204]

Whereas Justice Black reached back to the first settlers who came to the New World to escape the religious persecution of the Old,[205] Rehnquist's origin story turns to the constitutional ratification debates. The Bill of Rights as a whole, and the Establishment Clause in particular, Rehnquist explains, address the criticisms levied by those who opposed the Constitution on account of its "potential for tyranny."[206] The Constitution's proponents, contending that the proposed national government was one only of delegated powers, did not share that fear.[207] Led by Madison, they sought amendments that would "surely do no harm and might do a great deal of good."[208] The drafting debates, which Rehnquist reports do "not seem particularly illuminating," reveal that Madison spoke "as an advocate of sensible legislative compromise, not as an advocate of incorporating the Virginia Statute of Religious Liberty into the United States Constitution."[209] The movement that led to the Establishment Clause was not, it turns out, the "dramatic climax"[210] to eliminate Old World religious persecution from New World America, but rather political maneuvering necessary to get the Constitution ratified.[211] Having depreciated the significance and importance of the adoption of the Establishment Clause, Rehnquist says:

> It seems indisputable from these glimpses of Madison's thinking, as reflected by actions on the floor of the House in 1789, that he saw the Amendment as designed to prohibit the establishment of a national

---

204. *Id.*

205. Everson v. Bd. of Educ., 330 U.S. 1, 8–10 (1947).

206. *Wallace*, 472 U.S. at 92–93 (Rehnquist, J., dissenting).

207. *See id.* ("During the debates in the Thirteen Colonies over ratification of the Constitution, one of the arguments frequently used by opponents of ratification was that without a Bill of Rights guaranteeing individual liberty the new general Government carried with it a potential for tyranny. The typical response to this argument on the part of those who favored ratification was that the general Government established by the Constitution had only delegated powers, and that these delegated powers were so limited that the Government would have no occasion to violate individual liberties.").

208. *Id.* at 93–94.

209. *Id.* at 98.

210. *See Everson*, 330 U.S. at 12 (footnote omitted) ("Madison wrote his great Memorial and Remonstrance against the [tax levy]. In it, he eloquently argued that a true religion did not need the support of law; that no person, either believer or non-believer, should be taxed to support a religious institution of any kind; that the best interest of a society required that the minds of men always be wholly free; and that cruel persecutions were the inevitable result of government-established religions.").

211. *See Wallace*, 472 U.S. at 98–99 (Rehnquist, J., dissenting) ("During the ratification debate in the Virginia Convention, Madison had actually opposed the idea of any Bill of Rights. His sponsorship of the Amendments in the House was obviously not that of a zealous believer in the necessity of the Religion Clauses, but of one who felt it might do some good, could do no harm, and would satisfy those who had ratified the Constitution on the condition that Congress propose a Bill of Rights.").

> religion, and perhaps to prevent discrimination among sects. He did not see it as requiring neutrality on the part of government between religion and irreligion. Thus the Court's opinion in *Everson*—while correct in bracketing Madison and Jefferson together in their exertions in their home State leading to the enactment of the Virginia Statute of Religious Liberty—is totally incorrect in suggesting that Madison carried these views onto the floor of the United States House of Representatives when he proposed the language which would ultimately become the Bill of Rights.[212]

After reviewing late eighteenth and early nineteenth century national policies toward religion, as well as the commentary of the distinguished jurists Joseph Story and Thomas Cooley, Rehnquist concludes:

> It would seem from this evidence that the Establishment Clause of the First Amendment had acquired a well-accepted meaning: it forbade establishment of a national religion, and forbade preference among religious sects or denominations. . . . The Establishment Clause did not require government neutrality between religion and irreligion nor did it prohibit the Federal Government from providing nondiscriminatory aid to religion. There is simply no historical foundation for the proposition that the Framers intended to build the "wall of separation" that was constitutionalized in *Everson*.[213]

It would seem that Rehnquist intended his review of the Establishment Clause's creation to undermine the separationist's origin story and its accompanying mischiefs, meaning, rules, and purposes. The mischief that led to the Establishment's Clause's drafting was not government support to any and all religions, but rather Anti-Federalist fears that the newly created national government might establish a national church or prefer one sect over others.[214] The First Amendment does not build a "wall of separation,"[215] demand government "neutrality"[216] toward religion, or even prevent all government aid to religion.[217] Instead, it imposes the specific rules that the national government cannot officially establish a church and cannot prefer one sect over other sects.[218] The

---

212. *Id.*

213. *Id.* at 106.

214. *Id.* at 98.

215. *See, e.g.*, *Everson*, 330 U.S. at 16 (discussing the true meaning of the term "establishment of religion" in the First Amendment).

216. *See* Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 244–46 (1963) (citations omitted) (Brennan, J., concurring) (analyzing *United States v. Ballard* and discussing how elusive the First Amendment's injunction of struct neutrality is a moving target).

217. *Wallace*, 472 U.S. at 98–100, 106 (Rehnquist, J., dissenting).

218. *See id.* at 106 ("It would seem from this evidence that the Establishment Clause of the First Amendment had acquired a well-accepted meaning: it forbade establishment of a national religion, and forbade preference among religious sects or denominations.").

Establishment Clause's animating purpose is not to end civil strife caused by church-state integration but rather to ensure even-handed treatment of religious sects if and when government supports or interacts with religion.[219]

We can chart Justice Rehnquist's construction in *Wallace* as follows: Because of the Anti-Federalist fears of the national government establishing a religion and governmental preference of some sects over others, the Framers adopted the Establishment Clause to prohibit an official national established church and discrimination among sects, so as to ensure evenhanded governmental treatment of religious sects.

Mischief	Official establishment of a religion and governmental preference of some sects over others
Meaning	[Not articulated, Rehnquist skips straight to rules]
Rules	• No official national church • No governmental preference of one sect over others
Purpose	Evenhanded treatment of all religious sects

Justice Rehnquist's nonpreferentialist approach was offered in a dissenting opinion, and his construction has never been adopted by a Court majority.[220] Two of his originalist colleagues, however, took up his effort to overturn the separationist wall.

b. Preventing Legal Coercion: Justice Scalia's Establishment Clause Construction

Justice Antonin Scalia first took aim at the separationist wall in *Lee v. Weisman*,[221] the public-school-graduation-prayer case in which Justice Kennedy clarified that his notion of coercion included psychological peer pressure of students.[222] Scalia sought to construct the Establishment Clause in a manner that would accommodate the "historic practices of our people."[223] He starts, accordingly, with what we might call a reverse

219. *See id.* (alteration in original) ("'The real object of the [First] [A]mendment was . . . to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government.'").

220. For a discussion of Rehnquist's Establishment Clause jurisprudence, see generally Richard W. Garnett, *Chief Justice Rehnquist, Religious Freedom, and the Constitution*, *in* THE CONSTITUTIONAL LEGACY OF WILLIAM H. REHNQUIST (Bradford P. Wilson ed., 2015).

221. *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 631 (1992) (Scalia, J., dissenting) ("In holding that the Establishment Clause prohibits invocations and benedictions at public-school graduation ceremonies, the Court—with nary a mention that it is doing so—lays waste a tradition that is as old as public-school graduation ceremonies themselves, and that is a component of an even more longstanding American tradition of nonsectarian prayer to God at public celebrations generally.").

222. *See supra* Part II.2.a and accompanying notes.

223. *Lee*, 505 U.S. at 632 (Scalia, J., dissenting).

origin story. Instead of turning to history to explain what the Establishment Clause was meant to prohibit, Scalia looks to official founding-era and early American church-state actions to identify practices that the Establishment Clause permits.[224] That history, he finds, includes "public ceremonies featuring prayers of thanksgiving and petition"[225] and "invocations and benedictions at public school graduation exercises."[226]

Historical examples lead Scalia to dissent from the Court's ruling in *Lee* that the graduation prayer at issue was unconstitutional.[227] They also provide the basis for his Establishment Clause construction. Scalia's analysis is brief:

> The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support by force of law and threat of penalty. Typically, attendance at the state dissenting church was required; only clergy of the official church could lawfully perform sacraments; and dissenters, if tolerated, faced an array of civil disabilities. Thus, for example, in the Colony of Virginia, where the Church of England had been established, ministers were required by law to conform to the doctrine and rites of the Church of England; and all persons were required to attend church and observe the Sabbath, were tithed for the public support of Anglican ministers, and were taxed for the costs of building and repairing churches.[228]

The Establishment Clause, Scalia concludes, was adopted to prohibit, at the federal level, the types of coercion that attend traditional religious establishments.[229] He "acknowledge[s] for the sake of argument" that "financial support of religion generally[] by public taxation" was considered by 1790 by some to be an establishment;[230] "but that would still be an establishment coerced *by force of law*."[231] He further concedes

---

224. *Id.* at 633.

225. *Id.*

226. *Id.* at 635.

227. *See generally id.* at 631–46.

228. Lee v. Weisman, 505 U.S. 577, 640–41 (1992) (Scalia, J., dissenting) (citing LEONARD LEVY, THE ESTABLISHMENT CLAUSE 4 (1986)).

229. Scalia also parenthetically notes that the Establishment Clause was meant "to protect state establishments of religion from federal interference." *See id.* at 641 (Scalia, J., dissenting). But Scalia never fully adopts the view Justice Thomas will eventually articulate—that the Establishment Clause resists incorporation entirely. *See, e.g.*, McCreary Cnty. v. Am. C.L. Union, 545 U.S. 844, 898–99 (Scalia, J., dissenting) (citation omitted) ("Justice Stevens says that if one is serious about following the original understanding of the Establishment Clause, he must repudiate its incorporation into the Fourteenth Amendment, and hold that it does not apply against the states. This is more smoke.").

230. *Lee*, 505 U.S.at 641 (Scalia, J., dissenting).

231. *Id.* at 640.

that America's "constitutional tradition" also "ruled out of order" "sectarian" endorsements of religion, but not non-sectarian endorsements and prayers.[232] Scalia writes:

> Religious men and women of almost all denominations have felt it necessary to acknowledge and beseech the blessing of God as a people, and not just as individuals, because they believe in the "protection of divine Providence," as the Declaration of Independence put it, not just for individuals but for societies; because they believe God to be, as Washington's first Thanksgiving Proclamation put it, the "Great Lord and Ruler of Nations." One can believe in the effectiveness of such public worship, or one can deprecate and deride it. But the longstanding American tradition of prayer at official ceremonies displays with unmistakable clarity that the Establishment Clause does not forbid the government to accommodate it.[233]

In the Free Exercise Clause case *Locke v. Davey*, Scalia clarifies that his accommodating construction allows religious individuals (including ministers) to participate in generally available government programs.[234] The First Amendment, he explains, does not require clergy be excluded from benefits (including financial benefits) made available to all citizens on a non-religious basis.[235] Founding-era practices reveal that the Framers were hostile only toward laws that singled out clergymen specifically for financial aid.[236] In fact, Scalia contends that to exclude a religious minister or a religious individual from a generally available benefit solely on the basis of religion would violate the Free Exercise Clause.[237]

The following year, in *McCreary County v. American Civil Liberties Union*, Scalia again defends the constitutional permissibility of government support for religion, taking aim at the Court's doctrines of separation and neutrality.[238] After cataloging the repeated and widespread practices of non-sectarian religious prayers and invocations throughout American history by governmental officials and institutions, Scalia asks,

> how can the Court *possibly* assert that "the First Amendment mandates governmental neutrality between . . . religion and nonreligion," and that "[m]anifesting a purpose to favor . . . adherence to religion generally," is unconstitutional? Who says so? Surely not the words of the

232. *Id.* at 641.
233. *Id.* at 645.
234. *See* Locke v. Davey, 540 U.S. at 721, 726–27 (2004) (Scalia, J., dissenting) ("When the State makes a public benefit generally available, that benefit becomes part of the baseline against which burdens on religion are measured . . . .").
235. *Id.* at 727–28.
236. *Id.* at 727.
237. *Id.* at 726–27.
238. McCreary Cnty. v. Am. C.L Union, 545 U.S. at 885 (2005) (Scalia, J., dissenting).

> Constitution. Surely not the history and traditions that reflect our society's constant understanding of those words. Surely not even the current sense of our society, recently reflected in an Act of Congress adopted unanimously by the Senate and with only 5 nays in the House of Representatives, criticizing a Court of Appeals opinion that had held "under God" in the Pledge of Allegiance unconstitutional. Nothing stands behind the Court's assertion that governmental affirmation of the society's belief in God is unconstitutional except the Court's own say-so, citing as support only the unsubstantiated say-so of earlier Courts going back no farther than the mid-20th century.[239]

"Those who wrote the Constitution," Scalia emphasizes, "believed that morality was essential to the well-being of society and that encouragement of religion was the best way to foster morality."[240]

Similar to Justice Rehnquist in *Wallace v. Jaffree*,[241] Scalia sought to replace the entire edifice of separationism. He did not adopt Rehnquist's rule of non-preferentialism, but rather asserted that the Establishment Clause prohibits legal coercion of religious orthodoxy and direct taxation to exclusively finance religion.[242] Thus understood, the First Amendment allows religious individuals to participate in general government programs and allows the government to support—and even endorse—religion in general as long as it does so in a non-sectarian (though not necessarily non-preferential) manner.[243]

Scalia does not offer an explanation as to why the Framers adopted the Establishment Clause.[244] He does not offer an origin story that explores in any detail why the Framers adopted the Establishment Clause or articulates the overarching purposes the Clause was designed to foster.[245]

---

239. *Id.* at 889 (citation omitted) (citing the majority opinion and two recent acts of Congress that received almost unanimous support in reaffirming the Pledge of Allegiance and the National Motto, both of which refer to "God").

240. *Id.* at 887.

241. *See supra* Part II.B.2.a.

242. *McCreary*, 545 U.S. at 908–09 (Scalia, J., dissenting).

243. Scalia also argues that the Framers contemplated monotheistic religions only when drafting the Establishment Clause. *See generally id.* at 893–95.

244. *See generally id.* at 897–98.

245. The omission of a robust origin story comports with Scalia's skepticism of discerning legislative intentions and purposes. Justice Scalia vociferously criticized the Court's use of legislative history during his tenure. Nowhere was this truer than in statutory interpretation cases. In *Conroy v. Aniskoff*, for example, he wrote: "The greatest defect of legislative history is its *illegitimacy*. We are governed by laws, not by the intentions of legislators." 507 U.S. 511, 519 (1993) (emphasis added). *See also* SCALIA & GARNER, *supra* note 18, at 45 (citation omitted) ("As Justice Oliver Wendell Holmes put it: 'We do not inquire what the legislature meant; we ask only what the statute means.'"). Scalia developed his critique of legislative history over a number of years. *See generally* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of*

Instead, Scalia focuses on historical practices to uncover what the Framers understood to be permissible.[246] Those practices, he says, communicate the primary rule of no legal coercion of religion, but he offers little direct evidence for that conclusion—a citation to the church-state scholar Leonard Levy and a sentence about some elements of Colonial Virginia's establishment.[247]

We can chart Justice Scalia's construction in *Lee* and *McCreary County* (supplemented by *Locke v. Davey*) as follows. Given that Scalia does not elaborate on the mischiefs the Establishment Clause was designed to remedy or articulate the text's overarching purpose, we infer those from what little he does say. The Establishment Clause prohibits the establishment of a religion, which, as revealed by practices in Colonial Virginia, included mischiefs such as legally enforced church attendance and sabbath observance, privileges for state clergy, and civil disabilities on religious dissenters. America's traditions have also associated the mischiefs of an establishment to include direct exclusive financial aid to clergy and sectarian religious endorsements by state officials. The Establishment Clause imposes the constitutional rules of prohibiting legal coercion of religious orthodoxy, taxation to finance religion exclusively, and sectarian endorsements by state officials, so as to leave Americans free of state coercion in matters of religion but to allow them, through official state actions, to support religion in a general, non-sectarian manner.

Mischief	Legally enforced and thereby coerced: • church attendance and sabbath observance • legal privileges for state clergy • civil disabilities on dissenters, i.e., those not belonging to the state church • taxation to finance religion exclusively • sectarian endorsements of religion by state officials
Meaning	The Clause's meaning reduces to the following rules
Rules	• No legal coercion of orthodox religious belief or practice • No legally compelled, exclusive financial support of

United States Federal Courts in Interpreting the Constitution and Laws, *in* TANNER LECTURES ON HUMAN VALUES 79, 104–10 (1995).

246. *See generally McCreary*, 545 U.S. at 631–47 (Scalia, J., dissenting); Lee v. Weisman, 505 U.S. 577, 631–32 (1992) (Scalia, J., dissenting).

247. This focus on rules (as opposed to standards or principles) also comports with Scalia's jurisprudential philosophy, specifically his claim that the rule of law is the law of rules. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1187 (1989) ("I urge . . . that the *Rule* of Law, the law of *rules*, be extended as far as the nature of the question allows . . . .").

	clergy • No sectarian endorsements of religion by state actors
Purpose	To prevent state coercion in religious matters while also allowing individuals and groups to "acknowledge and beseech the blessing of God" collectively and publicly, and to allow the state to foster the moral character of citizens through non-coercive support and non-sectarian endorsements of religion

Justice Scalia's closest ally on Establishment Clause matters was Justice Thomas, who signed on to Scalia's *Lee*, *Davey*, and *McCreary County* dissents.[248] Thomas has agreed with and repeated Scalia's contention that the Establishment Clause prohibits the legal coercion of religion.[249] He also has offered a strikingly unique federalism construction of the Clause's original meaning.

c. Recognizing Federalism and Protecting State Establishments: Justice Thomas's Establishment Clause Construction

Justice Thomas's Establishment Clause construction is unlike any other justice's construction. In a number of opinions, beginning with *Zelman v. Simmons-Harris*,[250] Justice Thomas has stated that the original meaning of the Establishment Clause pertains to federalism. In *Town of Greece v. Galloway*, where he offers his most robust defense of his construction, Thomas begins by pointing out the diversity of church-state arrangements at the state level at the time of the Constitution's adoption.[251] At least six states, he says, had established churches; other states had eliminated their exclusive establishments and adopted general establishments; Virginia ended its official establishment; still other states

248. *See generally Lee*, 505 U.S. at 631 (Scalia, J., dissenting); Locke v. Davey, 540 U.S. 712, 725 (2004 (Scalia, J., dissenting); *McCreary*, 545 U.S. at 885 (Scalia, J., dissenting).

249. *See, e.g.*, Town of Greece v. Galloway, 572 U.S. 565, 608–09 (2014) (Thomas, J., concurring) (citations omitted) ("[B]oth state and local forms of establishment [when the Bill of Rights was ratified] involved 'actual legal coercion,'" thus, "to the extent coercion is relevant to the Establishment Clause analysis, it is actual legal coercion that counts . . . ."). *See also* Van Orden v. Perry, 545 U.S. 677, 693 (2005) (Thomas, J., concurring) (alteration in original) ("The Framers understood an establishment 'necessarily [to] involve actual legal coercion.'").

250. *See generally* Zelman v. Simmons-Harris, 536 U.S. 639 (2002). Though Justice Thomas did not develop a federalism construction of the Establishment Clause fully in *Zelman*, he suggested that he did not think the Establishment Clause should be incorporated—a novel view at the time. Justice Thomas offered a more robust version of his federalism construction two years later in *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 18 (2004) (Thomas, J., concurring).

251. *See generally Galloway*, 572 U.S. at 601–03 (Thomas, J., concurring).

had no history of formal establishments.[252] "The import of this history," Thomas explains, "is that the relationship between church and state in the fledgling Republic was far from settled at the time of ratification [of the Constitution]."[253]

Thomas suggests that the Establishment Clause was adopted to respect and protect this diversity, making clear "that Congress 'could not interfere with state establishments, notwithstanding any argument that could be made based on Congress' power under the Necessary and Proper Clause.'"[254] Like Justice Rehnquist in *Wallace*,[255] Thomas locates the reasons for which the Establishment Clause was drafted in specific Anti-Federalist fears about the proposed Constitution.[256] In Thomas's reading, however, those fears were not primarily about government preference for one religion over others but rather about potential abuses of power by the new national government.[257] The Establishment Clause, Thomas contends, was designed to recognize the absence of federal authority and protect state authority over church-state establishments.[258] He writes,

> The language of the First Amendment ("Congress shall make no law") "precisely tracked and inverted the exact wording" of the Necessary and Proper Clause ("Congress shall have power . . . to make all laws which shall be necessary and proper . . ."), which was the subject of fierce criticism by Anti-Federalists at the time of ratification. That choice of language—"Congress shall make no law"—effectively denied Congress any power to regulate state establishments.[259]

Thomas's conclusion that the original meaning of the Establishment Clause pertains to federalism means that it does not protect an individual right and that its original meaning "resist[s] incorporation."[260] It was

252. *Id.* at 605.

253. *Id.* at 606.

254. *Id.* at 604; *see also Elk Grove*, 542 U.S. at 50 (Thomas, J., concurring in judgment).

255. *See* Wallace v. Jaffree, 472 U.S. 38, 96–99 (1985) (Rehnquist, J., dissenting) (stating that none of the members of Congress indicated that the language before them would mean the Government).

256. *See* Town of Greece v. Galloway, 572 U.S. 565, 605 (2014) (Thomas, J., concurring) (noting that a federalism construction of the Establishment Clause accords with the variety of church-state arrangements existing at the time of its adoption).

257. *Id.*

258. *Id.*

259. *Id.* at 604–05 (alterations in original).

260. *Id.* Thomas recognizes the "most cogent argument in favor of incorporation may be that, by the time of Reconstruction, the framers of the Fourteenth Amendment had come to reinterpret the Establishment Clause (notwithstanding its Federalist origins) as expressing an individual right." *Id.* at 607. On this question, he contends, the historical evidence "is mixed." *Id*. If the Establishment Clause is incorporated, he reasons that its incorporated meaning should reflect a "hallmark of historical establishments of religion," which was "'coercion of religious orthodoxy and of financial support by force of law and threat of penalty.'" *Id.* at 608 (citing Lee v. Weisman, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting)).

designed, instead, to remedy the mischief of the national government exercising power not delegated to it and interfering with state-level religious establishments.[261]

We can chart Justice Thomas's federalism construction of the Establishment Clause as follows, recognizing that he also has signed on to Justice Scalia's legal coercion construction.[262] Because of Anti-Federalist fear of federal power (including the potential expansion of national power through the Necessary and Proper Clause), the Framers adopted the Establishment Clause to prohibit the newly created national government from interfering with state church-state arrangements, thus protecting state authority over religious establishments, including the authority to maintain a state establishment.

Mischief	Potential national power that might be exercised to interfere with state church-state arrangements
Meaning	Rule of federalism
Rules	Congress lacks power to make any law respecting state establishments
Purpose	Protect state authority over state-level church-state arrangements, including protecting then-existing state establishments

Justice Thomas's federalism construction has not been embraced by his colleagues. As we discuss in the next section, Justices Samuel Alito, Neil Gorsuch, and Brett Kavanaugh have instead followed Justice Scalia's lead in constructing the Establishment Clause in light of the nation's history and traditions. At the same time, Justices Stephen Breyer and Sonya Sotomayor have, in an increasingly futile effort, championed various aspects of separationism.[263]

C. Separationism and Non-Separationism on the Contemporary Court

Charting past separationist and non-separationist constructions helps to reveal what aspects of past Establishment Clause jurisprudence most

261. Town of Greece v. Galloway, 572 U.S. 565, 606–07 (2014) (Thomas, J., concurring).

262. Justice Thomas has also consistently presented shorter accounts of his federalism construction. *See, e.g.*, Van Orden v. Perry, 545 U.S. 677, 692 (2005) (Thomas, J., concurring) (noting the competing concurrences to the case); *see also* Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2263 (2020) (Thomas, J., concurring) ("Until we correct course on that interpretation, individuals will continue to face needless obstacles in their attempts to vindicate their religious freedom").

263. *See infra* Part II.C.1.

influence contemporary decision-making. Among separationists, Justice Breyer has emphasized divisiveness in the tradition of Justices Black, Rutledge, and Burger, while seemingly eschewing Justice Brennan's focus on autonomy. Justice Sotomayor has been more encompassing in her opinions, citing the full range of separationist arguments. Among non-separationists, Justices Alito, Gorsuch, and Kavanaugh have adopted Justice Scalia's history and tradition approach.[264] With the additional votes of Chief Justice Roberts and Justices Thomas and Barrett, "history and tradition" now governs church-state jurisprudence.[265] Justice O'Connor's focus on inclusiveness and Justices Brennan and Kennedy's focus on autonomy have, for the most part, fallen out of favor. As noted, Justice Thomas's federalism construction has not garnered support from his colleagues.

1. Contemporary Separationism: Justices Breyer, Sotomayor, and Kagan

Justices Breyer (prior to his retirement) and Sotomayor have become the leading separationists on the Court.[266] While they both operate within the larger separationist construction, Justice Breyer emphasizes the mischief of divisiveness and the corresponding purpose of preserving civil peace, whereas Justice Sotomayor has drawn upon the full range of separationist mischiefs and purposes in her Establishment Clause jurisprudence.

Justice Breyer clearly outlined his basic approach to the Establishment Clause in dissent in *Zelman*, a case involving state funding of vouchers that could be used at private religious schools.[267] Echoing Justice Black in *Everson*, Breyer contends that the First Amendment Religion Clauses "reflect the Framers' vision of an American Nation free of the religious strife that had long plagued the nations of Europe."[268] The Establishment Clause, he says, protects "the Nation's social fabric from religious conflict."[269]

In 2005, Breyer's focus on the mischief of divisiveness would lead him to write a concurring opinion upholding a Ten Commandments

---

264. *See infra* Part II.C.2.

265. *See, e.g.*, Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2071 (2019); Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2450 (2022).

266. Before her passing in 2020, Justice Ginsburg also championed separationism. When this Article was originally presented in April 2022, Justice Breyer was still on the Supreme Court. We have not altered the text to account for his retirement or the subsequent appointment of Justice Ketanji Brown Jackson to the bench.

267. 536 U.S. 639 (2002).

268. *Id.* at 718 (Breyer, J., dissenting).

269. *Id.* at 717.

monument on the grounds of the Texas State Capitol[270] and, on the same day, to sign on to Justice Souter's majority opinion striking down a Ten Commandment display in a Kentucky Courthouse.[271] In the Texas case, Breyer explains that his "legal judgment," which aims to "reflect and remain faithful to underlying purposes of the . . . Religion Clauses," leads him to conclude that the monument does not violate the Establishment Clause.[272] Though he worked through the *Lemon* test in his opinion, Breyer notes:

> I rely less upon a literal application of any particular test than upon consideration of the basic purposes of the First Amendment's Religion Clauses themselves. This display has stood apparently uncontested for nearly two generations. That experience helps us understand that as a practical matter of *degree* this display is unlikely to prove divisive. And this matter of degree is, I believe, critical in a borderline case such as this one.[273]

Breyer repeats the mischiefs of "religiously based social conflict," "religious discord and division," and "religiously based strife, conflict, and social division" in his more recent Establishment Clause opinions.[274]

Religious divisiveness assumes an all-encompassing role in Breyer's jurisprudence. Not only is it the mischief that the Clause attempts to remedy. It serves as the functional standard and rule to implement the Establishment Clause's meaning, which Breyer associates with "benevolent neutrality."[275] Civic harmony regarding religion, which is simply the antonym of divisiveness, appears to reflect Breyer's understanding of the Establishment Clause's fundamental purpose.

We can chart Justice Breyer's construction as follows: The Establishment Clause remedies the mischief of "religiously based strife, conflict, and social division" by requiring a type of government neutrality toward religion that prevents state actions that would create "religious discord and division," so that civic harmony regarding religion may be achieved and "religiously based strife, conflict, and social division" minimized.[276]

---

270. *See* Van Orden v. Perry, 545 U.S. 677, 698–708 (2005) (Breyer, J., concurring in judgment) ("If the relation between government and religion is one of separation, but not of mutual hostility and suspicion, one will inevitably find difficult borderline cases.").

271. McCreary Cnty. v. Am. C.L. Union, 545 U.S. 844 (2005).

272. *Van Orden*, 545 U.S. at 700 (Breyer, J., concurring in judgment).

273. *Id.* at 703–04.

274. *See, e.g.*, Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2282 (2020) (Breyer, J., dissenting); Carson v. Makin, 142 S. Ct. 1987, 2005 (2022) (Breyer, J., dissenting).

275. *Carson*, 142 S. Ct. at 2004 (Breyer, J., dissenting) (citation omitted).

276. *See id.* at 2005 (Breyer, J., dissenting); *Espinoza*, 140 S. Ct. at 2282 (Breyer, J., dissenting); *Van Orden*, 545 U.S. at 698 (Breyer, J., concurring in judgment).

Mischief	Religiously-based strife, conflict, and discord
Meaning	Standard of neutrality
Rules	Judges must apply "legal judgment" to determine whether a challenged state action causes "religiously based social conflict"[277]
Purpose	To foster civic harmony by preventing "religiously based strife, conflict, and social division"[278]

Justice Breyer's construction recalls Justice Burger's jurisprudence insofar as he emphasizes limiting "political division along religious lines" as both the mischief to be remedied and underlying purpose of the Establishment Clause.[279] Unlike Burger, who crafted the three-part *Lemon* test, Breyer makes political division along religious lines an Establishment Clause test.[280] In doing so, he does exactly what Justice O'Connor anticipatorily wrote against in *Lynch v. Donnelly*.[281]

Breyer's placement of religious divisiveness at the core of every aspect of the Establishment Clause has not been adopted by Justice Sotomayor, who has assumed the mantle of the Court's most strident separationist.[282] This is not to suggest that Justice Sotomayor has disavowed religious divisiveness as part of the story; rather, she limits its role to one of several mischiefs that she believes the Establishment Clause attempts to remedy.[283]

---

277. *Carson*, 142 S. Ct. at 2005 (Breyer, J., dissenting); *Van Orden*, 545 U.S. at 698 (Breyer, J., concurring in judgment); *see also* Zelman v. Simmons-Harris, 536 U.S. 639, 717–21 (2002) (Breyer, J., dissenting) ("I believe that the Establishment Clause concern for protecting the Nation's social fabric from religious conflict poses an overriding obstacle to the implementation of this well-intentioned school voucher program.").

278. *Carson*, 142 S. Ct. at 2005 (Breyer, J., dissenting); *see also Van Orden*, 545 U.S. at 698 (Breyer, J., concurring in judgment).

279. *See* Lemon v. Kurtzman, 403 U.S. 602, 622 (1971). *Compare Zelman*, 536 U.S. at 717–21 (Breyer, J., dissenting), *with Lemon*, 403 U.S. at 623–24.

280. *Van Orden*, 545 U.S. at 703–04 (Breyer, J., concurring in judgment).

281. 465 U.S. 668, 683–84 (1984) ("[T]his Court has not held that political divisiveness alone can serve to invalidate otherwise permissible conduct.").

282. Though Justice Sotomayor joined most of Justice Breyer's *Carson* dissent, she did not join the part where Breyer stated that the Religion Clauses "should be interpreted to advance their goal of avoiding religious strife." *Carson*, 142 S. Ct. at 2004 (Breyer, J., dissenting).

283. *See, e.g.*, Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2031 (2017) (Sotomayor, J., dissenting) (noting that the Establishment Clause and Free Exercise Clause "give[s] government some room to recognize the unique status of religious entities and to single them out on that basis for exclusion from otherwise generally applicable laws"); *Carson*, 142 S. Ct. at 2012–15 (Sotomayor, J., dissenting) (noting that the Establishment Clause provides for a "religiously neutral" public education); Kennedy v. Bremerton, 142 S. Ct. 2407, 2441–43 (2022) (Sotomayor, J., dissenting) (noting that the Establishment Clause prohibits a school employee from having a public and communicative display regarding the employee's religious beliefs at a school event).

In a series of recent dissents, including a lengthy one in *Kennedy v. Bremerton*,[284] Justice Sotomayor seeks to shield the separationist wall from the non-separationist wrecking balls that her originalist colleagues wield.[285] Justice Sotomayor's Establishment Clause jurisprudence harkens back to Justice Rutledge's concerns about protecting religion from government and government from religion.[286] Her dissents highlight a number of mischiefs long identified by separationists,[287] including public funding of religion (especially of ministers and houses of worship), divisiveness caused by religious competition for state benefits, religious indoctrination, and "subtle" religious coercion of public school students.[288] Similarly, she recurs to long-accepted separationist doctrines when she construes the Establishment Clause to establish the standard of "neutrality"[289] and impose rules against "sponsorship, financial support, and active involvement"[290] by the state of or with religious activity, state endorsement of religion,[291] and state coercion (direct or indirect) of religious practice.[292]

Perhaps the most novel aspects of Justice Sotomayor's separationism appear in one of the two purposes she says the Establishment Clause seeks to achieve. She echoes Justices Brennan and Kennedy's purpose of autonomy, writing that the Religion Clauses "express the view, foundational to our constitutional system, 'that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State.'"[293] Justice Sotomayor also adds that the Establishment Clause excludes houses of worship[294] and religious schools[295] from

284. *See generally Kennedy*, 142 S. Ct. at 2434–53 (Sotomayor, J., dissenting).

285. *See id.* at 2441–43 ("[The] 'preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere,' which has the 'freedom to pursue that mission.'"); *Carson*, 142 S. Ct. at 2012–15 (Sotomayor, J., dissenting) (noting that the Court "continues to dismantle the wall of separation between church and state that the Framers fought to build").

286. *See, e.g.*, *Trinity Lutheran*, 137 S. Ct. at 2031 (2017) (Sotomayor, J., dissenting) (noting that the government may act to accommodate these concerns); *See also supra* Part II.B.1.a (discussing Justice Rutledge's approach to resolve Establishment Clause cases).

287. *See supra* Part II.B.1.

288. *See, e.g.*, *Trinity Lutheran*, 137 S. Ct. at 2028–31 (Sotomayor, J., dissenting); Carson v. Makin, 142 S. Ct. 1987, 2012–15 (2022) (Sotomayor, J., dissenting); *Kennedy*, 142 S. Ct. at 2441–43 (2022) (Sotomayor, J., dissenting).

289. *See Kennedy*, 142 S. Ct. at 2442 (Sotomayor, J., dissenting) (explaining that the neutrality toward religion is extremely important in the public-school context).

290. *Id.* at 2441.

291. *Id.* at 2447; *see also id.* at 2448 n.4.

292. *Id.* at 2450–53.

293. *Id.* at 2441 (Sotomayor, J., dissenting) (citation omitted).

294. *Trinity Lutheran*, 137 S. Ct. at 2030 (Sotomayor, J., dissenting).

295. Carson v. Makin, 142 S. Ct. 1987, 2012–14 (2022) (Sotomayor, J., dissenting).

taxpayer support to further "the government's ability to remain secular."[296] While separationists have long used a secular purpose test to apply the Establishment Clause,[297] Sotomayor elevates secularism to a constitutional commitment and an overarching purpose more clearly and explicitly than have previous separationists.[298] In her construction, secularity is transformed from a means to an end; ensuring that specific state actions have a secular purpose becomes maintaining the state as a secular entity.

We can chart Justice Sotomayor's construction of the Establishment Clause as follows: Because of the mischiefs associated with state entanglement with religion, which includes the direct and indirect coercion of religion, taxpayer funding of religion (especially of ministers and houses of worship), and religion-based divisiveness, the Establishment Clause mandates that the state be neutral toward religion, thus prohibiting state endorsement, advancement, and coercion (direct and indirect) of religion, so that individuals remain autonomous in their religious choices and the government remain secular.

Mischief	• State entanglement with religion • Direct and indirect coercion of religion • Taxpayer funding of religion (especially of ministers and houses of worship) • Religion-based divisiveness
Meaning	Standard of neutrality
Rules	• No endorsement • No coercion (direct or indirect) • No advancement
Purpose	Securing autonomy in matters of religious belief and practice and maintaining a secular government

296. *Trinity Lutheran*, 137 S. Ct. at 2041 (Sotomayor, J., dissenting).

297. *See, e.g.*, Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 222 (1963) ("The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution."); Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (noting that all tests for the Establishment Clause must have a secular legislative purpose).

298. In *Schempp*, when the secular purpose rule was first adopted, the Court's majority opinion explicitly denied it was advancing a "religion of secularism." Justice Clark wrote:

> It is insisted that unless these religious exercises are permitted a "religion of secularism" is established in the schools. We agree of course that the State may not establish a "religion of secularism" in the sense of affirmatively opposing or showing hostility to religion, thus "preferring those who believe in no religion over those who do believe." We do not agree, however, that this decision in any sense has that effect.

374 U.S. at 225 (citation omitted).

Justice Elena Kagan signed on to separationist dissenting opinions by Justice Breyer in *Carson v. Makin*[299] and Justice Sotomayor in *Kennedy v. Bremerton*,[300] so it might seem she should be placed clearly within the separationist camp. However, her vote to allow a Christian church to receive state funds to refurbish its playground in *Trinity Lutheran Church v. Comer*,[301] her vote and concurring opinion to uphold a large cross on state property in the public display case *American Legion v. American Humanist Association*,[302] and her lead dissent in the town board prayer case *Town of Greece v. Galloway* make her more difficult to classify.[303]

At the outset of her first significant Establishment Clause opinion, Justice Kagan states that the "norm of religious equality" does not translate "into a bright separationist line."[304] Instead of "bright line" separationism, Justice Kagan offers a nuanced approach that fuses elements of Justice Rehnquist's non-preferentialism and Justice O'Connor's concern with exclusion.[305] In *Galloway*, Justice Kagan employs a series of hypotheticals (which serve as a sort of non-originalist origin story) to identity the mischief of government aligning with and placing its imprimatur on "a particular religious creed."[306] State-sponsored sectarianism or "religious favoritism"[307] is the core mischief that, according to Kagan, the Establishment Clause remedies.[308]

The Establishment Clause remedies these maladies by imposing the constitutional standard of neutrality,[309] which Kagan implements with the rule that government cannot prefer one religion over others[310] and with *Lemon*'s purposes and effects prongs.[311]

---

299. *See generally* Carson v. Makin, 142 S. Ct. 1987, 2003–11 (2022) (Breyer, J., dissenting).
300. *See generally* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2434–53 (2022) (Sotomayor, J., dissenting).
301. *See generally* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2029–30 (2017).
302. *See generally* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2094 (2019) (Kagan, J., concurring in part).
303. *See generally id.*; (Town of Greece v. Galloway, 572 U.S. 565, 615–38 (2014) (Kagan, J., dissenting).
304. Galloway, 572 U.S. at 615–16 (Kagan, J., dissenting).
305. *Id.*
306. *Id.* at 619.
307. *Id.* at 620.
308. *Id.*
309. *Id.* at 629–30.
310. *Galloway*, 572 U.S. at 619–20 (Kagan, J., dissenting).
311. *See* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2094 (2019) (Kagan, J., concurring in part) (noting that the *Lemon* test's focus on purposes and effects is crucial in evaluating government action).

While her Establishment Clause doctrine blends *Lemon*'s separationism and Rehnquist's non-preferentialism, Kagan echoes Justice O'Connor when explaining the purposes of these rules. Government neutrality and non-preferentialism helps to achieve "inclusivity and nondiscrimination," recognizing "the important role that religion plays in the lives of many Americans" while also showing "sensitivity to and respect for this Nation's [religious] pluralism."[312] As Kagan writes in *Galloway*, "each person of this nation must experience a government that belongs to one and all, irrespective of belief. And for its part, each government must ensure that its participatory processes will not classify those citizens by faith, or make relevant their religious differences."[313] Establishment Clause rules against religious favoritism ensure that state interaction with religion is "inclusive" and thus that every member of the community is respected as an equal citizen.[314]

We can chart Justice Kagan's construction of the Establishment Clause as follows: Because of the mischiefs of state sectarianism and religious favoritism, the Establishment Clause mandates that the state be neutral toward religion, such that state action cannot prefer one religion over another, may not have a secular purpose, and must neither advance nor inhibit religion, so that all individuals will experience a government that is religiously inclusive.

Mischief	State favoritism and state-sponsored sectarianism
Meaning	Standard of neutrality
Rules	• No religious preference • State action must have a secular purpose • State action must neither advance nor inhibit religion
Purpose	Foster a religiously inclusive political community

During the 2021 Court term, Justices Breyer, Sotomayor, and Kagan found themselves on the losing end of a number of significant church-state cases.[315] In a series of opinions, the Court's non-separationists would achieve what Justice Scalia had failed to accomplish in the 1990s, redirecting the Establishment Clause away from separationism and toward a construction centered on history and tradition.

312. *Id.* (Kagan, J., concurring in part) (citation omitted).
313. *Galloway*, 572 U.S. at 630 (Kagan, J., dissenting).
314. *Id.* at 622–23 (highlighting how the town's board members did not ensure that the prayers offered were inclusive; rather, the prayers were more sectarian and less inclusive).
315. *See generally* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022); Carson v. Makin, 142 S. Ct. 1987 (2022).

2. Contemporary Non-Separationism: "History and Tradition"

In *Kennedy v. Bremerton*, perhaps the most consequential Establishment Clause case in decades, a six-member majority announced that "this Court long ago abandoned *Lemon* and its endorsement test offshoot."[316] In place of *Lemon* and the endorsement test, the Court majority declared that "the Establishment Clause must be interpreted by reference to historical practices and understandings. '[T]he line' that courts and governments must draw between the permissible and the impermissible has to 'accor[d] with history and faithfully reflec[t] the understanding of the Founding Fathers.'"[317] In *Kennedy*, a non-separationist majority appears to have completed the demolition project started by Justices Rehnquist and Scalia in the 1980s and early 1990s to tear down the so-called "wall of separation" between church and state.[318]

Justice Scalia's Establishment Clause construction of coercion guides the newly minted non-separationist approach.[319] The *Kennedy* majority writes that "government may not, consistent with a historically sensitive understanding of the Establishment Clause, 'make a religious observance compulsory.'"[320] Nor may the state coerce anyone to attend church, or force citizens to engage in formal religious exercise.[321] This is so, the majority explains, because "coercion along these lines was among the foremost hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment."[322] True, the majority admits that "[m]embers of this Court have sometimes disagreed on what exactly qualifies as impermissible coercion in light of the original meaning of the Establishment Clause."[323] But the Court nonetheless held that the private religious exercise in *Kennedy*—a coach praying on the field alone and with his students—"did not come close to crossing any line one might imagine separating protected private expression from impermissible government coercion."[324] Therefore, without specifying exactly what constitutes religiously coercive state action, the majority adopts non-coercion as the meaning and rule to give the Establishment

316. 142 S. Ct. at 2427.
317. *Id.* at 2428 (alteration in original) (internal quotation marks and citations omitted).
318. *Id.* at 2407; *see also supra* Part II.B.2.b–c (analyzing the "demolition" cases in which Justices Rehnquist and Scalia took aim at the Court's doctrines of separation and neutrality).
319. *See supra* Part II.B.2.b (outlining Justice Scalia's focus on historical practices to determine what is permissible and what counts as coercion of religion).
320. *Kennedy*, 142 S. Ct. at 2429 (quoting Zorach v. Clauson, 343 U.S. 306, 314 (1952)).
321. *See id.* (quoting Lee v. Weisman, 505 U.S. 577, 589 (1992)).
322. *Id.*
323. *Id.*
324. *Id.*

Clause legal effect.

As was true with Scalia's jurisprudence, the *Kennedy* majority focuses less on what the Establishment Clause prohibits and more on what it allows.[325] In *Galloway*, Justice Alito explains the originalist presumption that guides the majority's reasoning: "This Court has often noted that actions taken by the First Congress are presumptively consistent with the Bill of Rights, and this principle has special force when it comes to the interpretation of the Establishment Clause."[326] For the *Kennedy* majority, "history and tradition" establishes what the Establishment Clause permits.[327]

The *Kennedy* Court does not provide an origin story as to why the Clause came into being. Similar to the role that "divisiveness" plays in Justice Breyer's jurisprudence, religious coercion seems to function as the *Kennedy* majority's catchall.[328] It serves as both the mischief and rule. And preventing religious coercion seems to be its understanding of the Establishment Clause's purpose. Though the *Kennedy* majority opinion did not cite Justice Kavanaugh's concurring opinion in *American Legion v. American Humanist Association*, Kavanaugh there combines coercion, history, and tradition into a doctrinal statement that would seem to capture the thrust of the *Kennedy* majority:

> And the cases together lead to an overarching set of principles: If the challenged government practice is not coercive *and* if it (i) is rooted in history and tradition; or (ii) treats religious people, organizations, speech, or activity equally to comparable secular people, organizations, speech, or activity; or (iii) represents a permissible legislative accommodation or exemption from a generally applicable law, then there ordinarily is no Establishment Clause violation.[329]

The absence of a "history and tradition" origin story, as we shall discuss below, leaves several important questions largely unanswered from the *Kennedy* majority opinion: What constitutes unconstitutional religious coercion? Is coercion limited only to disabilities such as fines and imprisonment, or is it capacious enough to include psychological peer pressure as Justice Kennedy and the Court concluded in *Lee*?[330] In *Lee,* Justice Kennedy advanced the idea that the Establishment Clause's

---

325. *See Kennedy*, 142 S. Ct. at 2429–30 (explaining how speech that a school permits on a nondiscriminatory basis does not mean the school endorses or coerces students to participate in the speech).

326. Town of Greece v. Galloway, 572 U.S. 565, 602 (2014) (Alito, J., concurring) (citation omitted).

327. *Kennedy*, 142 S. Ct. at 2428.

328. *Compare supra* Part II.C.1., *with Kennedy*, 142 S. Ct. at 2429–30.

329. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2093 (2019) (Kavanaugh, J., concurring).

330. *See* Lee v. Weisman, 505 U. S. 577, 593 (1992) (explaining how peer pressure to participate directly or indirectly "can be as real as any overt compulsion.").

purpose is to secure individual autonomy in religious matters and that achieving that purpose demands that children not be pressured to engage in religious exercises.[331] The *Kennedy* Court offers no similar overarching goal. Without an origin story that generates an account of the mischiefs the Establishment Clause seeks to remedy and a purpose it seeks to achieve, the *Kennedy* majority's adoption of coercion remains unfinished and would seem to be in need of further construction.

III. EVALUATING ESTABLISHMENT CLAUSE CONSTRUCTIONS

In Part II, we employed the mischief rule framework to document how various justices have constructed the Establishment Clause. The same framework can be used to structure evaluations of those constructions. While we do not attempt to do such evaluations ourselves (a project beyond the scope of this Article), in Part III we attempt to explain how the mischief rule framework could be employed to evaluate constructions.

There are as many ways to evaluate a construction as there are jurisprudential criteria. An evaluator might ask, for example, if a construction's doctrines and rules offer sufficient generality to address the variety of Establishment Clause cases that arise but also the necessary specificity to resolve similar cases in a similar manner. Justice Kennedy, for example, contended that Justice O'Connor's non-endorsement rule was too vague and subjective to coherently resolve cases, even though he accepted her more general doctrine of neutrality.[332]

To illustrate how the mischief rule framework can be employed to evaluate constructions, we limit ourselves to brief considerations of how basic non-originalist and originalist evaluations might be performed. We recognize that we are presenting simplified versions of these methodologies and that many other types of external evaluations could employ the mischief rule framework.[333]

---

331. *See id.* at 592–94 (explaining that freedom of belief ensures that one's religious faith is genuine instead of coerced and that this principle is eroded when children are pressured into participating in exercises in which they disbelieve).

332. *See, e.g.,* Cnty. of Allegheny v. Am. C.L. Union, 492 U.S. 573, 655–60 (1989) (Kennedy, J., concurring) (highlighting that the *Lemon* test does not always "[provide] concrete answers" to whether the government practice is religiously neutral).

333. We leave a different kind of evaluation—what one might call an "internal evaluation"—for another article. An internal evaluation would examine a construction on the construction's own terms. It would aim to measure the coherence of a particular construction, asking questions such as: Do the construction's proposed rules cohere with the constructed doctrine? Does the doctrine actually remedy the mischiefs? Does the construction's doctrine actually achieve the construction's purposes? Is the construction's purpose furthered by remedying its mischiefs?

A. Non-Originalist Evaluations

A non-originalist might employ the mischief rule framework by asking questions such as:[334]

- What are the mischiefs the Establishment Clause ought to remedy?
- What are the doctrine(s) and rule(s) that would solve these mischiefs and advance the Establishment's Clause's purposes?
- What purposes should the Establishment Clause further and advance?

A non-originalist necessarily begins from a particular vantage point. He or she stipulates mischiefs and purposes with corresponding doctrines and then evaluates existing constructions in light of those stipulations.

We can use Justice William Brennan's 1985 Georgetown University speech defending living constitutionalism to illustrate how a non-originalist might use the mischief rule framework to evaluate Establishment Clause constructions.[335] Brennan adopted the vantage point of "human dignity."[336] The Constitution, he said, is our "lodestar" that helps us achieve the "aspiration to social justice, brotherhood, and human dignity that brought this nation into being."[337] For a human-dignity-living-constitutionalist, the mischief rule framework questions are:

- How do religious establishments threaten human dignity?
- What constitutional doctrines and rules will protect against those establishment threats to human dignity and help to advance those aspects of human dignity that religious establishments harm?
- What aspects of human dignity are secured by preventing religious establishments?

With these questions answered, the human-dignity-living-constitutionalist can then evaluate various constructions. Let us presume (since it corresponds to Brennan's own Establishment Clause jurisprudence) that the human-dignity-living-constitutionalist starts with the notion that human dignity requires forming one's own deeply held beliefs autonomously and acting in accordance with those core beliefs. He or she might provide something like the following answers to the

---

334. We reiterate that we are not arguing that the Establishment Clause *should* be constructed in a non-originalist way. Rather, explaining the prototypical non-originalist construction helps to clarify the Establishment Clause jurisprudence of certain judges.

335. *See generally* William J. Brennan, *Construing the Constitution*, 19 U.C. DAVIS L. REV. 2 (1985).

336. *Id.* at 8–11.

337. *Id.* at 2.

questions posed above:

- Religious establishments threaten human dignity by influencing and imposing religious beliefs and practices.
- Human dignity requires state neutrality toward religion, which means government cannot foster the religious activities of religious institutions, employ state power for religious purposes, or employ religious means to secure secular ends when secular means would suffice.
- Preventing religious establishments helps to secure individual autonomy in the development of core beliefs and corresponding practices.

A non-originalist might also use the mischief rule framework to evaluate alternative establishment clause constructions. Regarding Justice Scalia's "coercion" construction,[338] an advocate of the human dignity construction might say that Justice Scalia's construction is too narrow insofar as it fails to remedy the mischiefs of psychological coercion and indoctrination (especially among public school students) and, accordingly, fails to sufficiently advance the purpose of autonomy in religious matters.[339]

The mischief rule framework helps sharpen non-originalist evaluations of constitutional constructions in at least two ways. First, it brings to the surface non-originalist commitments. As we stated above, a non-originalist necessarily begins from a stipulated vantage point. In order to evaluate the various building blocks of a given construction, this starting point must be clarified. This stipulated vantage point may or may not produce a historically accurate mischief. The non-originalist will also derive a meaning, and purpose to guide his or her understanding. Second, and relatedly, the framework helps to focus evaluations. It highlights the essential attributes of a given construction, thus offering a template through which evaluations can take place.

The mischief rule also offers a framework for living constitutionalists to evolve constitutional constructions.[340] A living constitutionalist might conclude that what once was a mischief no longer is so and thus adopt new mischiefs. In our given example, the purpose of autonomy might remain constant, but what threatens autonomy may have changed. Because of the weakening of religions' political power, the direct and indirect coercion of religion by state authority may no longer threaten

338. *See supra* Part II.B.2.b (highlighting Justice Scalia's conclusion that the Establishment Clause was designed to prohibit religious coercion at the federal level).

339. *See id.*

340. *See, e.g.*, *id.* at 126–29.

religious autonomy. Perhaps because of the rise of private corporate power, the actual threat to religious autonomy now may be the suppression of religious belief and actions by powerful, non-state corporate actors. A living constitutionalist might find coercion of religion by private actors to be the now-salient threat to the Establishment Clause value of religious autonomy and, accordingly, construe a non-establishment doctrine to apply against non-state actors.

Alternatively, a living constitutionalist might find that our understanding of human dignity itself has evolved and, therefore, that autonomy ought not be the Establishment Clause's purpose. Say equality is judged to be more fundamental to human dignity than autonomy. In that case, securing equal treatment by the state regarding one's core beliefs might guide one's evaluations of a given construction. A human-dignity-as-equality living constitutionalist might find fault with both Scalia's legal coercion and Brennan's autonomy constructions. The former might be criticized for allowing the state to favor some religions over others; the latter, for allowing the state to promote the formation of ethnic, racial, and other identities but not religious identities, which arguably fails to treat religious citizens equally.

To repeat a point already made, the mischief rule framework does not dictate the criteria a non-originalist ought to use to evaluate constitutional constructions, but it does provide a structure to sharpen both the non-originalist's own perspective as well as the substantive evaluations he or she makes.

B. Originalist Evaluations

Most originalists now hold that it is the text's original public meaning (as opposed to the intentions that animated it) that is fixed at the time of adoption and that ought to be the lodestar.[341] An originalist approach to the Establishment Clause would start by attempting to ascertain the original meaning of the words, "Congress shall make no law respecting an establishment of religion."[342] An originalist could also evaluate Establishment Clause judicial opinions primarily in terms of their

---

341. *See, e.g.*, Barnett & Bernick, *Unified Theory*, *supra* note 8 ("[D]iscovering the functions of the Constitution's various clauses and structural design entails investigation into the context in which they were enacted.").

342. This is the "interpretation" piece of the Interpretation-Construction distinction. *See* Solum, *I-C Distinction*, *supra* note 24, at 95–96 ("[Interpretation] is the process (or activity) that recognizes or discovers the linguistic meaning or semantic content of the legal text."). A justice may look to traditional tools of textual analysis, such as dictionaries, earlier drafts of the same provision within the congressional record, or even new modes of ascertaining original public meaning of words such as corpus linguistics. For more on corpus linguistics and the Establishment Clause, see generally Stephanie H. Barclay et al., *Original Meaning and the Establishment Clause: A Corpus Linguistics Analysis*, 61 ARIZ. L. REV. 505 (2019).

historical accuracy—assessing whether an opinion accurately articulates and applies the text's original public meaning to the dispute.

But what if the original public meaning of those words cannot be ascertained for reasons of vagueness, indeterminacy, or underdeterminacy? Where does the originalist turn if there is no accessible original public meaning by which to evaluate a jurisprudential opinion, as scholars have suggested is the case?[343]

The mischief rule framework offers a way for some originalists to evaluate Establishment Clause opinions if the original meaning of the text cannot be determined and must be constructed. If no clear doctrine and rule corresponds to the original public meaning of "respecting an establishment of religion," an originalist still can attempt to discover the original mischief the text attempted to remedy and original purpose the Establishment Clause sought to achieve. That inquiry would take the form of the following questions:

- What was the original mischief(s) the authors of the Establishment Clause sought to remedy?
- What was the original purpose(s) the First Amendment Framers sought to further and achieve?

These questions seek to pinpoint the reason(s) the Clause came into being (the underlying mischief) and determine what the Clause's authors sought to achieve (the original purpose(s)). Not all originalists are willing to engage in inquiry about a provision's mischiefs and purposes,[344] but for

---

343. *See, e.g.*, MUÑOZ, RELIGIOUS LIBERTY & THE FOUNDING, *supra* note 12, at 143–44 (arguing that the Framers "drafted text prohibiting a national establishment and national interference with state establishments without precisely defining what constitutes an establishment of religion"); Alicea & Drakeman, *supra* note 15, at 1218 (explaining that the objective evidence for the original meaning of "establishment" "points in two opposite directions" and "[t]here is no particular reason . . . to choose one meaning of establishment over the other").

344. Considerations of purpose have fallen out of favor among textualists and originalists. Within the field of statutory interpretation, Justice Scalia vociferously criticized any use of purpose or legislative history. In his view, the text is the law, and any inquiry into the purpose behind the text only leads judges astray. There is strong evidence that his view (at least in general) now commands a majority on the Court. *See, e.g.*, Jonathan R. Siegel, *The Legacy of Justice Scalia and His Textualist Ideal*, 85 GEO. WASH. L. REV. 857, 867 (2017). However, within constitutional interpretation, the status of purpose is a bit murkier. *See, e.g.*, Mark E. Brandon, *Originalism and Purpose: A Precis*, 16 U. PA. J. CONST. L. 413, 435–41 (2013) (discussing the deep roots of purposive interpretation in constitutional jurisprudence). To be sure, originalism has shifted away from a focus on the Framers' intentions to a focus on the original public meaning of the Constitution's words. *See, e.g.*, Barnett & Bernick, *supra* note 10, at 34 (interpreting the Constitution involves examining what was said about it "both in public and in private."). *But see* DONALD L. DRAKEMAN, THE HOLLOW CORE OF CONSTITUTIONAL THEORY: WHY WE NEED THE FRAMERS (2021) (reinvigorating the debate about why constitutional interpretation benefits from considering the Framers' intentions). We think our mischief rule framework at least complicates

those that are, the answers to the questions above can structure originalist evaluations of Establishment Clause constructions.[345]

An originalist would favor a construction that accurately reflects the original mischief(s) the Framers sought to arrest and secures the original purpose(s) the Establishment Clause was designed to achieve.[346] Such historical questions, of course, are much easier to ask than to answer, and we will not even attempt to venture a speculative answer here. But it is worth noting that the mischief rule framework does offer a framework for originalist constructions. To repeat, not all originalists may be willing to engage in the type of inquiries that an originalist construction requires, but we believe the mischief rule framework we have presented at least complicates the conclusion that originalism has nothing to say about constitutional construction, as Justice Scalia argued.[347] An originalism that is willing to engage in inquiries about the original mischiefs that led constitutional texts to be drafted and the purposes that constitutional texts were originally designed to achieve can engage in and evaluate constitutional constructions.

Justice Gorsuch took steps toward completing an originalist Establishment Clause construction during the Court's 2021 term, though not in *Kennedy*. Ironically, Gorsuch actually offered a more complete originalist account of the Establishment Clause in the free speech case *Shurtleff v. Boston*.[348] *Shurtleff* addressed the city of Boston's denial of a request to raise a "Christian flag" at City Hall.[349] In a concurring opinion, Gorsuch set forth several "telling traits" associated with historical establishments of religion.[350] Gorsuch writes:

> First, the government exerted control over the doctrine and personnel of the established church. Second, the government mandated attendance in the established church and punished people for failing to participate. Third, the government punished dissenting churches and individuals for their religious exercise. Fourth, the government

---

the question about purpose's role in constitutional interpretation of underdetermined provisions such as the Establishment Clause.

345. Mischief(s) and purpose(s) may be derived from founding-era primary sources. And attending to the original mischief(s) and purpose(s) of the Establishment Clause serves to cabin the judicial creativity inherently involved in constitutional construction. After all, all judicial constructions effectively create constitutional law, which can only be reversed by constitutional amendment.

346. One of the authors of this Article has recently written about why the Framers' original "design" of the religion clauses must be understood and applied. *See generally* MUÑOZ, RELIGIOUS LIBERTY & THE FOUNDING, *supra* note 12, at 126–82.

347. *See supra* note 18 and accompanying text.

348. *See* Shurtleff v. Boston, 142 S. Ct. 1583, 1608–10 (2022) (Gorsuch, J., concurring in judgment) ("Boston sought to drag *Lemon* once more from its grave.").

349. *Id.* at 1587.

350. *Id.* at 1609.

> restricted political participation by dissenters. Fifth, the government provided financial support for the established church, often in a way that preferred the established denomination over other churches. And sixth, the government used the established church to carry out certain civil functions, often by giving the established church a monopoly over a specific function. Most of these hallmarks reflect forms of coerc[ion] regarding religion or its exercise.[351]

"[T]he historical hallmarks of an establishment of religion" as well as a number of prior Court decisions, Gorsuch concludes, indicate that "government control over religion offends the Constitution, but treating a church on par with secular entities and other churches does not."[352]

In his *Shurtleff* opinion, Gorsuch articulates a number of Establishment Clause mischiefs and suggests an overarching purpose.[353] His mischiefs include: government control over religious doctrine and personnel of the established church; government-mandated attendance (and punishment for non-attendance) in the established church; government punishment of dissenting churches and individuals; government restrictions on political participation by dissenters; preferential governmental support for the established church; and government employment of the established church to carry out civil functions.[354] While Gorsuch says that most of these hallmarks "reflect forms of coerc[ion]," he also focuses on how they involve both government controlling religion and government ceding control of state functions to religion.[355] We might therefore label Justice Gorsuch's Establishment Clause purposes as institutional autonomy for churches, individual liberty for individuals, and civic autonomy for the state.

We can chart Justice Gorsuch's construction as follows. Because of the mischiefs of state control over religious doctrine and personnel, state mandates and prohibitions of religious practice, exclusive or preferential support for the state church, and delegation of civic functions to the state church, the Framers adopted the Establishment Clause to prohibit state control and coercion of religious institutions and individuals and religious control of state institutions, so that churches remained autonomous, individuals could practice religion freely, and the state would retain its authority in its own sphere.

---

351. *Id.* (alteration in original) (citations omitted).
352. *Id.* at 1609–10.
353. *Shurtleff*, 142 S. Ct. at 1608–09 (citing Lemon v. Kurtzman, 403 U.S. 602 (1971)).
354. *Id.* at 1609.
355. *Id.* (alteration in original) (internal quotes omitted) (quoting Lee v. Weisman, 505 U.S. 577, 587 (1992)).

Mischief	• State control over religious doctrine and personnel • State mandates and prohibitions of religious practice • Exclusive or preferential support for the state church • Delegation of civic functions to the state church
Meaning	The Clause's meaning reduces to the following rules
Rules	• No religious coercion • No state control of religious institutions • No delegation of state function to religious institutions
Purpose	• Church autonomy • Individual freedom (understood as direct non-coercion) in religious practice and non-delegation of state function

Gorsuch's nascent construction distinguishes governmental and religious spheres, echoing Justice Rutledge's separationism insofar as it prohibits the delegation of state power to churches and protects churches' institutional autonomy.[356] The construction discards the separationist standard that the state must be neutral toward religion, however. It also drops a number of long-standing separationist concerns, including divisiveness, endorsement, exclusion, and psychological coercion.

Justice Gorsuch did not elaborate his more complete Establishment Clause construction in his majority opinion in *Kennedy*,[357] which the Court handed down seven weeks after *Shurtleff*. It is unclear why he did not repeat in *Kennedy* what he had already stated in *Shurtleff*, but perhaps he lacked the votes to do so. From the perspective of the mischief rule, his *Kennedy* opinion is incomplete. As discussed, the six-member *Kennedy* majority announced that "this Court long ago abandoned *Lemon* and its endorsement test offshoot."[358] In their place, the majority imposed a "history and tradition" test to determine practices that do not offend the Establishment Clause and suggested that the Establishment Clause prohibits religious coercion.[359]

The *Kennedy* majority, however, left unanswered what constitutes religious "coercion" and how it would determine what state actions are and are not "coercive."[360] Gorsuch, who wrote for the Court, acknowledged this issue when he recognized that, "Members of this Court have sometimes disagreed on what exactly qualifies as

356. *See supra* Part II.B.1.a; *see also Shurtleff*, 142 S. Ct. at 1610 (Gorsuch, J., concurring in judgment).
357. *See generally* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022).
358. *Id.* at 2427 (citing Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2080–82 (2019)).
359. *Id.* at 2428.
360. *Id.* at 2429.

impermissible coercion in light of the original meaning of the Establishment Clause."[361] But there was no pressing need to resolve it because, Gorsuch said, "Mr. Kennedy's private religious exercise did not come close to crossing any line one might imagine separating protected private expression from impermissible government coercion."[362] In a future case, one suspects that the Court will have to resolve what constitutes unconstitutional religious coercion. If and when justices provide reasons for selecting some forms of coercion over others, it would seem that they will have to engage in something like the construction process we have set forth. As just discussed, Justice Gorsuch already initiated this process in *Shurtleff*.[363]

The mischief rule framework presented in this Article does not and cannot answer whether Gorsuch's *Shurtleff* construction, or any other construction, is "correct." It can, however, provide a framework for how the Establishment Clause constructions have been performed and how they might be evaluated by originalists and non-originalists alike.

CONCLUSION

Drilling down into the process of construction via the mischief rule framework clarifies what justices have actually done, at least in Establishment Clause jurisprudence. To speak plainly, justices have invented the Establishment Clause's meaning by creatively constructing it; they have not discovered it through straightforward textual interpretation. This is not to say that all judicial creativity is blameworthy. Indeed, if there is no clear meaning to be discovered or if the text's meaning is so obscure that it cannot be uncovered, a judge must construct meaning. But constructions should be seen for what they are: acts of judicial creativity. Only then may we begin to evaluate them based on their fidelity to original mischief(s) and purpose(s) or some other metric.

Conceptualizing the patterns within constitutional constructions brings analytical clarity to exactly how justices perform such constructions. Such clarity, in turn, helps shed light on how and why, "since *Everson*, the Court has reached results in establishment cases that are legendary in their inconsistencies," despite relying on historical evidence.[364] Additionally, and importantly, recognizing how and where justices are

361. *Id.*
362. *Kennedy*, 142 S. Ct. at 2429.
363. *See supra* pp. 451–53.
364. William P. Marshall, *"We Know It When We See It": The Supreme Court Establishment*, 59 S. CAL. L. REV. 495, 495 (1986).

constructing constitutional texts provides a sharper lens through which to evaluate judicial decision-making, both from non-originalist and originalist perspectives. More profoundly appreciating the pervasiveness of construction, in short, helps us both to understand and to evaluate the Court's Establishment Clause jurisprudence.