RELIGIOUS ORIGINALISM

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I. INTRODUCTION

Though disputed, originalism as a theory of jurisprudence and a method for constitutional interpretation is deeply embedded in Supreme Court opinions over the past half-century. Historical lenses have been influential in construing much of the U.S. Constitution, and perhaps most importantly for structural provisions such as the separation of powers and federalism.[1] Originalist arguments have been more contentious in individual rights cases, such as those rooted in the First Amendment religion clauses. Arguments cut both ways, either as a defense or critique of existing rules and jurisprudence.[2] The First Amendment religion clauses (Free Exercise and Establishment) sit at an awkward intersection where originalist and historical methods are embraced or rejected depending on the particular case, litigant, or judge.[3] The importance of engaging originalist understandings of the Constitution has arguably become essential for litigants, and is taken seriously by jurists who might otherwise object to conventional originalist analysis such as Justice Ketanji Brown Jackson.[4] Opinions published in 2022 and 2023 have placed these tensions in high relief. Although *Dobbs v. Jackson Women's Health Organization*[5] is certainly the most contested, it may be that the recent religion clause cases provide the best case study for considering how originalist and historical interpretive methods are used by the current Supreme Court.

This article provides a historical and theoretical framework for considering the import and impact of originalism in contemporary First Amendment religion clause cases, with potential implications for originalism more broadly in Supreme Court jurisprudence. Section II attempts to identify the nuances of various originalist arguments and methods. Section III considers the historical and theoretical use of originalism in religion clause cases, particularly in the Roberts Court, analyzing the most recent case law, its coherence, and the most important critiques of originalism in religion clause cases. Section IV then considers

1. Tyler Broker, *Church and State Originalism*, 50 U. MEM. L. REV. 1, 2–3 (2019).

2. *See, e.g.,* Patrick T. Gillen, *A Winn for Originalism Puts Establishment Clause Reform Within Reach*, 21 WM. & MARY BILL RTS. J. 1107, 1107–08 (2013).

3. *See, e.g.*, Martin S. Flaherty, *Historians and the New Originalism: Contextualism, Historicism, and Constitutional Meaning*, 84 FORDHAM L. REV. 905, 912–13 (2015).

4. *See, e.g*., Debra Cassens Weiss, *Justice Jackson Uses Originalism to Undercut 'Conservative Juristocracy,',* ABA J. DAILY NEWS (Dec. 13, 2022, 8:59 AM), https://www.abajournal.com/news/article/justice-brown-jackson-uses-originalism-to-undercut-conservative-juristocracy [https://perma.cc/GL36-Y8MT] ("U.S. Supreme Court Justice Ketanji Brown Jackson is the de facto leader of a group embracing "a third wave of progressive originalism," according to Lawrence Solum.").

5. 142 S. Ct. 2228 (2022).

the implications of these dynamics in Supreme Court constitutional jurisprudence and advises whether and how originalism might be used by litigants.

II. ORIGINALISM

Modern originalism as a theory of jurisprudence and a method of interpretation may be attributed most clearly to a 1971 law review article by Judge Robert Bork[6] and the opinions of late Justice Antonin Scalia beginning in the mid-1980s. However, the approach can be traced back further to Justice Hugo Black or even earlier.[7] In the current Court, Justice Clarence Thomas is arguably the most consistent supporter of originalism over time, but some newer Justices (Justices Neil Gorsuch and Amy Coney Barrett) might be understood as originalist in key aspects of their jurisprudence.[8] Although not likely strict originalists, Chief Justice Roberts, Justice Samuel Alito, Justice Brett Kavanaugh,[9] and even Justice Ketanji Brown Jackson have used originalist methods in their opinions or in oral arguments.[10]

There are a number of ways to derive originalism, but proponents often rely on some form of contract theory.[11] To the extent that a constitution is a sort of agreement among the governed, it may be reasonable to consider the intent of the drafters of the original contract, or its later amendments, in order to arrive at a meaning that represents the meeting of the minds of the original parties. This approach is compelling

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6. Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

7. *See* Michael J. Gerhardt, *A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia*, 74 B.U. L. REV. 25 (1994). For earlier cases using originalism, *see, e.g.,* Fletcher v. Peck, 10 U.S. 87 (1810); Tr. of Dartmouth Colle. v. Woodward, 17 U.S. 518 (1819); Dred Scott v. Sandford, 60 U.S. 393, 395 (1856), superseded by constitutional amendment, U.S. Const. amend. XIII.

8. *See, e.g.*, ERWIN CHEMERINSKY, WORSE THAN NOTHING: THE DANGEROUS FALLACY OF ORIGINALISM 8–13 (Yale University Press 2022); for Justice Gorsuch *see generally* NEIL GORSUCH, A REPUBLIC IF YOU CAN KEEP IT (Forum Books 2019); for Justice Barrett *see* Amy C. Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921 (2017).

9. CHEMERINSKY, *supra* note 8.

10. Cassens Weiss, *supra* note 4.

11. *See, e.g.*, Bork, *supra* note 6, at 2–4; Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO STATE L.J. 1085, 1090 (1988); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995); John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 GEO. L.J. 1693 (2009); Randy E. Barnett & Evan Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1 (2018).

to the extent that it purports to be objective and historically rooted.[12] One of the great challenges to constitutional legitimacy is the appearance that Supreme Court opinions might simply reflect the political preferences of the majority of sitting Justices.[13] One goal of originalism is to frame judicial decision-making as a rational, perhaps even mechanical, process that transcends individual preferences and bias.[14] It does not promise efficient or even fair outcomes, but it claims to be the consequence of the original intent of the parties to the national compact.[15] When those outcomes are inefficient or unjust, the natural response would arguably be to amend the Constitution.[16]

Others have written extensively on the origins, development, variations, advantages, and disadvantages of originalist approaches,[17] so this paper will only briefly highlight some of the most important observations and arguments raised in prior work, with special attention to the influence of Justice Scalia. Although Justice Scalia passed away in early 2016, his impact has continued as justices appointed by President Donald Trump shifted the ideological balance of the court through 2020.[18] Although it is not the main aim of this paper, I will note the continuing strands of originalism in post-Scalia opinions in order to demonstrate a continuity. Finally, this section will consider the use of originalist

12. *See, e.g.*, Barnett & Bernick, *supra* note 11, at 1 (combining an originalist theory of construction that, together with originalist theory of interpretation, "yields a unified theory of originalism."). Judges are fiduciaries of the public, and when original meaning is not sufficient to resolve a question, they have a duty to employ good-faith construction to draw conclusions that are consistent with spirit of the constitution. If originalist interpretation is a commitment to the letter of the constitution, then originalist construction must be a commitment to the spirit of the constitution. Because of the fiduciary duty theory outlined near the beginning, good-faith originalist construction is the only acceptable option.

13. *See, e.g.*, Bork, s*upra* note 6, at 12–13; *see also* HUGO LAFAYETTE BLACK, A CONSTITUTIONAL FAITH 3–22 (1968).

14. *See, e.g.*, Barnett & Bernick, *supra* note 11, at 3 ("Originalism is the view that the meaning of the Constitution remains the same until it is properly changed, with an Article V amendment being the only proper method of revision.").

15. H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 888 (1984).

16. *See* Barnett & Bernick, *supra* note 11, at 3.

17. *See, e.g.*, Farber, *supra* note 11; J. M. BALKIN, LIVING ORIGINALISM (2011); Powell *supra* note 15; McConnell, *supra* note 11; McGinnis & Rappaport, *supra* note 11; Barnett & Bernick, *supra* note 11; Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980).

18. *See, e.g.*, Mark R. Burch, Antonin Scalia's Establishment Clause Jurisprudence (2010) (Ph.D dissertation, Claremont Graduate University and the Claremont McKenna College) (ProQuest).

arguments by justices like Ketanji Brown Jackson even though they may function differently.[19]

A. The Development of Originalism in Supreme Court Jurisprudence

The idea of considering the historical context in interpreting constitutional provisions is not a modern innovation.[20] Such considerations appear in Supreme Court opinions early on as part of the overall interpretive method, and this is an approach that continues to be used by non-originalists along with others.[21]

However, the idea that interpretation must be justified by either the intent of the framers or contemporaneous understanding of text is a 20th century (and primarily a later 20th century) phenomenon.[22] Some scholars consider Justice Hugo Black to have had originalist intuitions in his textualism, which may have served as a precursor to the originalist method of Justice Scalia and later Justice Thomas in a more conservative mode.[23] Although justices have a variety of understandings of originalism, there is a general consensus in the practice of law and the art of judging that considering the intent of the framers and/or original meaning is an important step in construing constitutional text.[24] In her confirmation hearings, Justice Elena Kagan famously responded to a question from Senator Patrick Leahy about construing the Fourth Amendment when considering modern technology as follows: "[S]ometimes they laid down very specific rules. Sometimes they laid down broad principles. Either way

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19. Some observers have contended that if jurists like Justice Jackson and Kagan can be considered "originalist" along with Justices Scalia and Thomas, then the term has no coherent meaning. *See, e.g.*, Conor Casey & Adrian Vermeule, *If Every Judge is an Originalist, Originalism is Meaningless,* WASH. POST (March 25, 2022, 10:54 AM), https://www.washingtonpost.com/outlook/2022/03/25/if-every-judge-is-an-originalist-originalism-is-meaningless/ [https://perma.cc/7FJE-EA65].

20. *See infra* notes 21.

21. Derigan Silver & Dan V. Kozlowski, *The First Amendment Originalism of Justices Brennan, Scalia and Thomas*, 17 COMM. L. & POL'Y 385, 388–89 (2012); *cf.* McCulloch v. Maryland, 17 U.S. 316 (1819).

22. Silver & Kozlowski, *supra* note 21, at 388.

23. *See* JAMES B. STAAB, LIMITS OF CONSTRAINT: THE ORIGINALIST JURISPRUDENCE OF HUGO BLACK, ANTONIN SCALIA, AND CLARENCE THOMAS (Kansas 2022) (finding Black's originalism rooted in the philosophy of Thomas Jefferson, Scalia's in that of Alexander Hamilton, and Thomas's in natural law theory and libertarianism).

24. *See, e.g.*, Harry Litman, *Originalism, Divided,* ATLANTIC (May 25, 2021, 10:30 AM), https://www.theatlantic.com/ideas/archive/2021/05/originalism-meaning/618953/ [https://perma.cc/J7NL-AMEM].

we apply what they say, what they meant to do. So in that sense, we are all originalists."[25]

The most common justification for originalism prior to the Roberts Court was that it served to provide a restraint on judicial discretion,[26] and this justification can be found in the opinions of Justices Black, Scalia, and Thomas.[27] As a method, it held out the hope of providing bright line rules that minimize the temptation or need for the exercise of judicial fiat.[28] However, in cases like *Citizens United v. Federal Election Commission*[29] and *Shelby County v. Holder,* that justification may have been less important.[30]

Several of my colleagues have opined that originalism (and most other methodological frameworks aspiring to provide objective interpretation) inevitably serve as cover for judges and justices "simply making stuff up." I understand where this sentiment comes from, and it is not wrong from a certain point of view. There has rarely been a consistent methodological consensus on the Supreme Court, particularly over the past 100 years or so,[31] and I suppose the drive to find broader consensus with regard to interpretive rules may be utterly unattainable. However, the fact that Justices including Hugo Black, Antonin Scalia, Clarence Thomas, Ruth

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25. *See The Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States*: *Hearing Before the S. Committee on the Judiciary*, 111th Cong. 62 (2010) (statement from Elena Kagan).

26. *See* Silver & Kozlowski, *supra* note 21, at 386–87.

27. *See* STAAB, *supra* note 23. For a detailed account of Justice Scalia's jurisprudence see ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997).

28. *See* Silver & Kozlowski, *supra* note 21 at 386–87.

29. 558 U.S. 310 (2010). The majority opinion overruled two previous Supreme Court cases that had upheld the constitutionality of campaign finance regulations. *Id*. at 365. The opinion was criticized for not providing a sufficiently convincing reason for departing from these precedents and for appearing to be an exercise in judicial fiat. *See, e.g.*, Geoffrey R. Stone, Citizens United *and Conservative Judicial Activism*, 2012 U. OF IL. L. REV. 485, 487–90 (2012).

30. Shelby Cnty., Ala. v. Holder, 570 U.S. 529 (2013). The majority opinion invalidated a key provision of the Voting Rights Act, Section 4(b), which had been upheld by the Supreme Court four times before, most recently in 2009, arguably without a sufficiently compelling justification. By doing so, the court arguably second-guessed the judgment of Congress, which had reauthorized the Voting Rights Act in 2006 with overwhelming bipartisan support and after conducting extensive hearings and gathering voluminous evidence of ongoing discrimination and suppression in voting. *See, e.g.*, Amy Davidson Sorkin, *The Court Rejects the Voting Rights Act—and History*, THE NEW YORKER (June 25, 2013, 10:59 AM), https://www.newyorker.com/news/amy-davidson/the-court-rejects-the-voting-rights-actand-history [https://perma.cc/K2XT-Y972].

31. *See* Silver & Kozlowski, *supra* note 21 at 424 ("Originalism […] even with its emphasis on relying on original intent and meaning rather than judicial preference, is an approach that in actuality offers virtually no restraints on judicial behavior.").

Bader Ginsburg, Elena Kagan, Amy Coney Barrett, and Ketanji Brown Jackson have all identified as originalist in some sense provides common context and vocabulary in at least some aspects of interpretation. Sure, there are inevitable disagreements regarding the historical bases for what might constitute the intent of the framers or original contemporaneous meaning, but it at least provides a touchstone for engagement within the Court.

B. Emerging Tensions Between Stare Decisis and Originalism

Federal judicial confirmation hearings typically include standard questions related to the role of precedent in judicial decision-making, and they essentially serve as a litmus test to confirm a basic commitment to the role of stare decisis.[32] Some flavors of originalism (such as in the jurisprudence of Hugo Black) include an adherence to precedent generally.[33] However, some originalist justices are increasingly willing to overturn well-established precedent where they find it in conflict with the original intent of the framers or the contemporaneous understanding of the text.[34] Justice Scalia was clear about this, and Justices Thomas, Gorsuch, and Coney Barrett have made similar assertions.[35] In some recent cases such as *Dobbs*, Justices Kavanaugh and Alito have been willing to take this sort of position as well.[36] Many scholars have expressed deep concern that these theoretical moves make precedent meaningless whenever a Justice finds it in conflict with their individual understanding of original meaning.[37] To be sure, non-originalist justices have been willing to overturn precedent such as in *Plessy v. Ferguson*, finding them inconsistent with general principles of constitutional justice, so the rule of precedent has never been absolute.[38]

The tension between the role of precedent and reference to original meaning in judicial decision-making is not unique to the United States. Classical Sunni Islamic jurisprudence uses a principle akin to precedent as a constraint on judicial power (*taqlid*), requiring judges to apply established rules developed within their particular school of jurisprudence

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32. *See, e.g.*, Lori A. Ringhand, *In Defense of Ideology: A Principled Approach to the Supreme Court Confirmation Process*, 18 WM. & MARY BILL RTS. J. 131, 149–52 (2009).

33. *See* STAAB, *supra* note 23, at 46–85.

34. For an interesting discussion of the role of precedent (and "super precedent") and the role of originalism, *see* Amy C. Barrett & John C. Nagle, *Congressional Originalism*, 19 U. PA. J. CONST. L. 1 (2016).

35. *See* CHEMERINSKY, *supra* note 8, at 6–13.

36. *Id.*

37. *See, e.g., id.* at 173–176.

38. 163 U.S. 537 (1896). *See* Brown v. Bd. of Educ. 347 U.S. 483 (1954).

(*mazhab*).[39] This system may even share historical roots with the Anglo-American tradition.[40] Only when there is no clear precedent are judges allowed to exercise significant discretion.[41] Even then, only the highest-ranked judges have authority to establish effectively new rules (in some ways like Supreme Court justices).[42] When presented with a truly novel issue not addressed by the rules established within a particular school of legal thought, a senior jurist uses an interpretive method called *takhrij* that may be viewed as a sort of originalism.[43] The jurist synthetically derives the rule that the founder would have established under the novel fact pattern by placing themselves in the founder's role to facilitate analogical reasoning consistent with the relevant doctrine.[44] In traditional Islamic jurisprudence these constraints tend to be dutifully followed; however, modernist critiques have argued for greater governmental and judicial discretion to address issues that could not have been fathomed in the 8th-12th centuries BCE, an argument similar to one used by some non-originalists.[45] However, unlike originalism in constitutional law, modernism in Islamic jurisprudence has not become normative.

C. Progressive Originalism

I am using the term "progressive originalism" to distinguish it from the sort of originalism advocated by Justice Scalia and his conservative colleagues on the Court. This section will briefly consider how notable liberal justices might be considered originalist. As mentioned earlier, the first member of the modern Court to expressly advocate for what we would now consider an originalist method to constitutional interpretation was Justice Hugo Black, who tended to be progressive in his policy analysis in

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39. *See* Mohammad Fadel, *The Social Logic of Taqlīd and the Rise of the Mukhataṣar*, 3 ISLAMIC L. & SOC'Y 194, 197 (1996).

40. Professor John Makdisi has made the historical argument that a number of Islamic legal traditions were adopted by the Norman conquerors of Muslim Sicily, who then brought those traditions to Great Britain. *See, e.g.*, John A. Makdisi, *The Islamic Origins of the Common Law*, 77 N.C. L. REV. 1635 (1999). Others have observed that shared attributes of taqlid and precedent might also be related. *See, e.g.*, TALAL AL-AZEM, RULE-FORMULATION AND BINDING PRECEDENT IN THE MADHHAB-LAW TRADITION (2017); For a detailed analysis of legal transplantation *see* ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (1993).

41. *See, e.g.*, Fadel, *supra* note 39, at 227–28.

42. *See* SHERMAN A. JACKSON, ISLAMIC LAW AND THE STATE: THE CONSTITUTIONAL JURISPRUDENCE OF SHIHĀB AL-DĪN AL-QARĀFĪ 91–93 (1996).

43. *Id.*

44. *Id.*

45. *See, e.g.*, ABDULLAHI AHMED AN-NA'IM, TOWARD AND ISLAMIC REFORMATION: CIVIL LIBERTIES, HUMAN RIGHTS, AND INTERNATIONAL LAW 57–68 (1990).

his time on the court from 1937 to 1971.[46] Justice Kagan claimed some form of identity as an originalist in her confirmation hearing and has sat in majorities formed by more-conservative justices in the face of dissents by her liberal colleagues.[47] And Justice Jackson has been identified by herself and others as originalist in some senses.[48]

Justice Black was explicitly textualist and arguably an originalist to the extent that he believed that the text of the Constitution is definitive on any question requiring judicial interpretation and that it should be understood, to the extent possible, as it would have been by the framers.[49] In the important First Amendment religion case, *Everson v. Board of Education*,[50] Justice Black diverged from precedent, turning to Thomas Jefferson's *Act for Establishing Religious Freedom* in Virginia and James Madison's *Memorial and Remonstrance* to shift Establishment Clause doctrine toward separationism.[51] He was also more broadly a textualist who advocated for a literal reading of legal texts, generally.[52] He was ultimately a pivotal member the Warren Court, using originalist methods to enforce constitutional civil liberties that had been ignored or violated in prior caselaw.[53]

Justice Kagan might be considered an originalist in a broad sense, having asserted that "we are all originalists" in her confirmation hearing.[54] In her opinions, she considers the text and structure of the Constitution in order to interpret particular provisions.[55] However, she also recognizes that the framers had competing goals in different parts of the document

46. *See* Gerhardt, *supra* note 7 at 25–26.

47. *The Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Committee on the Judiciary*, 111th Cong. 62 (2010) (statement from Elena Kagan).

48. *See* Cassens Weiss, *supra* note 4.

49. *See* STAAB, *supra* note 23. *See also* James B. Staab, Response, *Originalism's Limits*, N. Y. REV. OF BOOKS (2023), https://www.nybooks.com/articles/2023/05/25/originalisms-limits/ [https://perma.cc/TJ2T-YUQ6]. For a more detailed consideration of textualism in constitutional jurisprudence (though admittedly note in an originalist modes, *see* Akhil Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1992); and AKHIL REED AMAR, THE WORDS THAT MADE US: AMERICA'S CONSTITUTIONAL CONVERSATION, 1760–1840 (2021).

50. Everson v. Bd. of Ed. of Ewing Twp., 330 U.S. 1 (1947).

51. *See* Steven K. Green, *The Supreme Court's Ahistorical Religion Clause Historicism*, 73 BAYLOR L. REV. 505, 513 (2021).

52. *See* Gerhardt, *supra* note 7, at 28–32.

53. *Id.* at 43.

54. Litman, *supra note* 24.

55. Adam Liptak, *Justice Jackson Joins the Supreme Court, and the Debate Over Originalism*, N. Y. TIMES (Oct. 10, 2022, 5:00 AM), https://www.nytimes.com/2022/10/10/us/politics/jackson-alito-kagan-supreme-court-originalism.html [https://perma.cc/MVA7-U3CZ].

and that sometimes they laid down broad principles rather than specific rules.[56] That said, it is inconceivable that any scholar, or Justice Kagan herself, would claim that she adheres to a strict or rigid version of originalism that ignores the evolving context and values of society.[57] For example, she has joined opinions that are likely not consistent with the specific intent of the framers or the original public meaning of some constitutional provisions, such as in *Obergefell v. Hodges*, which recognized a right to same-sex marriage, and similar cases.[58] To muddy the meaning of originalism even further, Justice Ginsburg made a similar claim to originalism on at least one occasion.[59]

Justice Jackson may be considered an originalist in the sense that she looks at the text, history, and tradition of the Constitution and its amendments to interpret its provisions.[60] She observes that originalism can require liberal outcomes in some cases, such as voting rights.[61] She also challenges the conservative view that the Constitution is colorblind and that race-based distinctions are forbidden by the 14th Amendment.[62] She argues that the historical record shows that the amendment was meant to secure rights of freed former slaves.[63] Her first notable originalist position

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56. Litman, *supra* note 24.

57. *See, e.g.*, Casey & Vermeule, *supra* note 19.

58. 576 U.S. 644 (2015).

59. Given her long friendship with Justice Scalia on the court, it is not surprising that Justice Ginsburg would share some methodological sympathies with conservative originalists. *See, e.g.*, *Analysis: How Justice Ruth Bader Ginsburg Viewed Herself as an Originalist*, CONST. ACCOUNTABILITY CTR. (Oct. 13, 2020), https://www.theus constitution.org/news/analysis-how-justice-ruth-bader-ginsburg-viewed-herself-as-an-originalist/ [https://perma.cc/4AZZ-887D]. ("The late Justice Ruth Bader Ginsburg, a liberal icon whose seat Judge Barrett is seeking, refused to cede the originalist ground to the right. 'I have a different originalist view,' she said at a 2011 legal conference. 'I count myself as an originalist too, but in a quite different way,' than critics such as Justice Scalia, who argued the 14th Amendment's equal-protection clause didn't protect women. 'Equality was the motivating idea, it was what the Declaration of Independence started with but it couldn't come into the original Constitution because of the odious practice of slavery that was retained,' she said").

60. *See* Liptak, s*upra* note 55.

61. Kimberly Strawbridge Robinson, *Justice Jackson Takes Originalist Approach on Voting Rights*, BLOOMBERG LAW (Oct. 4, 2022), https://news.bloomberglaw.com/us-law-week/justice-jackson-takes-originalist-approach-on-voting-rights [https://perma.cc/V8YB-UJCM].

62. Kay Zou, *The Future of Progressive Originalism: Justice Ketanji Brown Jackson's Interpretation of the Constitution*, COLUM. UNDERGRADUATE L. REV. (Dec. 22, 2022), https://www.culawreview.org/journal/the-future-of-progressive-originalism-justice-ketanji-brown-jacksons-interpretation-of-the-constitution [https://perma.cc/XM7B-AVXY].

63. Marjorie Cohn, *Ketanji Brown Jackson Cleverly Turned the Right's Own Judicial Theory Against It*, TRUTHOUT (Oct. 27, 2022), https://truthout.org/articles/ketanji-brown-jackson-cleverly-turned-the-rights-own-judicial-theory-against-it/ [https://perma.cc/4UGP

as a member of the Supreme Court was laid out in oral arguments for *Allen v. Milligan*,[64] the case about whether Alabama must create a second, majority-Black, congressional district under the Voting Rights Act. From the bench, she noted the historical context for meaning in the reconstruction amendments and how they could support race-conscious aspects of the Voting Rights Act.[65] She elaborated on this argument further in her dissent in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College/University of North Carolina*.[66]

Cass Sunstein makes an interesting observation that the typical justifications for originalism rooted in the very existence of a written constitution or as a basis for justifying judicial review are unconvincing but that it might be supported on broadly consequentialist grounds.[67] He argues that while originalism might be reasonable and appropriate for interpreting the Impeachment Clause, it is arguably problematic in interpreting the Equal Protection Clause.[68] He then makes a pragmatic argument for using originalist methods where they may produce "good consequences."[69] This would be most appropriate when "other legally relevant materials are absent,"[70] or when the original meaning is sufficient to not require interpretive intervention, having both low decision cost and low error cost compared to alternatives.[71] This would not be the case where precedents or traditions are clear and longstanding, thus mitigating against overturning them on the basis of original meaning.[72] Although this account is well-reasoned, it cuts against both the typical conservative defenses of originalism and progressive advocacy for living constitutionalism, in contrast with much originalist scholarship, which I would generally characterize as deontological, rejecting teleological justifications.

D. Originalism Versus Textualism

Originalism and textualism are related but distinct approaches to interpreting legal texts, particularly the Constitution. Both have been embraced in sophisticated ways by members of the Supreme Court,

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64. 143 S. Ct. 1487 (2023).

65. Cohn, *supra* note 63.

66. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023) (Jackson, J. dissenting, joined by Justices Sotomayor and Kagan).

67. *See* Cass R. Sunstein, *Originalism*, 93 NOTRE DAME L. REV. 1671, 1671 (2018).

68. *Id.*

69. *Id.* A similar pragmatic argument is made in DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010).

70. Sunstein, *supra* note 67 at 1672.

71. *Id.*

72. *Id.*

particularly late Justice Scalia, Justice Gorsuch, and Justice Barrett.[73] The difference between the approaches is arguably one of scope rather than formal jurisprudence. Originalism presumes to interpret the Constitution based on the meaning of the text at the time of its writing (typically regarding either the intent of the framers or the likely meaning at the time), whereas textualism relies on the ordinary meaning of the text at the time of adoption, without turning to external sources such as contemporaneous comments and debate.

Both originalism and textualism are based on the premise that legal texts have fixed and objective meanings that can be ascertained by judges through careful analysis and historical research. Both aim to constrain judicial discretion, promoting consistency and predictability in legal interpretation. While modern originalism emerged in the 1980s largely as a response to living constitutionalism, textualism was a reaction to purposivism, which holds that statutes should be interpreted according to the intent or purpose of the lawmakers who enacted them.[74] Textualism rejects purposivism for giving judges discretion to speculate about legislative intent, which may be unclear, potentially distorting the plain meaning of the statutory text.[75]

Textualists typically claim that the only legitimate source of statutory meaning is the text itself, as understood by a reasonable person at the time of enactment, and this interpretive approach can be applied to the Constitution.[76] Textualism may be consistent with originalism focused on original meaning, but it could be in tension with the framers' intent approach.[77] However, some members of the Court consider originalism the appropriate method for approaching the Constitution, while textualism is reserved for statutory construction, approaches which may be in tension.[78]

Perhaps even more than originalism, legal scholars accept textualism as a normative approach to judicial interpretation of legal texts.[79] Five years after proclaiming that "we are all originalists now," Justice Kagan

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73. Ed Whelan, *Judge Barrett on Textualism and Originalism*, NAT'L REV. (Sep. 25, 2020, 12:13 PM). https://www.nationalreview.com/bench-memos/judge-barrett-on-textualism-and-originalism/ [https://perma.cc/A6NC-478E].

74. *See generally*, Katie Eyer, *Disentangling Textualism and Originalism*, 13 CONLAWNOW 115, 124–25 (2022).

75. Whelan, *supra* note 73.

76. *See* Eyer, *supra* note 74 at 115–16.

77. *See id.* at 120.

78. *See id.* at 116 n.5

79. *See* Lance Caughfield, *We're All Textualists Now*, APP. ADVOC. BLOG (July 14, 2020), https://lawprofessors.typepad.com/appellate_advocacy/2020/07/were-all-textualists-now.html [https://perma.cc/AK2N-RAEZ].

made a similar assertion that "we are all textualists now," at least with regard to the interpretation of statutes.[80] For purposes of this paper, I consider originalism focused on contemporaneous meaning to be a category of textualism. Although the approach is likely more defensible than intent of the framers, it still raises many historical and hermeneutical challenges as noted in the next section.

E. Responses to Originalism

There are a variety of critiques of originalism.[81] Some respond primarily to methods (exegetical and historical),[82] while others reject the assertion that the intent of the drafters is or should be binding on subsequent generations (typically using contractarian or modernist arguments).[83]

Methodological critiques fall into two main categories, literary and historical.[84] Both generally claim that methods accepted in Supreme Court cases do not meet the standards of literary/history scholars, and that by implication, more rigorous methods might arrive at contrary, alternative interpretations.[85] Scholars who reject the use of originalism, regardless of the effectiveness of interpretive methods, often assert that original understandings ought not be binding because the application of even reliable original understandings do not map on to the social and

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80. *Id.*

81. *See, e.g*., Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1 (2009); for an excellent survey of conventional approaches to originalism as well as critiques, *see also* Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375 (2013).

82. *See, e.g.*, Berman, *supra* note 81.

83. *See, e.g., id.* at 70, n. 71; *see, e.g.,* Whittington, *supra* note 81, at 403.

84. *See, e.g.*, H. Jefferson Powell, *supra* note 15, at 885. The framers themselves never expected, nor did they believe appropriate, a method of constitutional interpretation that is bound by the current understanding of "intent of the framers." *Id.* While early Republicans used "original intent" in their challenges to the Federalists, the understanding of the 1800s was that original intent meant the intent of the parties to the constitutional compact (the sovereign states), NOT the framers in Philadelphia. *Id.* at 888. Even then, "intent" was determined structurally – "this…was determined not by historical inquiry into the expectations of the individuals involved in framing and ratifying the Constitution, but by consideration of what rights and powers sovereign polities could delegate to a common agent without destroying their own essential autonomy." *Id.* at 888. Regardless of what other merits might exist to an originalist or nonoriginalist approach, the assumption that the framers presupposed or even prescribed modern intentionalism is historically incorrect. *Id.* at 888–89.

85. *See* Green, *supra* note 51, at 560–61.

technological contexts in which contemporary cases arise.[86] They may also challenge the notion that such understandings may be binding on subsequent generations on contractarian grounds, primarily because the original contracting parties are long dead.[87] Even the dreaded rule against perpetuities from 17th Century BCE England limited drafters from using legal instruments to exert control over ownership of property beyond the lifetime of the original parties in interest.[88]

A number of scholars have written in these areas, but the most recent significant work is Professor Erwin Chemerinsky's *Worse Than Nothing: The Dangerous Fallacy of Originalism*, which identifies core critiques as epistemological, incoherence, abhorrence, modernity, and hypocrisy.[89] Many of these arguments are compelling and address specific historical and interpretive issues in First Amendment jurisprudence. However, Chemerinsky argues the clearest inconsistency in using a strict originalist method in Supreme Court cases is that judicial review, the basis for many of those same cases, is not found in the text of the Constitution itself.[90] Critics also sometimes find it inconsistent to apply the First Amendment religion clauses to claims against State actors when those claims rely on the application of those clauses via the 14th Amendment.[91] It may be that justices such as Scalia[92] and Thomas[93] have worked within the framework of the majority of the Court in making such arguments, but some justices would likely have no problem exempting states from the religion clauses entirely.[94]

With regard to originalism in the First Amendment and religion cases in particular, it would be remiss not to mention the significance of Professor Steven H. Shiffrin.[95] His work is multi-layered and sophisticated, certainly non-originalist in the view of Professor

86. *See, e.g.*, ERIC J. SEGALL, ORIGINALISM AS FAITH 56–81 (2018).

87. *Id.*

88. *See, e.g.*, Kyle G. Durante, *A Modern Guide to the Modifications of the Rule Against Perpetuities in New York*, 32 TOURO L. REV. 947, 951 (2016).

89. CHEMERINSKY, *supra* note 8.

90. *Id.* at 75–78.

91. *Id.* at 92–114.

92. S*ee,* Vincent Phillip Muñoz, *The Original Meaning of the Establishment Clause and the Impossibility of its Incorporation*, 8 U. PA. J. CONST. L. 585, 633 n.250 (2006).

93. *Id.* at 586–88.

94. *See, e.g.*, Edward S. Corwin, *The Supreme Court as National School Board*, 14 LAW & CONTEMP. PROBS. 3 (1949); for a more recent example *see* Muñoz, *supra* note 92.

95. As a matter of full disclosure, Professor Shiffrin was a friend and mentor for 20 years, before he passed away in May 2023. I am deeply grateful for his contributions to the academy, his unflagging integrity, and to his support of younger scholars like myself.

Chemerinsky, but deeply thoughtful and rigorous nevertheless.[96] At a conference in 2008 at Seattle University, he commented on a panel that constitutional interpretation paralleled biblical exegesis in important ways and that developing a more explicit and consistent hermeneutic might help jurisprudence. This seems to be an aim of much of his work.[97]

Shiffrin advocated for interpreting specific language in light of broader themes.[98] Atomized sections of text interpreted in isolation may reach wildly conflicting values in a single document.[99] For example, Pauline texts regarding women and sexual minorities do not square easily with broader notions of equality and inclusion in those same epistles, let alone with the broader themes of love, redemption and nonjudgment in the Christian gospels.[100] Similarly, Shiffrin questioned narrow understandings of the First Amendment (what he would sometimes call a form of fundamentalism)[101] and advocated for construing language in the broader contexts of liberty and equity engendered in the Constitution as a whole, ideally with regard for the historical contexts of caselaw.[102]

There are at least four critiques of originalism concerning its reliance on historical methods and analysis. First, it assumes that the framers had a clear and unified intent that can be easily recovered and applied to modern cases.[103] The framers were a diverse group of people with different views and motivations, and they often compromised or left ambiguous many constitutional provisions.[104] Second, there may be no reliable historical method to discern contemporaneous meaning.[105] Third, originalist use of historical methods has been criticized for being nonsensical because the social, political, moral, and technological changes that have occurred since the drafting of the Constitution and its amendments are not amenable to potentially outdated and narrow visions of constitutional values and

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96. To his credit, Professor Shiffrin was deeply respected by folks across the academy, by those who disagreed with him consistently, and those who generally agreed with his positions.

97. *See, e.g.*, Steven H. Shiffrin, *The Pluralistic Foundations of the Religion Clauses*, 90 CORNELL L. REV. 9 (2004); and STEVEN H. SHIFFRIN THE RELIGIOUS LEFT AND CHURCH-STATE RELATIONS (2012).

98. *See, e.g.*, Akhil Amar, *Intratextualism*, 112 HARV. L. REV. 747, 769 (1999); Brest, *supra* note 17, at 207; and CHEMERINSKY, *supra* note 8, at 182–183.

99. *See, e.g.*, PETER J. GOMES, THE GOOD BOOK (Avon Books 1996).

100. *Id.*

101. Steven H. Shiffrin, *The Dark Side of the First Amendment*, 61 UCLA L. REV. 1480, 1481 (2014).

102. *See id.* at 1481; s*ee* Shiffrin, *The Pluralistic Foundations of the Religion Clauses*, *supra* note 97, at 11–14.

103. *See, e.g.*, CHEMERINSKY, *supra* note 8, at 44–63.

104. *Id.* at 51–55.

105. *Id*. at 56–63.

principles, which may result in consequences clearly contrary to the purpose of particular texts.[106] Finally, originalism may create artificial and arbitrary distinctions between interpretation and amendment,[107] and between original meaning and original expected application.[108]

As noted earlier, a variety of scholars and jurists have addressed these critiques, in some cases providing answers and in other cases dismissing the significance of the claims themselves.[109] It is possible that the current Court could shift to alternative theories that support either their jurisprudence or their policy preferences; however, originalist arguments are so deeply embedded within caselaw now, it is unlikely to simply disappear.[110] As a result, scholars and jurists who do not find originalism persuasive are compelled to engage it. Although originalism is important in a wide variety of cases, shifts in recent First Amendment religion clause cases present a special opportunity for considering its application.

III. RELIGION CLAUSE JURISPRUDENCE

From the Latin, "religare," religion refers to "binding back," usually in the sense of connecting with the divine. Not all scholarly definitions of religion imply divinity or even spirit, but the First Amendment is likely more conventional, considering communal and personal identification.[111] Three of the principal categories of theories defining religion are: first, religion in its metaphysical or theological sense (e.g., the underlying truth of the existence of God, the dharma, etc.),[112] second, religion as it is psychologically experienced by people (e.g., the feelings of the religious believer about divinity or ultimate concerns etc.),[113] and third, religion as

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106. *Id.* at 78–84, 117–38.

107. That is that doctrinal moves via interpretation might be considered impermissible, whereas amendment might be considered the only allowable avenue for changing constitutional doctrine. As a historical matter, shifts in doctrine have emerged from both. Berman, *supra* note 81, at 22.

108. CHEMERINSKY, *supra* note 8, at 63–67, 87–91; *see also* Jamal Greene, *On the Origins of Originalism*, 88 TEX. L.R. 1, 10 (2009); Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 662 (2009).

109. For a current detailed comparison, *see* Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243 (2019); *See also, e.g.*, Barnett & Bernick, *supra* note 11, at 45–52; McGinnis & Rappaport, *supra* note 11 at 3–25.

110. CHEMERINSKY, *supra* note 8, at 186–87.

111. *See, e.g.*, Lee J. Strang, *The Meaning of "Religion" in the First Amendment*, 40 DUQ. L. REV. 181, 181–82 (2002).

112. *See, e.g.*, RUSSELL POWELL, SHARI'A IN THE SECULAR STATE 8–9 (Routledge 2016).

113. *Id.* at 10–11.

a cultural or social force (e.g., symbolism that binds a community together or separates it from other communities).[114]

Although the Supreme Court has had numerous opportunities to define "religion" as understood in the First Amendment and in statutes, it has avoided doing so explicitly.[115] Cases through the middle of the 20th century assumed a conventional institutional understanding, focusing on established communities devoted to a deity.[116] However, conscientious objector cases in the 1960s led to a potential expanding of that understanding to include deeply held ethical and philosophical commitments that parallel theistic tradition in *U.S. v. Seeger*.[117] Although *Seeger* construed religion in a statutory context,[118] the decision was certainly related to understanding the Constitution.[119] That said, the fact that the religion clause understanding has never been elaborated, with a majority of the Court leaning toward originalism, it may be that religion could be limited to theistic commitments within recognized communities.[120] Many constitutional systems limit special protections for religion or religious communities to those that are well-established and historically recognized.[121]

A. Originalism in First Amendment Religion Cases

Although there were earlier examples of originalism in Supreme Court jurisprudence, it was most clearly endorsed by Justices Scalia and Thomas

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114. *Id.* at 11–13.

115. Strang, *supra* note 111, at 200.

116. *Id.* at 201.

117. *See* U.S. v. Seeger, 380 U.S. 163, 165–66 (1965).

118. *See id.* at 170–73.

119. *See id.* at 174.

120. *See, e.g.*, JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES Sec. 1865 (1833); *see also* THOMAS COOLEY, GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES 224–25 (3d ed. 1898).

121. *See, e.g.*, Louis Charbonneau, *German Ministers Say Scientology Unconstitutional*, REUTERS (Dec. 7, 2007), https://www.reuters.com/article/us-germany-scientology/german-ministers-say-scientology-unconstitutional-idUSL0767062220071207 [https://perma.cc/6VM2-9BSY] (the Church of Scientology is not a recognized religion in Germany, including for constitutional purposes); *see also* U.S. DEP'T OF STATE OFF. OF INT'L RELIGIOUS FREEDOM, 2021 REPORT ON INTERNATIONAL RELIGIOUS FREEDOM: RUSSIA (2022), https://www.state.gov/reports/2021-report-on-international-religious-freedom/russia/ [https://perma.cc/2UPY-LB4G]. Like many countries, Russia does not recognize all religions. *Id.* Legally, only Christianity, Judaism, Islam, Judaism, and Buddhism have clear legal status, and even then not all denominations or communities are recognized. *Id.*

from the 1980s onward.[122] Perhaps the most illustrative example of this position is Scalia's concurrence in *Lamb's Chapel v. Center Moriches Union Free School District* as an originalist critique of First Amendment religion clause doctrine at the time.[123] Although much of the foundational caselaw in First Amendment religion claims focused on either the Establishment Clause or the Free Exercise Clause,[124] many modern disputes have highlighted an apparent tension between establishment-based restrictions on government and free exercise claims by persons.[125] Although some scholars have made compelling arguments that these clauses address different problems and should not naturally be in tension,[126] that is not the position taken by Supreme Court precedent.[127]

1. *In Establishment Clause Cases*

Professor Carl Esbeck arguably wrote the defining article considering originalism in Establishment clause cases.[128] He observes that *Everson v. Board of Education of the Township of Ewing*,[129] fundamentally diminished the original meaning of the Establishment Clause.[130] The word "establishment" was used and understood in sufficiently different ways at the time of founding so the original meaning of the Establishment Clause is unclear.[131] However, we can deduce certain things that the Establishment Clause is not. It does not completely prohibit congressional legislation regarding religion.[132]

Congress can touch on religion generally in legislation, provided that it does not legislate more narrowly about an establishment of religion.[133] Esbeck notes that "statutory exemptions to accommodate religion are generally constitutional because they work not to expand religion, but to

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122. *See,* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989). *See* Clarence Thomas, *Justice Thomas's Inconsistent Originalism*, 121 HARV. L. REV. 1431, 1434–38 (2008).

123. 508 U.S. 384, 400–01 (1993) (Scalia, J., concurring).

124. *See, e.g.*, Everson v. Bd. of Educ., 330 U.S. 1, 14–16 (1947).

125. *See, e.g.*, Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 788 (1973).

126. *See* Carl H. Esbeck, *Uses and Abuses of Textualism and Originalism in Establishment Clause Interpretation*, 2011 UTAH L. REV. 489, 601–08 (2011).

127. *See id.* at 606.

128. *See id.* at 490–623.

129. Everson v. Board of Ed of the Township of Ewing 330 U.S. 1 (1947).

130. *Id.* at 529 (Rutledge, J. dissenting).

131. *See* Esbeck, *supra* note 126, at 490 n.1.

132. *Id.* at 494.

133. *Id.*

expand religious freedom by leaving religion alone."[134] Additionally, the Free Exercise Clause and the Establishment Clause are not in tension with one another because they both negate government power in ways that protect religious freedom.[135]

> For well over a millennium there evolved a dual-authority pattern where both church and nation-state had their own center of power. While the line dividing authority between them has shifted through the centuries, the existence of this line has not been a subject of doubt…It liberates the civil polity to practice religion (or not) as citizens see fit and it secures the integrity of religious organizations by preventing government interference in the internal matters of organized religion. Accordingly, citizen support for religion is a voluntary act.[136]

Other scholars have considered originalism in a variety of Establishment Clause cases involving taxes[137] and government funding.[138]

134. *Id.* at 621.
135. *Id.*
136. *Id.* at 623.
137. *See* Mark Storslee, *Church Taxes and the Original Understanding of the Establishment Clause*, 169 U. PA. L. REV. 111, 111 (2020). Everson v. Bd. of Education (1947) generally understood rule that the Establishment Clause prevents government from subsidizing any religious activity. *Id.* Looking at the history, the Framers were more concerned with coercive church taxes or tithes, not with erecting such a complete barrier between church and state. *Id.* In fact, both the federal government and many states funded religious schools at the time of the Framing. *Id.* The question of whether or not funding something is prohibited by the Establishment Clause is really about whether or not that funding is motivated by a public good and is not conditioned on a beneficiary's religious conduct. *Id.*
138. *See, e.g.*, Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 346 (2002). In the context of President G.W. Bush's announcement of the formation of the Office of Faith-Based Programs, the article makes deep examination of the history of the establishment clause, and ultimately an argument that the Establishment Clause was enacted with the central purpose of "protecting the Lockean value of liberty of conscience." Regardless of the terminology and framing used (evangelicals use bible passages, rationalists use philosophy), most parties in the debate on the Establishment Clause ultimately argued from liberty of conscience. *Id.* at 349–50.

Others have critiqued Supreme Court originalism as either ahistorical[139] or opportunistic.[140]

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139. *See, e.g.*, Steven K. Green, *The Supreme Court's Ahistorical Religion Clause Historicism*, 73 BAYLOR L. REV. 505 (2021). There is nothing wrong with historical analysis in Constitutional interpretation, but everyone needs to be a lot more careful and rigorous in developing historical understanding for religion clause issues. Most common presumptions (that there is ample historical evidence of Framer intent, that such evidence will reveal a clear consensus, that history is objective or neutral, etc…) are wrong. *See id.* at 518–19, 540. History has its uses and can be helpful, but it is complex. *Id.* at 505. As a result, jurists need to be particularly wary of some of the main historical presumptions that, despite evidence they are oversimplified or inaccurate, nevertheless underpin current originalist analysis. *Id.* at 516.

140. *See, e.g*., Caroline Mala Corbin, *Opportunistic Originalism and the Establishment Clause*, 54 WAKE FOREST L. REV. 617, 617 (2019) (arguing that originalism is used so inconsistently by SCOTUS that the only conclusion is that it is being used opportunistically). She compares *Town of Greece v. Galloway*, 572 U.S. 565 (2014) and *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012 (2017). *Id.* at 619. In *Galloway*, the town of Greece opened town meetings with Christian prayers, and SCOTUS held that prayer policy was constitutional under an originalist analysis. 572 U.S. at 582–83, This holding is largely because the Framers hired a chaplain to open, in prayer, the session that created the Establishment Clause, thus, the Establishment clause could not prohibit legislative prayer. Also of note, *Galloway* (and its predecessor, *Marsh*) ignored (and failed) the *Lemon* test. *See* Corbin, *supra* note 140, at 622. In *Trinity*, however, the court seemingly ignored the Establishment Clause to find that Missouri violated the Free Exercise Clause by refusing to award the church a government grant. *Id.* at 619. Originalism has many respectable and rationally sound approaches that are defensible, even if some scholars disagree. *See id.* at 659. SCOTUS uses none of them, as a general rule. "The Supreme Court is a fair-weather originalist." *See* Andrew Koppelman, *Phony Originalism and the Establishment Clause Symposium: Original Ideas on Originalism*, 103 NW. U. L. REV. 727, 728–29 (2009) (using examinations of Rehnquist, Scalia, and Thomas's establishment clause analyses, Koppelman argues that current "originalist" establishment clause jurisprudence is opportunistic, historically inaccurate, and partisan). The idea that the state simply cannot show a preference for some faiths over others is mistaken—the First Congress rejected four draft amendments that would have specifically adopted nonpreferentialism. *Id.* at 732. Scalia was just too inconsistent to claim to be an originalist – he flip flops based on his desired outcomes. *Id.* at 733–40; *compare* Edwards v. Aguillard, 482 U.S. 578, 610–18 (1987) (Scalia, J., dissenting) *with* Lee v. Weisman, 505 U.S. 577, 631–36 (1992) (Scalia, J., dissenting). Thomas seems to think that the Establishment Clause never should have been incorporated into 14A by *Everson* in the first place. Koppelman, 103 NW. U. L. REV. 727, 740–41. All of these justices are certainly employing their own mode of Constitutional construction and interpretation, but none of them are actual Originalists. Instead, they nominally deploy respected scholarship and theory so that they can hang their hats on this thing called "Originalism."

2. *In Free Exercise Cases*

Originalism in the Free Exercise Clause is somewhat less theorized, but scholars have engaged it in broad, theoretical strokes[141] and in specific, narrower contexts.[142] One originalist method in free exercise cases is to consider the historical context and practice of religious freedom in the colonial and founding eras. For example, some originalists argue that the Free Exercise Clause was meant to protect a natural right of conscience that could not be infringed by the government, even if it meant granting exemptions from generally applicable laws.[143] Others contend that it was intended primarily to prevent coercion or discrimination based on religion, but not to create a general right to exemptions.[144] Another source that originalists use is the text and structure of the Constitution itself, pointing to the language of the Free Exercise Clause.[145] The clause prohibits Congress from making any law that prohibits the free exercise of religion, as evidence that the Clause was meant to be broad and absolute.[146] Critics of this approach have invoked the Necessary and Proper Clause, which grants Congress the power to make laws that are necessary and proper for

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141. *See, e.g.*, Vincent Philip Munoz, *The Original Meeting of the Free Exercise Clause: The Evidence from the First Congress*, 31 HARV. J. L. & PUB. POL'Y 1083 (2008), *and* KENT GREENAWALT, RELIGION AND THE CONSTITUTION, VOLUME 1: FREE EXERCISE AND FAIRNESS (Princeton University Press 2006).

142. HARVARD LAW REVIEW ASSOCIATION, *Blasphemy and the Original Meaning of the First Amendment*, 135 HARV. L. REV. 689, 690–91 (2021) (arguing that the original public meaning of the First Amendment, in a controversial anonymous student paper, that "whether in 1791 or 1868" allowed for criminalizing blasphemy). Historically, anti-blasphemy laws rested on policy concerns of protecting the public peace, and only criminalized violent or revulsive blasphemy. *Id.* at 691. A survey of history and appellate blasphemy decisions up until *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495 (1952), shows that anti-blasphemy laws were routinely upheld. *Id.* at 689–690. In Pennsylvania, which had the strongest state constitutional prohibition on religious establishment, permitted anti-blasphemy laws. *Id.* at 705. Additionally, the original understanding of freedom of speech and press did not protect blasphemy, which was often lumped in with obscenity and libel. *Id.* at 710.

143. *See, e.g.*, JOHN WITTE, JR. & JOEL A. NICHOLS, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 41–63 (2016).

144. *See, e.g.*, Zalman Rothschild, *Individualized Exemptions, Vaccine Mandates, and the New Free Exercise Clause*, 131 YALE L.J. F. (Apr. 29, 2022), https://www.yalelawjournal.org/forum/individualized-exemptions-vaccine-mandates-and-the-new-free-exercise-clause [https://perma.cc/67CX-58GM].

145. *See, e.g.*, Daniel Conkle, *The Free Exercise Clause: How Redundant, and Why?,* 33 LOYOLA U. L. REV. 95, 118 (2002).

146. *Id.*

carrying into execution its enumerated powers, as a limitation on the scope of the Free Exercise Clause.[147]

These approaches have ebbed and flowed in terms of influence depending on the makeup of the Court and the historical and cultural context in which specific disputes have arisen.[148] However, since the 1980s and even more over the past six years, the Court has put a thumb on the scale in disputes with apparent tensions between non-establishment and free exercise principles, to the benefit of free exercise claims.[149]

B. Originalism in the Post-Scalia Court

Although Republican appointed justices have held a majority in the court since 1970,[150] Justices Stevens and Souter eventually voted fairly reliably along with Democratic appointed justices,[151] and Justices Kennedy and O'Connor similarly broke ranks in a number of notable cases.[152] Justice Kennedy's retirement and replacement by Justice Kavanaugh appears to have given the Republican-appointed majority more stability, and Justice Coney Barrett's succession to Justice Ginsburg's seat has made it extremely unlikely that the Democratic appointed minority will hold sway on any issues contested along conventional ideological lines.[153] The most obvious pivot point has been the holding in *Dobbs v. Jackson Women's Health Organization* and the overturning of *Roe v. Wade*.[154] However, many cases decided since 2016

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147. *See, e.g.*, Marci A. Hamilton, *The Religious Freedom Restoration Act is Unconstitutional, Period*, 1 U. PA. J. CONST. L. 1, 15–16 (1998).

148. *See id.* at 8–14.

149. *See id.* at 12.

150. *See Justices 1789 to Present, About the Court, Justices,* SUPREME COURT OF THE U.S., https://www.supremecourt.gov/about/members_text.aspx [https://perma.cc/3EVQ-7XAA].

151. Adam Liptack, *Why Newer Appointees Offer Fewer Surprises*, N.Y. TIMES (Apr. 17, 2010), https://www.nytimes.com/2010/04/18/us/18memo.html [https://perma.cc/79NY-4WKB].

152. *Id.* For further commentary, *see, e.g.*, Lee Epstein, Andrew D. Martin, Kevin M. Quinn & Jeffrey A. Segal, *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?* 101 NW. U. L. REV. 1483 (2007).

153. *See, e.g.*, Angie Gou, *As Unanimity Declines, Conservative Majority's Power Runs Deeper Than the Blockbuster Cases*, SCOTUS BLOG (July 3, 2022), https://www.scotusblog.com/2022/07/as-unanimity-declines-conservative-majoritys-power-runs-deeper-than-the-blockbuster-cases/ [https://perma.cc/Q9L4-MYSZ].

154. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022) for a discussion of reactions to the opinion; *see also* Pema Levy, *The Movement to Expand the Supreme Court is Growing*, MOTHER JONES (May 26, 2023), https://www.motherjones.com/politics/2023/05/the-movement-to-expand-the-supreme-court-is-growing/ [https://perma.cc/32FR-5LWY].

have indicated the increased importance of originalism in the analysis of majority opinions.[155]

In considering recent cases prior to the 2021–2022 term, there are two notable opinions with split decisions that wrestle with originalism and which address both of the First Amendment religion clauses.[156]

1. *Trinity Lutheran v. Comer*

The first case was *Trinity Lutheran v. Comer* in 2017.[157] Trinity Lutheran Church operated a preschool and daycare center that applied for a state grant to resurface its playground with recycled tires.[158] The State denied the grant because its constitution prohibited public funds from being given to any church or religious group, a position that many presumed to be required by precedent.[159] In a 7-2 decision with Justices Sotomayor and Ginsburg dissenting, the court determined that the State's denial of the grant violated the church's free exercise of religion under the First Amendment.[160] The majority held that the State discriminated against the church based on its religious identity and imposed a penalty on its religious exercise.[161] The majority also rejected the State's argument that it had a compelling interest in maintaining a strict separation of church and state.[162]

Professors Micah Schwartzman and Nelson Tebbe have observed a dynamic they call "Establishment Clause appeasement" when liberal justices (typically Breyer and Kagan) would somewhat awkwardly side with the majority to mollify the impact of a conservative and presumably undesirable outcome (or perhaps to create broader consensus on other issues).[163] They observed this phenomenon in *Trinity Lutheran* along with

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155. *See* Erwin Chemerinsky, *Chemerinsky: Originalism Has Taken Over the Supreme Court*, AM. BAR ASS'N J. (Sept. 6, 2022, 8:00 AM), https://www.abajournal.com/columns/article/chemerinsky-originalism-has-taken-over-the-supreme-court [https://perma.cc/7SQB-GFRB].

156. Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449 (2017); Espinoza v. Montana Dept. of Revenue, 140 S. Ct. 2246 (2020).

157. *Trinity*, 582 U.S. at 459 (2017).

158. *Id.* at 453–454.

159. *Id.* at 456.

160. *Id.* at 462.

161. The court determined that "[t]he Department's policy expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character." *Id.*

162. *Id.* at 466.

163. *See* Micah Schwartzman & Nelson Tebbe, *Establishment Clause Appeasement*, 2019 SUP. CT. REV. 2071 (2020).

other pre-2020 cases noted here, and their thesis could apply to some later cases as well.[164]

The Roberts opinion in *Trinity Lutheran* is generally formalistic and engaged with caselaw cited by the litigants.[165] It identifies a tension between the free exercise rights of the plaintiff church and the anti-establishment justification of the State of Missouri in denying a grant consisting of public money.[166] This is construed as discriminatory and impermissible. Importantly, the court narrowly understands *Locke v. Davey* as not applying in the case of money used for a playground as opposed to for the training of ministers.[167] Some commenters have noted that this outcome indicates the first case mandating that the state provide a church funding as a requirement of the Free Exercise Clause despite the perhaps more obvious establishment issue created by such funding.[168]

Is this originalism or not? The Supreme Court's reasoning in *Trinity Lutheran Church v. Comer* might be considered originalist in the sense that it relied on the majority's understanding of the original public meaning of the Free Exercise Clause by allowing the church to participate in a state funding program like any other institution.[169] The Court reasoned that the policy discriminated against the church based on its religious identity and status, and that such discrimination was not justified by a compelling state interest, rejecting the argument that the policy was necessary to comply with the Establishment Clause.[170] Notably, the Court cited historical evidence that showed that the framers of the First Amendment did not intend to exclude churches from public benefits programs that were otherwise neutral and secular.[171] The Court also distinguished this case from previous cases that upheld restrictions on direct funding to religious institutions for religious activities or purposes.[172]

However, some critics have argued that the court's reasoning was not truly originalist, but rather opportunistic and outcome-driven,[173] asserting that the Court ignored or distorted the historical context and purpose of the Establishment Clause, which was meant to prevent any form of

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164. *Trinity,* 582 U.S. at 465.
165. *Id.*
166. *Id.*
167. *Id.*
168. *See, e.g.*, CHEMERINSKY, *supra* note 8, at 62; Douglas Laycock, *Churches, Playgrounds, Government Dollars—and Schools*, 131 HARV. L. REV. 133, 168–69 (2017).
169. *Trinity,* 582 U.S. at 467.
170. *Id.*
171. *Id.*
172. *Id.* at 464.
173. *See, e.g.*, Corbin, *supra* note 140, at 643–44.

government support or preference for religion over non-religion. The Court may have also overlooked state constitutional provisions that prohibited public funding of churches, like the one in Missouri, and limited the original understanding of the Free Exercise Clause.

2. *Espinoza v. Montana Dept. of Revenue*

A 5-4 opinion in *Espinoza v. Montana Department of Revenue* built upon some arguments in *Trinity Lutheran*. Montana had enacted a tax credit program that allowed donors to private scholarship organizations to receive tax credits for their contributions.[174] The scholarship organizations then provided scholarships to low-income families who wanted to send their children to private schools, including religious schools.[175] The Montana Department of Revenue issued a rule that prohibited the use of these scholarships at religious schools, citing a provision in the State Constitution that barred aid to sectarian schools.[176] Three mothers who wanted to use the scholarships for their children's tuition at a Christian school sued the department, claiming that the rule violated their free exercise of religion under the First Amendment.[177] The majority held for the parents, finding that the rule discriminated against religious schools and families on the basis of their religious status and thus violated the Free Exercise Clause.[178] The majority opinion, written by Chief Justice Roberts and joined by Justices Thomas, Alito, Gorsuch and Kavanaugh, reasoned that the rule imposed a special disability on religious schools and families that was not justified by any compelling state interest.[179] The majority also rejected the Department's argument that it was required by the State Constitution to exclude religious schools from the program, finding that such a provision was itself unconstitutional under the Federal Constitution.[180]

The opinion in *Espinoza* is arguably originalist in that it presumes to be consistent with the original meaning of the Free Exercise Clause in its protecting religious liberty and preventing government hostility toward religion.[181] Originalist commentators have noted that some of the framers

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174. Espinoza, v. Montana Dept. of Revenue, 140 S.Ct. 2246 (2020).
175. *Id.*
176. *Id.* at 2252.
177. *Id.*
178. *Id.* at 2262.
179. *Id.* at 2252.
180. *Id.* at 2262.
181. *Id.*

supported public funding for religious institutions.[182] And for many scholars, biased anti-aid provisions in state constitutions and the rise of strict barriers justified by a presumed "wall of separation" between church and state in cases like *Lemon*[183] and *Nyquist*[184] were never constitutionally legitimate.[185] Amicus briefs filed in support of the plaintiffs alleged that the Montana Constitution's no-aid provision was a product of nineteenth-century anti-Catholic bigotry and is not supported by an original understanding of the Free Exercise Clause.

After the arguably major shift represented by the earlier *Trinity Lutheran* case and the victory for the plaintiffs that was clear to members of the Court as they prepared their final opinions, Justice Thomas' and Alito's concurrences are notable in their explicit assertion that originalism was operative in these cases for several members of the Court. Of the sixteen uses of "original" or "originalism" in the reported case, thirteen are found in these concurrences and appear to indicate that perhaps the primary normative basis for religion clause interpretation is the original meaning.[186] The three mentions in the dissents are largely responding to this line in the sand.[187] Both Thomas and Alito identify aspects of Supreme Court jurisprudence and precedent in this area to be erroneous in view of originalist meanings, requiring a change in doctrine.[188]

As noted earlier, a primary justification for originalism had been that it served as a constraint on judicial discretion. This justification has eroded over the 2010s and seems weakened today (other than for rhetorical purposes). It has been replaced with the assertion that it ensures fidelity to the Constitution. Under this view, overturning past precedent in conflict with the original intent of the drafters is an imperative. Although *Trinity Lutheran* and *Espinoza* foreshadow that shift, it became more explicit in the post-Ginsburg Court.[189]

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182. *See, e.g.*, Elizabeth Katz, *Founders Designed Establishment Clause to Protect Religion, McConnell Says*, UVA LAWYER (Oct. 31, 2005), https://www.law.virginia.edu/news/2005_fall/mcconnell.htm [https://perma.cc/T4F2-WEWP] (in a lecture at the University of Virginia, Judge Michael McConnell asserted that the Establishment Clause was intended to promote religious institutions as they foster virtue in society).

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

184. Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 788 (1973).

185. *See, e.g.*, Richard Garnett, *Religious Freedom and Recycled Tires: The Meaning and Implications of Trinity Lutheran*, 2016–2017 CATO S.C. REV. 105, 107 (2016).

186. *Espinoza*, 140 S.Ct. at 2263–74 (Thomas, J. concurring) (Alito, J. concurring).

187. *Id.* at 2283.

188. *Id.* at 2264–74.

189. *See* discussion *supra* Part III.C.

C. Notable First Amendment Religion Cases Post-Ginsburg

In the past three years, there appears to be a shift in Supreme Court jurisprudence generally and in First Amendment religion disputes in particular. Although some of this may simply be a reaction to the unique challenges created by the global COVID-19 pandemic, there has been a notable uptick in the use of the "shadow docket," and there are now cases emerging with a very different Court dynamic as a result of the death of Justice Ginsburg and the addition of three appointees by President Trump. These dynamics seem to indicate a new majority that has sufficient votes to overturn a number of well-established precedents, justified in part by the claim that such rules conflicted with the original understanding of the Constitution.

1. Specter of the Shadow Docket

"Shadow docket" is the term William Baude coined in 2015 to describe the emergency orders and summary decisions issued by the Supreme Court without oral argument or full briefing.[190] The shadow docket differs from the "merits docket," where the Court decides cases after hearing oral arguments and receiving extensive briefs.[191] So-called shadow docket orders are typically unsigned and unexplained even though they may have effects similar to judgments with traditional opinions. For example, the Court used the shadow docket to uphold the Texas abortion ban[192] and to block the OSHA vaccination rule during the pandemic.[193] The shadow docket has been criticized for its lack of transparency, accountability, and deliberation, but it has become increasingly important in terms of outcomes.

In their defense, these sorts of orders and decisions allow the Court to act quickly and efficiently in cases where time is of the essence and where there is a clear legal basis for granting or denying relief.[194] The shadow

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190. *See* William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J. OF L. & LIBERTY 1 (2015).

191. *See, e.g.*, Samantha O'Connell, *Supreme Court "Shadow Docket" Under Review by U.S. House of Representatives*, AM. BAR ASS'N THE PROJECT BLOG (Apr. 14, 2021), https://www.americanbar.org/groups/committees/death_penalty_representation/publications/project_blog/scotus-shadow-docket-under-review-by-house-reps/ [https://perma.cc/3JU9-LRVS].

192. Whole Women's Health v. Jackson, 595 U.S. 30 (2021).

193. Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, OSHA, 595 U.S. 109 (2022).

194. *See generally* Steve Vladeck, *What I Realized After Justice Alito Attacked Me for Critiquing the Shadow Docket*, SLATE (May 24, 2023), https://slate.com/news-and-politics/2023/05/supreme-court-shadow-docket-alito-fight.html [https://perma.cc/26GS-X6B4].

docket can also help the Court manage its workload and avoid unnecessary delays in resolving disputes.[195] Justice Alito has been particularly defensive of this process.[196]

One of the most significant examples of ruling via the shadow docket is the case of *Tandon v. Newsom*,[197] which granted injunctive relief against a California regulation that had the effect of restricting religious gatherings in private homes to no more than three households at a time. The Court ruled that the regulation violated the Free Exercise Clause because it treated religious activities less favorably than comparable secular activities and blocked California from enforcing these COVID-19 restrictions, pending the disposition of the appeal in the Ninth Circuit and the petition for a writ of certiorari.[198] They issued the order without oral arguments, full briefing, or a signed opinion.[199]

This case arose from an admittedly complex conflict between public health and safety orders set in the midst of an unpredictable, global pandemic and First Amendment free exercise rights.[200] In hindsight it may be considered a reasonable outcome. However, with a more deadly and virulent strain, the stakes could have been far higher, and the Justices were in no better position to judge this than state or federal public health officials.[201] Thus, the willingness of a majority of the Court to short circuit the normal appeal and cert process with potentially catastrophic consequences could portend similar orders in the future.

Although this sort of action does not necessarily conflict with originalist understandings of Supreme Court authority (other than the assumption of judicial review), the increase in this sort of ruling is a deviation from past practice.[202] As the conservative wing of the Court now has a stronger majority, this sort of action could allow for significant policy changes without the sort of analysis and record provided by recent cases like *Carson v. Makin* and *Kennedy v. Bremerton School District*.[203]

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195. *Id.*

196. *See* Katie Barlow, *Alito Blasts Media for Portraying Shadow Docket in "Sinister" Terms,"* SCOTUSBLOG (Sep. 30, 2021), https://www.scotusblog.com/2021/09/alito-blasts-media-for-portraying-shadow-docket-in-sinister-terms/ [https://perma.cc/3CLL-JPMW].

197. Tandon v. Newsom, 141 S.Ct. 1294 (2021).

198. *Id.* at 1296.

199. *Id.*

200. *Id.*

201. *See, e.g.*, George Wright, *Free Exercise and the Public Interest After Tandon v. Newsom*, 2021 U. ILL. L. REV. ONLINE 189 (May 16, 2021), https://illinoislawreview.org/online/free-exercise-and-the-public-interest-after-tandon-v-newsom/ [https://perma.cc/X5YX-RJEK].

202. *See* Vladeck, *supra* note 194.

203. *Id.*

2. *Carson v. Makin*

Carson v. Makin is the first notable religion case from the 2021–22 Term.[204] Historically, the State of Maine had difficulty providing public high school education to students in isolated and rural areas.[205] As a solution, in 1873 the State established a tuition assistance system allowing resident students without access to public high school to use state funds for private schools, even outside of the state.[206] As of 2021, this assistance could be as much as $11,000.[207] Prior to 1981, these funds could be used for a variety of schools, including schools organized and run by religious organizations.[208] Starting in 1981, as a response to First Amendment Establishment Clause jurisprudence at the time, tuition assistance was only provided to "a nonsectarian school in accordance with the First Amendment of the United States Constitution."[209] The Maine Department of Education considered "a sectarian school to be one that is associated with a particular faith or belief system and which, in addition to teaching academic subjects, promotes the faith or belief system with which it is associated and/or presents the material taught through the lens of this faith."[210]

A complaint was filed by the Nelson and Carson families, who lived in areas without local public high schools, requesting tuition assistance under the state system.[211] They argued that disallowing assistance for sectarian schools violated their First Amendment right to the free exercise of religion.[212] Their arguments were made in the context of the 2002 school voucher case *Zelman v. Simmons-Harris*,[213] with support from the 2017 case, *Trinity Lutheran*[214] (discussed earlier). During the process of

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204. Carson *ex rel.* O. C. v. Makin, 596 U.S. 767 (2022).
205. *Id.* at 771.
206. *Id.*
207. *See* Nina Totenberg, *Supreme Court Rules Maine's Tuition Assistance Program Must Cover Religious Schools*, NAT'L PUB. RADIO (Jun. 21, 2022), https://www.npr.org/2022/06/21/1105348236/supreme-court-rulesmaines-tuition-assistance-program-must-cover-religious- [https://perma.cc/62PQ-AL8X].
208. *Carson*, 596 U.S. at 774 (quoting ME. REV. STAT. ANN., Tit. 20-A, Section 2951(2)).
209. *Id.* (quoting Carson v. Makin, 979 F. 3d 21, 38 (1st Cir. 2020)).
210. *Id.*
211. *Id.*
212. *Id.* at 776.
213. Zelman v. Simmons-Harris, 536 U.S. 639 (2002).
214. Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449 (2017).

litigation and appeal, the related case, *Espinoza*[215] (also discussed earlier), was decided and provided additional support for the plaintiffs' claims.[216]

The six-Justice majority concluded that "a benefit program under which private citizens direct government aid to religious schools wholly as a result of their own genuine and independent private choice does not offend the Establishment Clause[;]" meaning that Maine cannot prohibit tuition assistance to sectarian schools.[217] Notably, the Council of Islamic Schools in North America signed on to an amicus brief along with Catholic and Orthodox Jewish organizations in support of the family petitioners.[218] Amicus briefs seem to have become critically important in cases that may turn to the historical understanding of constitutional text. Justices increasingly rely on and cite amicus briefs that provide a historical narrative supportive of particular positions, and some historians and legal scholars have identified this reliance on potentially spurious historical claims as deeply problematic, a topic that will be addressed in greater detail later.[219]

The first significant test case will likely arise in Oklahoma, where the Catholic Archdiocese of Oklahoma City applied to operate a virtual charter school, arguing that the *Carson* opinion requires that they be allowed to do so.[220] The initial application was denied by the Oklahoma Statewide Virtual Charter School Board in April 2023, but the Archdiocese expected the application to ultimately be accepted or move to litigation.[221] The application was ultimately successful on June 5, 2023, and legal challenges are already being prepared.[222]

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215. Espinoza v. Montana Department of Revenue, 140 S.Ct. 2246 (2020).

216. Carson, 596 U.S. at 787.

217. *Id.* at 775.

218. Brief for Partnership for Inner-City Edu., Council of Islamic Schools in North America, et al., Carson v. Makin, 596 U.S. 767 (2022) (No. 20-1088).

219. *See, e.g.*, Green, *supra* note 139, at 535 n.190 ("Does the side with the greater number of amicus briefs raising a historical argument therefore prevail on a question of historical interpretation?").

220. *See* Sarah Mervosh & Ruth Graham, *Nation's First Religious Charter School Could Be Coming to Oklahoma*, N.Y. TIMES (Apr. 11, 2023), https://www.nytimes.com/2023/04/11/us/oklahoma-catholic-charter-school.html [https://perma.cc/T4WR-35X2].

221. *See* Jonah McKeown, *Oklahoma Board Rejects Initial Proposal for Catholic Charter School*, CATH. NEWS AGENCY (Apr. 12, 2023), https://www.catholicnewsagency.com/news/254082/oklahoma-board-rejects-initial-proposal-for-catholic-charter-school [https://perma.cc/4UJR-ZK86].

222. Sarah Mervosh, *Oklahoma Approves First Religious Charter School in the U.S.*, N.Y. TIMES (June 5, 2023), https://www.nytimes.com/2023/06/05/us/oklahoma-first-religious-charter-school-in-the-us.html [https://perma.cc/AJ2A-G322] ("Oklahoma approved what would be the nation's first religious charter school on Monday, handing a victory to Christian conservatives but opening the door to a constitutional battle over whether taxpayer dollars can directly fund religious schools […] Within minutes of the

In light of *Carson,* I expect that challenges will be unsuccessful and therefore a number of states will allow such schools. This will encourage religious charter applications in states less sympathetic to them (such as my home state of Washington). Presuming that some states will deny these sorts of applications, potential founders will inevitably claim free exercise infringement under *Carson*, and successor cases could form the basis for a Supreme Court precedent that will require state support for religious charter schools.

Although I believe it likely that the Supreme Court will uphold the approval of Oklahoma's religious charter school, it is not a certainty, and it is even less certain that the Supreme Court would require all states to allow religious charters. Such a case will almost certainly garner a significant number of amici from religious communities, including minority communities, uncomfortable with a system of state funding that they perceive could be marginalizing. I can imagine some alliances that emerged in recent cases becoming frayed as minority religious communities raise Establishment Clause objections. Some scholars anticipate that this may constitute a bridge too far for the current Court, particularly for Justices Roberts and Kavanaugh, at least one of whom would be essential for building a majority along with the other conservative justices.[223]

A more immediate response to *Carson* has been the expansion of state programs designed to funnel resources through state channels to private religious schools. A wide variety of such programs exist, but they fall within three broad categories—vouchers (as in the *Carson* case), educational savings accounts, and scholarship tax credits.[224] Under *Espinoza* and *Carson*, these sorts of programs must allow funds to be directed to religious schools if they are generally available.[225] In the past year there has been a substantial increase in the availability of these sorts of programs, in part as a coordinated response to *Carson*.[226] As of March

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vote, Americans United for Separation of Church and State announced that it was preparing legal action to fight the decision.").

223. Teach Coalition, *Teach Coalition Webinar: Oklahoma Approves First Fully State Funded Religious Charter School*, YOUTUBE (June 9, 2023), https://www.youtube.com/watch?v=FWZ2Wzg0VyE [https://perma.cc/DJ3H-VVZU].

224. *See, e.g.*, Nicole Stelle Garnett*, Unlocking the Potential of Private-School Choice: Avoiding and Overcoming Obstacles to Successful Implementation*, MANHATTAN INSTITUTE (Mar. 2023), https://files.eric.ed.gov/fulltext/ED627462.pdf [https://perma.cc/6F5E-THWB].

225. *See* Espinoza v. Montana Dept. of Revenue, 140 S. Ct. 2246 (2020); Carson *ex rel.* O.C. v. Makin, 596 U.S. 767 (2022).

226. For a detailed listing by state, *see Charter School Policies: State Profiles,* EDUCATION OF THE STATES (Jan. 28, 2020), https://www.ecs.org/charter-schools-policies-state-profiles/ [https://perma.cc/HV34-5N8M].

2023, there were voucher programs in sixteen states, educational savings accounts in six, and scholarship tax credits in nineteen.[227] The movement toward allowing public funding of religious schools has begun and is not likely to slow as long as there is demand for this sort of education.

In previous work, I have indicated my ambivalence with this rapid expansion of public financial support for religious education. The current trend in Supreme Court opinions has been to expand the understanding of the Free Exercise Clause to require greater funding opportunities for religious school choice than had been available previously,[228] which may have measurable positive outcomes in some areas. This may be especially true for religious communities that have been historically marginalized.[229] That said, there is a widely-held concern that a trend toward universal choice in education could harm public education in the United States and that this would likely disproportionately impact historically disadvantaged groups.[230]

3. *Kennedy v. Bremerton School District*

Kennedy v. Bremerton School District[231] addresses the right of a high school football coach to pray on the field after games.[232] This case is in the context of public schools and is viewed as problematic by many religious communities.[233] However, it reflects the posture of the Court in favoring the free exercise of religion over many competing concerns, even when

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227. *Id*.

228. See, e.g., Carson *ex rel.* O.C. v. Makin, 596 U.S. 767, 775 (2022).

229. *See, e.g.*, Michael Avi Helfand, *Religious Schools Should Receive State Funds for Special Education—Even in California*, MOSAIC (June 1, 2023), https://mosaicmagazine.com/picks/politics-current-affairs/2023/06/religious-schools-should-receive-state-funds-for-special-education-even-in-california/ [https://perma.cc/Z26T-4Y7C].

230. *See, e.g.*, Peter Bergman & Isaac McFarlin, Jr., *Who Does the Choosing Under School Choice?,* BROWN CTR. CHALKBOARD (Apr. 15, 2019), https://www.brookings.edu/blog/brown-center-chalkboard/2019/04/15/who-does-the-choosing-under-school-choice/ [https://perma.cc/DV29-AXRF] (reporting on a randomized controlled trial study that shows schools can discriminate against students who are perceived as harder to educate when given the option of school choice, finding that schools are less likely to respond to inquiries from parents of students with low grades, special needs, or behavioral issues); *and* Harry Brighouse & Adam Swift, *Putting Educational Equality in Its Place*, 3 EDUC. FIN. & POL'Y 444 (2008) (arguing that full privatization of schools would worsen the position of the least advantaged and would therefore be unjust).

231. Kennedy v. Bremerton Sch. Dist., 142 S.Ct. 2407 (2022).

232. *Id*. at 2416.

233. *See, e.g.*, Frederick Marks Gedicks, *Kennedy v. Bremerton School District: Gedicks's Comment*, BYU INT'L CTR. FOR L. & RELIGION STUD. (Aug. 9, 2022), https://talkabout.iclrs.org/2022/08/09/kennedy-v-bremerton-school-district/ [https://perma.cc/V3L2-J3NT].

there is an argument that for a teacher at a school event in public this might actually be an Establishment Clause problem.[234]

I view *Kennedy* as continuing the trajectory of opinions diverging from (or perhaps refining) Establishment Clause precedent, particularly when it appears to be in tension with the Free Exercise Clause. *Trinity Lutheran* used this tension to prioritize free exercise when states make public money available in order to prevent discrimination against religion, but the majority and concurring opinions made these arguments in fundamentally doctrinal and formalistic terms as described earlier.[235] *Espinoza* extends this reasoning to state money used to support education, but Thomas's and Alito's concurrences establish this in originalist terms requiring the overturning of indefensible precedents.[236] This strand of argument comes full circle in *Kennedy*, which addresses the issue of prayer by a public-school employee.[237] Having established the priority of the Free Exercise Clause in the previous two cases, the Court almost certainly narrowed the understanding and application of the Establishment Clause, going so far as to effectively overturn *Lemon v. Kurtzman*.[238]

Lemon created the so-called *Lemon* test used to determine whether governmental action violates the Establishment Clause.[239] It has three prongs: the governmental action must have a "secular"(non-religious) purpose, it must not have the primary effect of either "advancing" or "inhibiting" religion, and it must not result in an "excessive entanglement" of the government with religion.[240] If the governmental action fails any of these prongs, it is unconstitutional.[241]

Some debate exists as to whether the Supreme Court actually overturned the so-called *Lemon* test[242] in *Kennedy*.[243] However, the rule has been effectively discarded. Writing for the majority, Justice Gorsuch

234. *Kennedy*, 142 S.Ct. at 2417.

235. *See* discussion *supra* Part III.B.1.

236. *See* discussion *supra* Part III.B.2.

237. *See* Kennedy v. Bremerton Sch. Dist., 142 S.Ct. 2407 (2022).

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

239. *Id.*

240. *Id.* at 612–13.

241. *See id.*

242. *See* Peter Greene, *The Supreme Court Killed a Fifty-Year-Old Test for Church and State Separation. Will We Miss It?*, FORBES (July 13, 2022), https://www.forbes.com/sites/petergreene/2022/07/13/the-supreme-court-killed-a-fifty-year-old-test-for-church-and-state-separation-will-we-miss-it/ [https://perma.cc/L7MS-3AB6]; *see also* Press Release, Becket Fund for Religious Liberty, Supreme Court Overrules Lemon Test, Rules in Favor of Prayer for Football Coach (June 27, 2022), https://www.becketlaw.org/media/supreme-court-overrules-lemon-test-rules-in-favor-of-prayer-for-football-coach/ [https://perma.cc/C4SH-9L3K].

243. Kennedy v. Bremerton Sch. Dist., 142 S.Ct. 2407, 2427–28 (2022).

indicates that "the Establishment Clause must be interpreted by 'reference to historical practices and understandings,[]'" notably "in place of *Lemon*."[244] Justice Sotomayor's dissent criticizes Gorsuch's presentation of the facts, including photographic evidence of the prayers on the field.[245] She also asserts that the case "overrules" *Lemon* and "calls into question decades of subsequent precedents that it deems 'offshoots',"[246] perhaps fulfilling the aim of late-Justice Scalia who wrote of *Lemon*… "Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause once again[.]"[247] Although some commentators have called the death pronouncement of *Lemon* premature,[248] it is unclear how the rule would be applied in any meaningful sense, and recent federal cases citing *Kennedy* seem to presume that the *Lemon* test has been effectively overruled.[249] At the very least, it has been abrogated in such a way that it is unclear how it provides any clear rule for lower courts.[250]

Justice Gorsuch's opinion for the majority in *Kennedy* might be considered originalist in the sense that it relied on the historical practices and understandings of the First Amendment's religion clauses as noted earlier.[251] The Court held that the Bremerton School District violated Kennedy's rights under both clauses by suspending him for praying on the football field after games.[252] The Court reasoned that Kennedy's prayers were a personal religious observance that did not involve any coercion or endorsement of religion by the government, citing historical evidence that the framers of the First Amendment intended to prevent the government from imposing a state religion or favoring one sect rather than prohibit

244. *Id.* at 2428 (quoting Town of Greece v. Galloway, 572 U. S. 565, 576 (2014)).

245. *Id.* at 2436, 2438–39.

246. Kennedy, 142 S.Ct., at 2434 (2022) (Sotomayor, J. dissenting).

247. Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J. concurring).

248. *See, e.g.*, Valerie C. Brannon, *Kennedy v. Bremerton School District: School Prayer and the Establishment Clause*, CONG. RSCH. SERV. (June 30, 2022), https://crsreports.congress.gov/product/pdf/LSB/LSB10780 [https://perma.cc/9FCR-UXGR].

249. *See, e.g.*, Rojas v. City of Ocala, Fla., 40 F.4th 1347, 1351 (11th Cir. Jul. 22, 2022) ("After this appeal was filed, however, the Supreme Court drove a stake through the heart of the ghoul and told us that the *Lemon* test is gone, buried for good, never again to sit up in its grave. Finally and unambiguously, the Court has 'abandoned Lemon and its endorsement test offshoot.' […] Regardless of exactly when the ghastly decision was dispatched for good, the Supreme Court has definitively decided that Lemon is dead - long live historical practices and understandings.").

250. *See* Groff v. DeJoy, 600 U.S. 447, 143 S.Ct. 2279, 2281 (2023) (recalling "the Court's now-abrogated decision in *Lemon v. Kurtzman* . . . .").

251. Kennedy v. Bremerton Sch. Dist., 142 S.Ct. 2407, 2428 (2022).

252. *Id.* at 2416.

voluntary and private expressions of faith.[253] The Court distinguished this case from previous cases that involved government-sponsored prayers or religious activities in public schools, which were found to violate the Establishment Clause by emphasizing the private and personal nature of Kennedy's practice.[254]

Was this tack faithfully or consistently originalist? Perhaps the Court failed to adequately consider how Kennedy's prayers created a perception of endorsement and a pressure to conform among students, parents, and spectators, especially given his role as a public school employee and authority figure in the middle of the football field (even if immediately after a game had ended).[255] This case arose in the State of Washington, where there was deep concern expressed in local media that members of the community, particularly students, felt pressure to participate in these prayers.[256] Video of these prayers seems to depict large groups crowding around Coach Kennedy, making it hard to fathom how this practice would be considered private and personal.[257] Commenters, including dissenting Justices, objected to the Court's characterization of Kennedy's prayer as private, personal, and uncoercive.[258]

Although the issues are different, the court in the earlier case of *American Legion v. American Humanist Association*[259] made a similar decision to narrow non-establishment principles, moving away from the *Lemon* test.[260] The initial claim challenged the maintenance of a large cross erected as World War I memorial on public property in Maryland.[261] The Court concluded in a 7-2 decision that the although the cross may have had religious meaning when erected, as a war memorial its meaning had shifted, making it an acceptable public display.[262] Professors Nelson

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253. *Id.* at 2428

254. *Id*. at 2429.

255. *See, e.g.*, Ira C. Lupu & Robert W. Tuttle, *The Remains of the Establishment Clause*, 74 HASTINGS L.J 1763, 1803–04. https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2906&context=faculty_publications [https://perma.cc/3EJT-Y2KZ].

256. *See, e.g.*, *Bremerton Coach: A Case of Poor Leadership, not Religious Freedom*, SEATTLE TIMES (May 5, 2022), https://www.seattletimes.com/opinion/editorials/bremerton-coach-a-case-of-poor-leadership-not-religious-freedom/ [https://perma.cc/K9AE-VN6X].

257. *See, e.g.*, KING 5 Seattle, *"Praying Coach" Joe Kennedy Prepares to Head to Court*, YOUTUBE (June 6, 2017), https://www.youtube.com/watch?v=odQ37UozhoY [https://perma.cc/9AVW-955T].

258. Kennedy v. Bremerton Sch. Dist., 142 S.Ct. 2407, 2434–2439 (2022) (Sotomayor, J., dissenting).

259. Am. Legion v. Am. Humanist Ass'n, 139 S.Ct. 2067 (2019).

260. *Id.* at 2080.

261. *Id.* at 2078.

262. *Id.* at 2074. In 1918, "residents of Prince George's County, Maryland," decided to erect a cross as a World War I memorial. The 32-foot tall Latin cross has a plaque, naming

Tebbe and Micah Schartzman identified the broad majority as likely strategic.[263] If liberal justices were attempting to preserve non-establishment principles including the *Lemon* test by joining the conservative majority, *Kennedy* may represent the ultimate failure of that strategy.

4. *Cases Touching on Religion in the 2022-2023 Term*

Although the most recent Supreme Court cases that touch on religion, and at least tangentially the First Amendment, do not create the sort of obvious tension between the clauses found in *Carson* and *Kennedy*, they may provide some insight into the Court's use of originalism. This section will briefly consider the 2023 cases *Groff v. Dejoy*[264] and *303 Creative LLC v. Elenis*.[265]

a. Groff v. DeJoy

Gerald E. Groff, an evangelical Christian postal worker, sued Louis DeJoy, the Postmaster General of the United States Postal Service (USPS), for violating his religious rights under Title VII of the Civil Rights Act of 1964.[266] Groff claimed that USPS failed to reasonably accommodate his religious observance of Sunday Sabbath and retaliated against him for requesting such accommodation.[267] USPS insisted that accommodating Groff would impose an undue hardship on its business and other employees.[268] The U.S. District Court for the Eastern District of Pennsylvania granted summary judgment to USPS, finding that Groff failed to establish a prima facie case of religious discrimination or

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the 49 county soldiers who died in the war. The cross has been the site of patriotic events honoring veterans, and monuments honoring veterans of other conflicts were added in a nearby park. "The Maryland-National Capital Park and Planning Commission acquired the cross and the land" in 1961 and used public funds for its maintenance. The Supreme Court reversed the Fourth Circuit's decision that the display and maintenance of the cross violated the Establishment Clause, holding that although a war memorial erected in the form of a Latin cross may have originally served a religious purpose, the passage of time gave it historical and cultural significance so that its location on public land was not unconstitutional. The Court also held that under "a presumption of constitutionality for longstanding monuments, symbols, and practices," the expenditure of funds to maintain the cross did not amount excessive government entanglement with religion. *Id.* at 2074–78, 2082

263. *See* Schwartzman & Tebbe, *supra* note 163 at 277.
264. Groff v. Dejoy, 600 U.S. 447 (2023).
265. 303 Creative LLC v. Elenis, 600 U.S. 570 (2023).
266. *Groff*, 600 U.S. at 456.
267. *Id.*
268. *Id.*

retaliation.[269] The court also found that USPS had shown that accommodating Groff would cause more than a de minimis cost to its business and other employees, which constitutes an undue hardship under Title VII.[270] The U.S. Court of Appeals for the Third Circuit affirmed the district court's decision (with Judge Hardiman dissenting), holding that Groff did not show that he was subjected to an adverse employment action or that USPS's proffered reasons for its actions were pretextual.[271] The court also held that USPS met its burden of showing undue hardship by demonstrating that accommodating Groff would require it to incur significant overtime costs, disrupt its operations, and impose unfair burdens on other employees.[272]

The appellant, Groff, appealed to the Supreme Court, and the case was heard on April 18, 2022.[273] Although the dispute is fundamentally a Title VII claim, there is an implicit free exercise argument. A number of amicus briefs assert that *Trans World Airlines v. Hardison*[274] (which established the burden analysis used in this case) ought to be overturned for a variety of reasons, including its inconsistency with the Free Exercise Clause.[275] In discussing Hardison, Justice Alito acknowledged that a number of amici argued that the case also raised important Establishment Clause issues.[276]

In a surprising unanimous opinion authored by Justice Alito, the Court vacated the judgment below and remanded with a modified understanding of the *Hardison* case, which explicitly described an undue burden as one that is "substantial in the overall context of an employer's business."[277] It wrestled with the obvious tension between those standards and also considered the approach to accommodations under the Americans with Disabilities Act.[278] The opinion obtained unanimous consensus, technically upheld precedent, and engaged in reasonable practical and

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269. Groff v. DeJoy, No. 19-1879, 2021 WL 1264030, at *9 (E.D. Pa Apr. 5, 2021), *aff'd*, Groff v. DeJoy, 35 F.4th 162, 175–76 (3d Cir. 2022), *rev'd*, Groff v. Dejoy, 600 U.S. 447 (2023).

270. *Id.* at *11–*12.

271. *See* Groff v. DeJoy, 35 F.4th 162, 175–76 (3d Cir. 2022), *rev'd*, Groff v. Dejoy, 600 U.S. 447 (2023).

272. *Id.* at 175.

273. Groff v. DeJoy, 600 U.S. 447 (2023).

274. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977).

275. *See, e.g.*, Brief for the Church of Jesus Christ of Latter-Day Saints et. al. as Amici Curiae Supporting Petitioner, Groff v. DeJoy, 600 U.S. 447 (2023) (No. 22-174).

276. *Groff,* 600 U.S. at 467.

277. "We hold that showing 'more than a *de minimis* cost,' as that phrase is used in common parlance, does not suffice to establish 'undue hardship' under Title VII. . . . We therefore, like the parties, understand *Hardison* to mean that 'undue hardship' is shown when a burden is substantial in the overall context of an employer's business." *Id.* at 468.

278. *Id.* at 471; *see* Americans with Disabilities Act (ADA) of 1990, Pub. L. No. 101-336, 104 Stat. 327.

linguistic jurisprudence; however, it was arguably not textualist with regard to *Hardison* in that "*de minimis* cost" must now mean substantially more than that.[279]

b. 303 Creative LLC v. Elenis

Lorie Smith, the owner and founder of a Colorado graphic design firm, 303 Creative LLC, expanded her business to include wedding websites, but she opposes same-sex marriage on religious grounds and does not want to design websites for same-sex weddings.[280] The Colorado Anti-Discrimination Act (CADA) prohibits businesses that are open to the public from discriminating on the basis of numerous characteristics, including sexual orientation.[281] Smith challenged CADA in federal court in 2016, alleging numerous constitutional violations, before the state sought to enforce CADA against her.[282] The district court granted summary judgment for the State in 2019, and the U.S. Court of Appeals for the Tenth Circuit affirmed in 2021.[283] Smith applied for certiorari, claiming a breach of First Amendment speech rights protecting her artistic expression.[284] The Supreme Court opinion was delivered on June 20, 2023, ruling 6-3 in favor of Smith, holding that Colorado could not force her to create websites with content that would violate her conscience.[285]

The majority opinion, written by Justice Gorsuch, argues that Smith's planned wedding websites qualify as pure speech protected by the First Amendment,[286] and that Colorado had to satisfy strict scrutiny before compelling speech, which it did not.[287] The dissenting opinion, written by Justice Sotomayor and joined by Justices Kagan and Jackson, criticizes the majority for granting a business open to the public a constitutional right to refuse to serve members of a protected class.[288] The dissent argues that the state's compelling interest in preventing discrimination in public accommodations justifies incidental impact on Smith's speech within the context of her commercial activity, warning that the case ruling could undermine civil rights laws and invite discrimination against other

279. *See Groff,* 600 U.S. 447, 471–72.
280. 303 Creative LLC v. Elenis, 600 U.S. 570, 580 (2023).
281. *Id.* at 581; COLO. REV. STAT. § 24-34-601(1) (2022).
282. *See* 303 Creative LLC v. Elenis, 405 F. Supp. 3d 907, 908 (D. Colo. 2019), *aff'd*, 6 F.4th 1160 (10th Cir. 2021), *rev'd*, 600 U.S. 570 (2023).
283. 303 Creative, LLC v. Elenis, 6 F.4th 1160, 1190 (10th Cir. 2021), *rev'd*, 600 U.S. 570 (2023).
284. *See* 303 Creative LLC v. Elenis, 600 U.S. 570, 584 (2023).
285. *Id*. 602–603.
286. *Id.* at 587.
287. *Id.* at 583.
288. *Id.* at 603–04 (Sotomayor, J., dissenting).

historically marginalized groups.[289] Although this case (like *Masterpiece Cakeshop v. Colorado Civil Rights Commission*[290] and *Arlene's Flowers Inc. v Washington*[291]) directly addresses speech rights as they relate to commerce, especially when the activity involves artistic expression,[292] the underlying tension is between religious exercise and anti-discrimination law.[293]

There is a different line of cases raising similar issues but more directly related to *Employment Division v. Smith*[294] and the Religious Freedom Restoration Act of 1993 (RFRA) when there is a tension between a state law of general applicability that might substantially burden free exercise.[295] *Fulton v. City of Philadelphia*[296] involved a dispute between the City of Philadelphia and Catholic Social Services (CSS), a religious foster care agency that refused to certify same-sex couples as foster parents on religious grounds.[297] When the city stopped contracting with CSS because its policy violated the city's anti-discrimination law, CSS sued on First Amendment grounds.[298] The Supreme Court ruled unanimously in favor of CSS, holding that the city's refusal to contract with them violated the Free Exercise Clause.[299] However, the Court did not overturn its previous decision in *Smith*, which held that neutral and generally applicable laws do not violate the Free Exercise Clause even if they burden religious practice.[300]

The Court instead found that the city's anti-discrimination law was not generally applicable because it allowed for exceptions to be made at the discretion of a city official.[301] Therefore, the law was subject to strict scrutiny, and the Court concluded that the city failed to meet this standard, as it did not show that it had a compelling interest in denying an exception to CSS or that it could not accommodate CSS without undermining its

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289. *Id*. at 608.

290. Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com'n, 138 S.Ct. 1719 (2018).

291. Arlene's Flowers, Inc. v. Washington, 138 S.Ct. 2671 (2018).

292. *See* 303 Creative, LLC, 600 U.S. at 624 (Sotomayor, J., dissenting).

293. *See* NELSON TEBBE, RELIGIOUS FREEDOM IN AN EGALITARIAN AGE 1–2 (Harvard U. Press 2017).

294. Emp. Div., Dep't of Hum. Res. of Oregon v. Smith, 494 U.S. 872 (1990).

295. *See, e.g.*, Fulton v. City of Philadelphia, Pennsylvania, 141 S. Ct. 1868 (2021).

296. *Id.*

297. *Id.* at 1874.

298. *Id.* at 1876.

299. *Id.* at 1882.

300. *Id.*; Emp. Div., Dep't of Hum. Res. of Oregon v. Smith, 494 U.S. 872, 879 (1990). For an excellent analysis of substantial burden analysis under RFRA and Smith, *see generally* Michael A. Helfand, *Substantial Burdens As Civil Penalties*, 108 IOWA L. REV. 2189 (2023).

301. *Fulton*, 141 S. Ct. at 1878.

anti-discrimination objectives.[302] Roberts' opinion was joined by Justices Breyer, Sotomayor, Kagan, Kavanaugh, and Coney Barrett.[303] All the Justices other than Roberts, Sotomayor, and Kagan, joined one of the concurring opinions pushing for overturning *Smith*.[304] There are a number of pending cases that could bring *Smith* to an end, continuing the pattern of overturning well-established precedents presumed to have been wrongly decided under the First Amendment.[305]

D. Dynamics in Briefing

It is not at all surprising that adverse parties and those who file amicus briefs on their behalf would take opposite positions on appropriate interpretive theories, the impact of particular precedents, or the constitutional provisions applicable to a case. This is especially evident in the cases analyzed in this section—*Carson*, *Kennedy*, *Groff,* and *303 Creative*.[306] Those advocating for narrowed non-establishment restrictions and expanded free exercise come from a variety of sources, but most are affiliated with interested religious organizations.[307] Opposing briefs come from organizations concerned about eroding church-state boundaries,

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302. *Id.* at 1882.

303. *See id.*

304. *See id.* (Barrett, J., with whom Kavanaugh, J., and Breyer, J., join concurring in all but the first pararagraph); *Id.* at 1883 (Alito, J., with whom Thomas, J., and Gorsuch, J., join concurring); *Id.* at 1926 (Gorsuch, J., with whom Thomas, J., and Gorsuch, J., join concurring).

305. *See e.g.*, Appellant's Opening Brief at 37, 46, Tingley v. Ferguson, No. 21-35815 (9th Cir. Dec. 6, 2021); Brief for Wagner Faith & Freedom Center and Right to Life of Michigan in Support of Petitioner, Vitagliano v. County of Westchester, Petition for Writ of Certiorari (2023) (No. 23-74); *See generally* Jonny Williams, *Legal Advocates Eye Next Big Victory for Religious Liberty*, CHRISTIANITY TODAY (July 20, 2023) (expressing optimism that *Smith* will be overturned.).

306. *See* discussion *supra* Part III.C.1–4.

307. *See, e.g.*, Brief for Center for Religious Expression as Amicus Curiae in Support of Petitioners at 1, 303 Creative LLC v. Elenis, 600 U.S. 570 (2022) (No. 21-476) 2022 WL 2047737 at *1; Brief for the Thomas More Society and the Jewish Coalition for Religious Liberty as Amici Curiae in Support of Petitioner at 1, Groff v. Dejoy, 600 U.S. 447 (2023) (No. 22-174) 2023 WL 2347964 at *1; Brief for Ethics and Religious Liberty Commission of the Southern Baptist Convention, Billy Graham Evangelistic Association, National Association of Evangelicals, Concerned Women for America, Congressional Prayer Caucus Foundation, et al., as Amici Curiae in Support of Petitioner at 1–6, Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022) (No. 21-418) 2022 WL 685207 at *1–*6; Brief for the Jewish Coalition of Religious Liberty as Amicus Curiae Supporting Petitioners at 1–2, Carson *ex rel.* O.C. v. Makin, 596 U.S. 767 (2021) (No. 20-1088) 2021 WL 4173242 at *1–*2.

including labor unions, educational institutions and similarly concerned parties.[308]

The following chart was developed by a count of all filings for the appropriate cases as reported on Westlaw. The count was then verified twice.

Case Name	Amicus Briefs for Petitioner	Amicus Briefs for Respondent	Amicus Briefs in support of Neither Party	Amicus Briefs in Total
Carson v. Makin	35	12	n/a	47
Kennedy v. Bremerton School Dist.	39	21	n/a	60
Groff v. DeJoy	34	5	1	40
303 Creative LLC v. Elenis	42	27	4	73
Dobbs v. Jackson Women's Health Organization	72	52	3	130

1. Carson v. Makin

The overarching theme in arguments that amici made supporting the petitioners is two-fold: First, earlier jurisprudence (specifically *Zelman v.*

308. *See, e.g.*, Brief for Americans United for Separation of Church and State and Lambda Legal Defense and Education Fund, Inc. as Amici Curiae in Support of Respondent at 1, Groff v. Dejoy 600 U.S. 447 (2023) (No. 22-174), 2023 WL 2773541, at *1; Brief for American Postal Workers Union, Afl-Cio as Amicus Curiae in Support of Respondent at 1, Groff v. Dejoy, 600 U.S. 447 (2023) (No. 22-174), 2023 WL 2773547 at *1; Brief for National Education Association, American Federation of Teachers, Maine Education Association, Sanford Federation of Teachers, AFT Local 3711, and the Service Employees International Union as Amici Curiae in Support of Respondent at 1, Carson as next friend of O.C. v. Makin, 596 U.S. 767 (2021) (No. 20-1088) 2021 WL 5098229 at *1; Brief for the National Education Association and American Federation of Teachers as Amici Curiae in Support of Respondents at 1, Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022) (No. 21-418) 2022 WL 1032779 at *1; Brief for Amicus Curiae NAACP Legal Defense & Educational Fund, Inc., in Support of Respondents at 2–3, 303 Creative LLC v. Elenis, 600 U.S. 570 (2022) (No. 21-476) 2022 WL 3648196 at *3.

Simmons-Harris[309]) has held that states may subsidize religious education without violating the Establishment Clause.[310] Additionally, the fact that many other states have similar educational funding programs that allow families to direct funds to religious education undercuts Maine's argument that it has a compelling interest in excluding sectarian schools in order to comply with the Establishment Clause.[311] Second, strict scrutiny must apply because Maine's restrictions on tuition fund use is based on the religious status of the excluded schools, not the use of public funds.[312] Furthermore, whether the tuition program is a "traditional school-choice" program or not, the non-sectarian requirement violates the Free Exercise Clause by discriminating against religious families.[313]

In briefs supporting the respondent, the main arguments were all based in the unique and distinguishing nature of Maine's public school tuition program.[314] The program exists to meet the state's obligation to provide free public education, and it covers a number of communities where no public secondary school exists.[315] Because of this context, the program is not a school-choice or voucher program, and strict scrutiny is not warranted.[316] Rather, this case is only about Maine's obligation to provide free public education.[317]

2. *Kennedy v. Bremerton*

Briefs supporting the petitioners generally rely on casting the facts of Kennedy's prayers in a light that places them outside of his official job

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309. 536 U.S. 639 (2002).

310. *See, e.g.*, *id*. at 643–44; *see also* Brief for Cato Institute as Amicus Curiae Supporting Petitioners at 2, Carson v. Makin, 596 U.S. 767 (2022) (No. 20-1088), 2021 WL 4197935; States of Alabama, Arkansas, et al. as Amici Curiae Supporting Petitioners at 4, Carson v. Makin, 596 U.S. 767 (2022) (No. 20-1088), 2021 WL 4173440.

311. *See* Brief for States of Alabama, Arkansas, et al. *supra* note 311, at 18–20.

312. *See* Brief for Cato Institute *supra* note 310, at 4–5; Brief for States of Alabama, Arkansas, et al., *supra* note 310, at 3.

313. *See* Brief for Cato Institute *supra* note 310, at 4; Brief for States of Alabama, Arkansas, et. al *supra* note 310, at 19.

314. *See, e.g.*, Brief for Education and Constitutional Law Scholars as Amici Curiae in Support of Respondent at 3, Carson v. Makin, 596 U.S. 767 (2022) (No. 20-1088), 2021 WL 5098216; Brief for National Education Association et al. as Amici Curiae in Support of Respondent at 12, Carson v. Makin, 596 U.S. 767 (2022) (No. 20-1088), 2021 WL 5098229.

315. *Id.*

316. *See* Brief for Education and Constitutional Law Scholars, *supra* note 314, at 3; Brief for National Education Association, *supra* note 314, at 22.

317. *See* briefs cited *supra* note 314.

duties.[318] DeVos & the Freedom Institute claim that there are a number of issues with the facts in the Ninth Circuit decision, including that many people who joined Kennedy were not students or team members, and that the prayers at issue were all silent and private.[319] Furthermore, briefs supporting petitioner argue that the Ninth Circuit decision violates the free speech and free exercise rights of school employees, adversely impacting school districts by leading individuals to fear that working for a public school will come at the expense of their constitutional rights.[320]

Briefs supporting the respondent rely on the idea that there are heightened Establishment Clause concerns in the context of public elementary and secondary schools.[321] Freedom from religious coercion under the establishment clause requires that public schools stay neutral in matters of religion.[322] The First Amendment does not protect public employees' speech pursuant to performing their official duties, and Kennedy's prayers were absolutely in the course of his official duties as a football coach.[323] The school, therefore, has a right to limit that speech. A ruling for Kennedy would adversely affect public schools by depriving them of an objective and reliable way to evaluate if an employee's conduct is private or public; it could also chill the religious expression of students who are of a different religion.[324]

3. Groff v. DeJoy

Briefs supporting the petitioner mostly take issue with the "more than de minimis" standard of "undue hardship" put forward in *Trans World Airlines v. Hardison*.[325] Some argue that this standard is actually dicta,

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318. *See, e.g.*, Brief for Twenty-Seven States as Amici Curiae in Support of Petitioner at 3, Kennedy v. Bremerton Sch. Dist., 142 S.Ct. 2407 (2022) (No. 21-418), 2022 WL 2760544; Brief for Elisabeth P. DeVos & Defense of Freedom Institute for Policy Studies as Amici Curiae in Support of Petitioner at 2–3, Kennedy v. Bremerton Sch. Dist., 142 S.Ct. 2407 (2022) (No. 21-418), 2022 WL 685774.

319. *See* Brief for DeVos, *supra* note 318, at 2.

320. Brief for Twenty-Seven States *supra* note 318, at 4; Brief for DeVos *supra* note 318, at 3.

321. *See, e.g.*, Brief for U.S. House of Representatives Members as Amici Curiae Supporting Respondent, Kennedy v. Bremerton Sch. Dist., 142 S.Ct. 2407 (2022); Brief for States of NY, CA et al. as Amici Curiae Supporting Respondent, Kennedy v. Bremerton Sch. Dist., 142 S.Ct. 2407 (2022); Brief for the American Civil Liberties Union & ACLU of Washington as Amici Curiae Supporting Respondent, Kennedy v. Bremerton Sch. Dist., 142 S.Ct. 2407 (2022).

322. *See* briefs cited *supra* note 321.

323. *See id*.

324. *See id*.

325. *See, e.g.*, Brief for American Center of Law & Justice in Support of Petitioner at 2–3, Groff v. DeJoy, 600 U.S. 447 (2023) (No. 22-174); Brief for States of West Virginia,

which means there is no issue with stare decisis, while others make a reasonable interpretation argument that "de minimis" is so far from the plain meaning of "undue hardship" that the two ideas are incompatible.[326] Additionally, the more than de minimis standard is too easy for employers to meet, which unduly impacts minority religions whose sabbaths and holidays are not already integrated into the standard or traditional workplace calendar (unlike, say, Christmas, Easter, etc.).[327] Many of these briefs also argue that impact on co-workers should not be a consideration in the undue hardship analysis.[328]

The few briefs supporting the respondent argue that Groff is asking for preferential treatment.[329] Relying heavily on the validity of considering impact on co-workers, amici supporting respondents argue that all of Groff's colleagues are entitled to days off just as he is, and that weekend time off is preferable to all employees because of modern society (kids are in school Monday through Friday, partners and spouses may also work traditional weekday 9-5s).[330] Title VII only requires employers to show an undue burden on the *conduct* of business, not on the business owners or the business itself.[331] The inclusion of "conduct" makes the statutory language broad enough to include the impact on co-workers in the undue hardship analysis.[332]

4. 303 Creative LLC v. Elenis

Briefs supporting petitioners argue that what 303 Creative does is primarily expressive, and thus protected speech, despite the commercial element.[333] A number of amici argue that religious speech is the most

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et al. as Amici Curiae in Support of Petitioner at 1–2, Groff v. DeJoy, 600 U.S. 447 (2023) (No. 22-174); Brief for Religious Liberty Scholars & Employment Law Scholars as Amici Curiae in Support of Petitioner at 3, Groff v. DeJoy, 600 U.S. 447 (2023) (No. 22-174).

326. *See* Brief for American Center of Law *supra* note 325, at 4; Brief for States, *supra* note 326, at 1; Brief for Religious Liberty Scholars, *supra* note 325, at 3.

327. *See* Brief for States, *supra* note 325, at 1.

328. *See, e.g.*, Brief for Former EEOC General Counsel and Title VII Relgious Accommodation Expert as Amici Curiae in Support of Petitioner at 9–10, Groff v. Dejoy, 600 U.S. 447 (2023).

329. *See, e.g*., Brief for American Postal Workers Union et al. as Amicus Curiae In Support of Respondent, Groff v. DeJoy, 600 U.S. 447 (2023) (No. 22-174); Brief of the AFL-CIO as Amicus Curiae in Support of Respondent, Groff v. DeJoy, 600 U.S. 447 (2023) (No. 22-174) .

330. *See* Brief for American Postal Workers, *supra* note 329, at 5; Brief of the AFL-CIO *supra* note 329, at 22.

331. *See* Brief for the AFL-CIO, *supra* note 329, at 3–4.

332. *Id.* at 6–7.

333. *See, e.g.*, Brief for Arizona et al. as Amici Curiae in Support of Petitioners at 9–12, 303 Creative LLC v. Elenis, 600 U.S. 570 (2023) (No. 21–476); Brief for the Catholic

protected speech because, not only do the Free Exercise and Establishment Clauses exist, but they are also in the same amendment that protects speech, and the founders must have put all of these protections together for a reason.[334] Furthermore, while the compelling interest behind Colorado's statute is enough to withstand scrutiny, Colorado's statute is not sufficiently narrowly tailored.[335] This is evidenced by states with less restrictive laws who "have not had any difficulty continuing to protect their citizens against invidious status-based discrimination."[336]

Briefs supporting respondents argue that this is not about compelling an artist to speak, but regulating a business that has chosen to open to the public for the compelling state purpose of preventing discrimination in public accommodations.[337] There is a large focus on the fact that 303 Creative is a public-facing business, as opposed to an expressive artist who does not offer services to the public at large.[338] Additionally, amici argue that CADA (the Colorado Anti-Discrimination statute at issue) survives all levels of scrutiny because preventing discrimination is a compelling purpose, and the statute is narrowly tailored because it only regulates businesses that choose to open to the public.[339] Furthermore, despite the expressive component of petitioner's business, many amici argue that petitioner primarily provides a service similar to things like printing, commercial photography (e.g., school photos), or architecture, to name a few.[340] Because 303 Creative's services and product are primarily commercial, amici express concern that finding for the petitioner will create a system of speech-based exemptions to the anti-discrimination provisions or public accommodations laws.[341]

5. Comparison

In the 2019–20 term, an average of approximately 6.5 briefs were filed for petitioners and five for respondents, for an average of about twelve by

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League for Religious and Civil Rights as Amicus Curiae in Support of Petitioners at 15–16, 303 Creative LLC v. Elenis, 600 U.S. 570 (2023) (No. 21–476).

334. *See, e.g.*, Brief for Catholic League for Religious and Civil Rights *supra* note 333, at 6–13.

335. Brief for Arizona et al., *supra* note 333, at 19.

336. *Id.* at 20.

337. *See, e.g.*, Brief for ACLU et al. as Amicus Curiae in Support of Respondents at 6–11, 303 Creative LLC v. Elenis, 600 U.S. 570 (2023) (No. 21–476); Brief for First Amendment Scholars as Amici Curiae in Support of Respondents at 6–12, 303 Creative LLC v. Elenis, 600 U.S. 570 (2023) (No. 21–476).

338. *See id.*

339. *See id.*

340. *See, e.g.*, Brief for ACLU *supra* note 337, at 11.

341. *See id.* at 25–29.

February 2020, before many cases were heard.[342] Between 2010 and 2019 (October Terms), the rate generally increased, starting at an average of nine amici (which was considered extremely high at the time), climbing to sixteen.[343] In the 2022-23 term, the average number was more than twenty.[344] Some scholars have noted that these briefs increasingly provide historical justifications that are incorporated directly into opinions, raising potential questions regarding the methods and quality of historical analysis in these increasingly important texts.[345] These changes may indicate increasing polarization on these issues as well as growing concern that the Supreme Court is making significant departures from previous caselaw and method.

A number of scholars have identified Supreme Court reliance on dubious historical analysis from amicus briefs as a significant problem, particularly when originalist analysis demands historical understanding.[346] However, this problem is not isolated to First Amendment religion clause cases. Joshua Stein made similar observations in *District of Columbia v. Heller*,[347] which involved the interpretation of the Second Amendment right to bear arms.[348] In that case, the majority opinion by Justice Scalia relied heavily on an amicus brief by historians who argued that the Second Amendment was intended to protect an individual right to self-defense, not a collective right to militia service.[349] However, several other historians challenged this account (which was relied on by Justice Scalia) as selective and inaccurate, and pointed out that it ignored contrary

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342. *See* Adam Feldman, *Empirical SCOTUS: About this Term: OT 2019*, SCOTUSBLOG (Feb. 12, 2020), https://www.scotusblog.com/2020/02/empirical-scotus-about-this-term-ot-2019/ [https://perma.cc/2MVL-NYZK].

343. *See* Anthony J. Franze & R. Reeves Anderson, *Amicus Curiae at the Supreme Court: Last Term and the Decade in Review*, NAT'L L.J. (Nov. 18, 2020), https://www.arnoldporter.com/-/media/files/perspectives/publications/2020/11/amicuscuriae-at-the-supreme-court.pdf [https://perma.cc/V45U-Y3RT].

344. Based on a hand count of all briefs filed in the term.

345. *See, e.g.*, Green, *supra* note 51, at 534–35, 541, 558.

346. *See, e.g.*, Green, *supra* note 51; CHEMERINSKY, *supra* note 8, at 51–67; Corbin, *supra* note 140, at 643; Adam Liptak, *Seeking Facts, Justices Settle for What Briefs Tell Them*, N.Y. TIMES (Sep. 1, 2014), https://www.nytimes.com/2014/09/02/us/politics/the-dubious-sources-of-some-supreme-court-facts.html [https://perma.cc/P5DN-4UTS].

347. District of Columbia v. Heller, 554 U.S. 570 (2008).

348. *Id.* at 574–76; *see infra* note 349.

349. *See* Joshua Stein, *Historians before the Bench: Friends of the Court, Foes of Originalism*, 25 YALE J.L. & HUMANITIES 359, 365–366 (2013) ("[t]wo right-leaning scholars, on the other hand, could claim victory because the side for which their brief advocated, Heller's side, won…" referring to Brief for Academics for the Second Amendment as Amicus Curiae in Support of Respondent [Ratification And Original Public Meaning], District of Columbia v. Heller, 554 U.S. 570 (2008) (No. 07–290)).

evidence from historical sources.[350] Moreover, some of the sources cited in the brief were not primary sources, but secondary sources that arguably quoted or paraphrased primary sources out of context.[351] Thus, the majority opinion in *Heller* was arguably based on a flawed historical analysis that was influenced by an amicus brief with questionable credibility.[352]

Relying on sources from historical analysis that is largely disproven or dismissed by reputable scholars should be deeply concerning to the legal community as well as to the justices themselves. After all, originalism's claim to objectivity rests on empirically verifiable claims about the original public meaning of the text.[353] Anecdotally, in background reading for this project, many internet sites advocating for strict originalist interpretation cited to arguments similar to those used by authors such as David Barton[354] and Stephen McDowell.[355] Both have repeatedly attempted to shoehorn the views of key founders into an anachronistic frame, apparently consistent with contemporary Evangelicalism.[356] Although they have not been cited in Supreme Court amicus briefs, their approach to history and the First Amendment religion clauses has certainly been influential in many conservative Christian circles, creating space for the sort of problematic historical analysis noted above.[357] Though beyond the scope of this paper, a number of scholarly articles have identified anonymity and dark money support as

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350. *Id.* at 364–70.

351. *Id.* at 365–69.

352. *Id.* at 369–70.

353. *See generally* Jack M. Balkin, *The Construction of Original Public Meaning*, 31 CONST. COMMENT. 71 (2016) (discussing the importance of ascertaining the public's original understanding of the Constitution when different translations were distributed with textual differences).

354. *See, e.g.*, DAVID BARTON, ORIGINAL INTENT: THE COURTS, THE CONSTITUTION, & RELIGION (WallBuilder Press 2000).

355. *See generally,* PROVIDENCE FOUNDATION, https://providencefoundation.com/category/the-stategovernment/ [https://perma.cc/K8A9-B5AK] (all articles posted on the relationship between law and religion) (last visited Oct. 16, 2023).

356. *See* Barbara Bradley Hagerty, *The Most Influential Evangelist You've Never Heard Of*, NAT'L PUBLIC RADIO (Aug. 8, 2012) https://www.npr.org/2012/08/08/157754542/the-most-influential-evangelist-youve-never-heard-of [https://perma.cc/LU9A-PEHL]; PROVIDENCE FOUNDATION, *supra* note 355.

357. For Barton, see, e.g., Tara Isabella Burton, *Understanding the Fake Historian Behind America's Religious Right*, VOX (Jan. 25, 2018), https://www.vox.com/identities/2018/1/25/16919362/understanding-the-fake-historian-behind-americas-religious-right [https://perma.cc/GDH3-QGUR]. For McDowell, see, e.g., Paul Maltby, *Fundamentalist Dominion, Postmodern Ecology*, 13 ETHICS & ENV'T 119, 123, 126 (2008).

compounding the problem of poor or biased historical analysis in amicus briefs.[358]

IV. Implications for Constitutional Jurisprudence

Recent originalist (or at least arguably originalist) successes in *Carson*, *Kennedy*, and *Dobbs* will likely give rise to new cases moving caselaw rules in similar directions in the absence of major political backlash. Although cases from the 2021–2022 term (especially *Dobbs*) mobilized large numbers of voters, Republicans were still able to achieve a majority in the House of Representatives that has largely stymied the Biden administration's efforts to pass meaningful legislation—even when necessary to avoid defaulting on the U.S. debt.[359] To the extent that originalist holdings might be viewed as abhorrent to even a majority of the population, originalist scholars and jurists would advocate for constitutional amendments as a correction.[360] However, in the current social and electoral environment, it is virtually inconceivable that any process of amendment could be successful on wedge issues involving free exercise or establishment (or for abortion or gun regulation for that matter).[361]

Although many have criticized the Court for appearing to be teleological in its approach without regard for precedent, I expect that justices in the majorities in the cases discussed above would justify their rulings and opinions as grounded in formalistic legal reasoning rooted both in precedent and the Constitution itself. Given their opinions, questions/comments at oral arguments, and public statements, justices willing to overturn established precedent based on an originalist understanding of the religion clauses of the First Amendment (and in other

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358. Sheldon Whitehouse, *A Flood of Judicial Lobbying: Amicus Influence and Funding Transparency*, YALE L.J. FORUM (Oct. 24, 2021), https://www.yalelawjournal.org/forum/a-flood-of-judicial-lobbying-amicus-influence-and-funding-transparency [https://perma.cc/D5S7-BXNQ].

359. *See, e.g.*, Chris Stein, *Republicans and Democrats Deadlocked as US Debt Ceiling Deadline Nears – as it Happened*, GUARDIAN (May 8, 2023), https://www.theguardian.com/us-news/live/2023/may/08/debt-ceiling-republicans-biden-politics-live-updates [https://perma.cc/9GBV-82KN].

360. *See* John McGinnis & Michael Rappaport, *Originalism and the Good Constitution*, 98 GEO. L.J. 1693 (2009).

361. *See* Jesse Wegman, *Thomas Jefferson Gave the Constitution 19 Years. Look Where We Are Now*, N.Y. TIMES (Aug 4, 2021), https://www.nytimes.com/2021/08/04/opinion/amend-constitution.html [https://perma.cc/WYS8-VSQR]; Sarah Isgur, *It's Time to Amend the Constitution*, POLITICO (Jan. 8, 2022), https://www.politico.com/news/magazine/2022/01/08/scalia-was-right-make-amending-the-constitution-easier-526780 [https://perma.cc/WQJ3-Z5Q6].

areas) view this trendline in cases as a corrective to undo erroneous rules unsupported by the original understanding of the text. To the extent that this description is true, I would expect this pattern to continue.

Given recent precedent and the originalist understandings of the religion clauses held by members of the Supreme Court, I expect that we could have major shifts in a variety of areas. For example, it is likely that *Carson* will give rise to disputes that ultimately require states to authorize religious charter schools and may move toward a universal school choice system that could have profound consequences for public schools. *Kennedy* is likely to give rise to broadened free exercise claims in the workplace that could further marginalize religious minorities with potentially coercive impacts. If *Groff* now requires broader accommodation for days of religious observance, it could create extreme challenges for employers with significant economic impacts.

It is a notable transition from the days of *Lemon*, when U.S. constitutional law regarding church and state bore more of a resemblance to France in its concern for coercion.[362] I have written previously about similar approaches to secularism in Turkish constitutional law, and it is notable that Turkey has made a similar pivot from stronger secularism to a more permissive role for religion, even in governmental contexts.[363] Perhaps this represents a global shift toward conservative religious tradition that has impacted governments and law (as in Turkey, Hungary, India, Russia and others). Perhaps this is a reflection of a religious awakening in the United States as observed by commentators on the Asbury University revival.[364] However, that shift does not seem to be consistent with recent polling on religious affiliation and observance in the United States.[365]

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362. *See* Rik Torfs, *Church and State in France, Belgium, and the Netherlands: Unexpected Similarities and Hidden Differences*, 1996 B.Y.U. L. REV. 945, 955 (1996).

363. *See* Birol A. Yeşilada, *The AKP, Religion, and Political Values in Contemporary Turkey: Implications for the Future of Democracy*, 24 TURKISH STUD. 593 (2023).

364. *See* Jeff Jacoby, *Is This How a New Great Awakening Begins?*, BOSTON GLOBE (Apr. 2, 2023), https://www.bostonglobe.com/2023/04/02/opinion/religious-revival-asbury/ [https://perma.cc/6LAC-JMZN].

365. *See, e.g.*, *Religion and Congregations in a Time of Social and Political Upheaval*, PUB. RELIGION RSCH. INST. (May 16, 2023), https://www.prri.org/research/religion-and-congregations-in-a-time-of-social-and-political-upheaval/ [https://perma.cc/ARM7-V3EB] ("Religion is less important for Americans today than it was a decade ago."); *see also Modeling the Future of Religion in America*, PEW RSCH. CTR. (Sept. 13, 2022), https://www.pewresearch.org/religion/2022/09/13/modeling-the-future-of-religion-in-america/ [https://perma.cc/HRQ7-T9U3] ("Since the 1990s, large numbers of Americans have left Christianity to join the growing ranks of U.S. adults who describe their religious identity as atheist, agnostic or 'nothing in particular.' This accelerating trend is reshaping the U.S. religious landscape, leading many people to wonder what the future of religion in America might look like.").

This Court dynamic has significant implications for strategy in First Amendment litigation and for constitutional questions more broadly. The reality is that regardless of the justifications for originalism and whether they are defensible, a majority of the current Supreme Court along with a large portion of the judiciary and legal academy accept, and in some cases require, constitutional interpretation to be rooted in some form of originalism.[366] Given the ages and influence of members of this community, it is likely to remain a norm for the foreseeable future. Younger scholars and jurists have recognized this and are increasingly crafting arguments against conventionally conservative policy positions in originalist terms, often with great historical sophistication, including in First Amendment religion cases.[367]

V. CONCLUSION

The title of this article describes the state of First Amendment religion clause jurisprudence and its relationship with originalist thought. However, it may also describe the quality of devotion to originalism, either consistently or when convenient.[368] The new reality in U.S. Supreme Court jurisprudence is that originalist arguments must be addressed by litigants. That said, there is no guarantee that judges or justices who typically embrace originalist arguments will do so in every case or consistently.[369] However, compelling originalist arguments running counter to conventional conservative approaches to constitutional jurisprudence might provide opportunities for justices such as Roberts, Kavanaugh, Gorsuch, and Barrett to consider alternatives to the dominant narrative (depending on the specific issues).

Party and amicus briefs in recent free exercise, establishment, and related cases paint radically different pictures of the state of the law, evincing a tension between current precedent and originalist understandings of constitutional text.[370] Although some scholars have argued that the use and dismissal of originalist claims simply cloaks the policy preferences of jurists, I remain hopeful (perhaps as an act of

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366. *See generally* Mary Ziegler, *Originalism Talk: A Legal History*, 2014 B.Y.U L. REV. 869 (2014) (Discussing the evolution of a coherent originalist coalition dedicated to developing and reinforcing originalism as a constitutional interpretive theory used by the courts). It follows from this concerted effort that the members of this coalition, including any judicial appointees, would seek to require originalist interpretations in their courtrooms.

367. *See, e.g.* Cassens Weiss, *supra* note 4.

368. *See* Segall, *supra* note 86, at 171–91.

369. *See, e.g.*, Corbin, *supra* note 140.

370. *See* discussion *supra* Part III.D.1–5.

religious faith) that even in a new normal of accepted interpretive theories, jurists will strive to arrive at coherent rules that provide a degree of objectivity and predictability. The sad alternative is that law could be popularly considered a system of fiat benefiting the powerful, losing legitimacy in the eyes of many citizens. Some would argue that the law has never served a purpose other than to maintain the status quo for the wealthy and powerful and that court legitimacy was not broadly believed by those on the margins. However, cases like *Bush v. Gore*, *Citizens United*, *Dobbs*, and even *Kennedy* have eroded even the appearance of legitimacy for larger swaths of U.S. society.[371]

So then, are we all now originalists as postulated by Justice Kagan? If so, what meaning might the term retain, and how does it impact judicial decision-making? At the very least, it means that parties must address the methods and interpretive preferences of a majority of the Court which seem to be generally formalist, lightly historical, and often traditionalist (particularly when this view might be in tension with deep historical analysis). As Professor Chemerinsky has observed, it may be a fallacy to assume that there is a clear and fixed meaning to the Constitution that can be discerned by judges;[372] however, there must be some overlapping consensus as to interpretive methods in order for Supreme Court opinions to maintain some degree of continuity, coherence, and legitimacy. I share the view of Professor Michael Klarman that a number of iconic decisions were made possible by the sense that they reflected societal shifts allowing them to be received as legitimate (even if they resulted in some substantial pushback as in *Brown*).[373]

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371. *See* William W. Taylor III, *How the Supreme Court is Destroying Its Own Legitimacy*, ALL. FOR JUST. (Jan. 25, 2023) https://www.afj.org/article/how-the-supreme-court-is-destroying-its-own-legitimacy/ [https://perma.cc/JQM3-VKDU]; David A. Kaplan, *Has the Court Learned Nothing from Bush v. Gore?*, N.Y. TIMES (Nov. 2, 2020) https://www.nytimes.com/2020/11/02/opinion/election-supreme-court.html [https://perma.cc/X2P8-KQRU]; Robert W. Tuttle, David R. Kirschner, Sherry Kirschner, *Kennedy v. Bremerton School District – A Sledgehammer to the Bedrock of Nonestablishment*, AM. CONST. SOC'Y (June 28, 2022) https://www.acslaw.org/expert forum/kennedy-v-bremerton-school-district-a-sledgehammer-to-the-bedrock-of-nonestablishment/ [https://perma.cc/WU5M-C4U5]; The Editorial Board, *The Supreme Court Isn't Listening, and It's No Secret*, N.Y. TIMES (Oct. 1, 2022) https://www.nytimes.com/2022/10/01/opinion/supreme-court-legitimacy.html [https://perma.cc/73DR-E7LB].

372. Erwin Chemerinsky, *How the Scourge of Originalism is Taking over the Supreme Court*, LA TIMES (Sep. 6, 2022), https://www.latimes.com/opinion/story/2022-09-06/originalism-supreme-court-conservatives-fallacy-robert-bork [https://perma.cc/8YGA-QUHP].

373. *See generally* MICHAEL J. KLARMAN, BROWN V. BOARD OF EDUCATION AND THE CIVIL RIGHTS MOVEMENT (Oxford University Press 2007).

Even if originalist opinions in some sense faithfully adhere to the intent of the framers or original understandings, the Supreme Court may risk losing authority if it moves too far beyond the broad democratic consensus of the American electorate. Perhaps cases like *Trinity Lutheran*, *Espinoza*, *Carson*, and *Kennedy* may represent a general shift in American views of religion and the state such that they will eventually be viewed as important steps back to a more faithful interpretation of the Constitution. However, if these decisions ultimately lack that sort of broad support, they may lead to deeper division and the sort of polarization we have sadly come to expect as a "new normal."