St. John's Law Review

Volume 95
Number 3 *Volume 95, Summer 2022, Number 3*

Article 8

Funding Faith: The Paycheck Protection Program's Establishment Clause Violation

Brenna Jean O'Connor

FUNDING FAITH: THE PAYCHECK PROTECTION PROGRAM'S ESTABLISHMENT CLAUSE VIOLATION

BRENNA JEAN O'CONNOR[†]

INTRODUCTION

In the early months of 2020, COVID-19 had a swift and profound impact on public health, the economy, state and local governments, and businesses across the United States.[1] In response, on March 27, 2020, the United States Congress passed the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") to protect the American people from the worsening public health crisis and mitigate the resulting economic downturn.[2] Additionally, within the CARES Act, Congress established the Paycheck Protection Program ("PPP"), which expanded the Small Business Administration's ("SBA") authority to guarantee forgivable loans to eligible small businesses.[3] Among other prerequisites, the PPP required qualified small businesses to have 500 or fewer employees.[4] As evidenced by the maximum employee cutoff, the PPP was intended "to keep Main Street open," preserve American jobs and employment,[5] and subsidize payroll expenses

[†] Associate Managing Editor, *St. John's Law Review*; J.D. Candidate, 2022, St. John's University School of Law; M.A., 2016, Katholieke Universiteit Leuven; B.A., 2015, Loyola University Maryland. For my parents—their unconditional support is the foundation of my academic accomplishments. I also wish to thank my friends and family for their constant encouragement throughout my law school career. Finally, thank you to the editors of the *St. John's Law Review* for their insightful suggestions, careful revisions, and hard work on this Note.

[1] *See* Kelsey Snell, *What's Inside The Senate's $2 Trillion Coronavirus Aid Package*, NPR (Mar. 26, 2020, 5:34 PM), https://www.npr.org/2020/03/26/821457551/whats-inside-the-senate-s-2-trillion-coronavirus-aid-package [https://perma.cc/Q6T6-58CT].

[2] *Id.*

[3] *See* VALERIE C. BRANNON, CONG. RESEARCH. SERV., LSB10445, ELIGIBILITY OF RELIGIOUS ORGANIZATIONS FOR THE CARES ACT'S PAYCHECK PROTECTION PROGRAM 1 (2020), https://crsreports.congress.gov/product/pdf/LSB/LSB10445 [https://perma.cc/9KZG-W7RC].

[4] Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Pub. L. No. 116-136, § 1102, 134 Stat. 281, 288 (2020) (codified at 15 U.S.C. §§ 636, 9001 et. seq. (West 2021)).

[5] Reese Dunklin & Michael Rezendes, *Catholic Church Lobbied for Taxpayer Funds, Got $1.4B*, ASSOCIATED PRESS (July 10, 2020), https://apnews.com/article/dab8261c68c93f24c0bfc1876518b3f6 [https://perma.cc/C9ST-RKPN].

for those small businesses that were devastated by the economic shutdown.[6] The PPP loans could be used for payroll costs, as well as rent, utilities, and interest on mortgage payments.[7] To qualify for forgiveness, at least sixty percent must have been used for payroll expenses..[8]

Through the PPP, Congress modified the eligibility requirements for SBA loans from solely small, for-profit businesses to include nonprofit organizations.[9] The PPP was silent, however, as to whether faith-based nonprofit organizations were incorporated within those revised eligibility requirements.[10] As a result, the U.S. Conference of Catholic Bishops lobbied the federal government so that Catholic parishes across the country would qualify.[11] Following the initial uncertainty concerning nonprofit religious organizations' eligibility, on April 3, 2020, the SBA released an FAQ document signifying that, "notwithstanding any regulations to the contrary," faith-based organizations, including churches, could receive forgivable loans under the PPP.[12] The SBA unilaterally asserted that "no otherwise eligible organization" would be disqualified from receiving a loan due to its "religious nature, religious identity, or religious speech."[13] Prior to this guidance on religious organizations' eligibility, the SBA had explicitly excluded organizations primarily tasked with

---

[6] Michelle Boorstein, *The Stimulus Package Will Cover Clergy Salaries. Some Say the Government Has Gone Too Far.*, WASH. POST (Apr. 10, 2020, 3:15 PM), https://www.washingtonpost.com/religion/2020/04/10/cares-act-paycheck-protection-churches-salaries-coronavirus.

[7] § 1102, 134 Stat. at 290.

[8] U.S. SMALL BUS. ADMIN., PPP LOAN FORGIVENESS, https://www.sba.gov/funding-programs/loans/covid-19-relief-options/paycheck-protection-program/ppp-loan-forgiveness [https://perma.cc/GQL5-KVJJ] (last visited June 12, 2022).

[9] BRANNON, *supra* note 3, at 2; *see* § 1102, 134 Stat. at 286 ("[T]he term 'nonprofit organization' means an organization that is described in section 501(c)(3) of the Internal Revenue Code of 1986 and that is exempt from taxation under section 501(a) of such Code.").

[10] BRANNON, *supra* note 3, at 2.

[11] Dunklin & Rezendes, *supra* note 5. For example, "the Los Angeles archdiocese, whose leader heads the bishops' conference, paid $20,000 to lobby the U.S. Senate and House" to include religious organizations in the category of eligible nonprofits under the PPP. *Id.*

[12] BRANNON, *supra* note 3, at 2.

[13] U.S. SMALL BUS. ADMIN., FREQUENTLY ASKED QUESTIONS REGARDING PARTICIPATION OF FAITH-BASED ORGANIZATIONS IN THE PAYCHECK PROTECTION PROGRAM (PPP) AND THE ECONOMIC INJURY DISASTER LOAN PROGRAM (EIDL) 1 (2020), https://www.sba.gov/sites/default/files/2020-06/SBA%20Faith-Based%20FAQ%20Final-508.pdf [https://perma.cc/U92S-VYJG].

"teaching, instructing, counseling, or indoctrinating religion or religious beliefs, whether in a religious or secular setting" from receiving governmental loans, repeatedly citing Establishment Clause concerns.[14]

Additionally, the SBA's FAQ guidance and an interim final rule amended the affiliation requirements for small businesses and nonprofits, which govern when one organization is regarded as "affiliated" with another for purposes of calculating whether the organization has 500 or fewer employees.[15] With little explanation, the SBA stated that it would exempt institutions that typically would be subject to its affiliation rules if those organizations' connections with other entities were "based on a religious teaching or belief" or were "otherwise a part of the exercise of religion."[16]

The SBA had the Catholic Church and its associated entities in mind when it modified the affiliation rules and created the religious exemption.[17] Indeed, the SBA's guidance included an illustration of this new religious exemption using a local diocese as its principal example.[18] Without this exception, "many Catholic dioceses would have [remained] ineligible because . . . between their head offices, parishes and other affiliates," their employees surpassed the "500-person cap."[19] The SBA thus established the eligibility of networks of churches with considerably more than 500 employees for PPP loans.[20]

The SBA further stipulated that religious organizations were "eligible to receive SBA loans regardless of whether they provide

---

[14] BRANNON, *supra* note 3, at 1.

[15] *See id.* at 2–3.

[16] U.S. SMALL BUS. ADMIN., *supra* note 13, at 3–4; *see also* Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. 20817, 20820 (Apr. 15, 2020) (codified at 13 C.F.R. § 121.103(b)(10) (2021)).

[17] *See* U.S. SMALL BUS. ADMIN., *supra* note 13, at 3–4.

[18] *Id.* The question presented in the SBA's FAQ document was: "Is my faith-based organization disqualified from any SBA loan programs because it is affiliated with other faith-based organizations, such as a local diocese?" *Id.* at 3. The SBA provided the following answer to that question: "Not necessarily . . . . For example, if your faith-based organization affiliates with another organization because of your organization's religious beliefs about church authority or internal constitution . . . your organization would qualify for the exemption." *Id.* at 3–4.

[19] Dunklin & Rezendes, *supra* note 5.

[20] *See* Micah Schwartzman et al., *The Separation of Church and State Is Breaking Down Under Trump*, ATLANTIC (June 29, 2020), https://www.theatlantic.com/ideas/archive/2020/06/breakdown-church-and-state/613498 [https://perma.cc/8JW4-7UUJ].

secular social services."[21] Finally, the SBA took an extraordinary step and declared that PPP loans were to be "used to pay the salaries of ministers and other staff engaged in the religious mission of institutions."[22] Churches, synagogues, and other religious institutions around the country subsequently applied for the loans and collectively received up to $10 billion under the PPP.[23]

Catholic dioceses across the country promoted the PPP and shepherded resources to help affiliates navigate the loan's application process.[24] Although the Department of the Treasury did not originally disclose the exact monetary amounts of the loans,[25] the Department has since released detailed data about loan recipients and the funding they acquired under the PPP.[26] The most recent reports establish that, for example, the Trustees of St. Patrick's Cathedral on Fifth Avenue in New York City received $1,808,777.[27] Additionally, the Roman Catholic Diocese of Brooklyn received $2,388,907.[28] The Archdiocese of New York received $7,735,890,[29] though other estimates suggest that the Archdiocese received fifteen loans, reaching at least $28 million.[30] Under the PPP, the U.S. Catholic Church was approved for at least 3,500 forgivable loans, totaling between $1.4 and $3.5 billion.[31]

---

[21] U.S. SMALL BUS. ADMIN., *supra* note 13, at 1.

[22] *Id.* at 1–2.

[23] Tom Gjelten, *Religious Groups Received $6-10 Billion in COVID-19 Relief Funds, Hope for More*, NPR (Aug. 3, 2020, 6:57 PM), https://www.npr.org/sections/coronavirus-live-updates/2020/08/03/898753550/religious-groups-received-6-10-billion-in-covid-19-relief-funds-hope-for-more [https://perma.cc/7SNS-UBJV].

[24] Dunklin & Rezendes, *supra* note 5.

[25] Yonat Shimron, *Federal Loans for Small Businesses Went to Thousands of Churches and Other Religious Organizations*, WASH. POST (July 10, 2020, 4:49 PM), https://www.washingtonpost.com/religion/federal-loans-for-small-businesses-went-to-thousands-of-churches-and-other-religious-organizations/2020/07/10/da79ba8a-c244-11ea-9fdd-b7ac6b051dc8_story.html. Rather than indicating the specific amount of funding that each entity received, the initial release "broke down the data into five broad ranges or tiers: $150,000 to $350,000; $350,000 to $1 million; $1 million to $2 million; $2 million to $5 million; and $5 million to $10 million." *Id.*

[26] U.S. SMALL BUS. ADMIN., PPP DATA, https://www.sba.gov/funding-programs/loans/covid-19-relief-options/paycheck-protection-program/ppp-data [https://perma.cc/8QTV-MANZ] (last visited June 29, 2022).

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] Dunklin & Rezendes, *supra* note 5.

[31] *Id.*

This Note argues that the SBA's dispensation of between $1.4 and $3.5 billion in taxpayer money to the U.S. Catholic Church—explicitly to pay for clergy and religious staff's salaries—exemplifies a quintessential Establishment Clause violation, and, accordingly, was likely unconstitutional.

Part I examines the historical basis of the Establishment Clause and demonstrates that the Framers' principal concern was to eliminate and prohibit church taxes, which they viewed as infringements on freedom of conscience and religious liberty. Part II traces the Supreme Court's modern Establishment Clause jurisprudence and posits that while the Court has increasingly embraced a permissive approach to providing governmental financial assistance to religious institutions, it nevertheless requires that such funding be restricted to only secular use. Therefore, the government may not finance essentially religious endeavors. Finally, Part III argues that the government's dispensation of billions of taxpayers' dollars to the U.S. Catholic Church for the purpose of funding clergy members' salaries under the PPP not only contravenes the historical basis of the Establishment Clause but is distinguishable from all modern church-state Supreme Court decisions. The PPP funding provided to churches is a clear example of an Establishment Clause violation.[32]

I. THE ESTABLISHMENT CLAUSE AND GOVERNMENTAL FINANCIAL ASSISTANCE TO RELIGIOUS ORGANIZATIONS

A. Overview

The First Amendment's Establishment Clause, requiring that "Congress shall make no law respecting an establishment of religion"[33] is not self-explanatory; rather, it must be deciphered.[34] However, divergent approaches to constitutional analysis advance a variety of "interpretative guidelines."[35] As a result, the Supreme

---

[32] This Note acknowledges that the issue of taxpayer standing would likely arise if parties pursued lawsuits with respect to PPP funding provided to religious organizations. However, the issue of taxpayer standing is outside the scope of this Note. For a comprehensive analysis of taxpayer standing to challenge perceived Establishment Clause encroachments, see generally Case Comment, *Taxpayer Standing—Establishment Clause Violations*, 121 HARV. L. REV. 325 (2007).

[33] U.S. CONST. amend I.

[34] Caroline Mala Corbin, *Opportunistic Originalism and the Establishment Clause*, 54 WAKE FOREST L. REV. 617, 623 (2019).

[35] *Id.*

Court's modern Establishment Clause jurisprudence, as a whole, is "in shambles"[36]—it is both profoundly contradictory and almost irreparably confused.[37] There is no discernable consensus among the Justices regarding the appropriate doctrinal methods employed to evaluate Establishment Clause issues involving governmental financial assistance to religious institutions.[38] Individual Justices hold opposing views on the meaning of the Establishment Clause,[39] and the Court has never settled on one mode of interpretation "without exceptions."[40] Additionally, compared to other constitutional issues addressed by the Court, the invocation of the Founding Fathers is "unparalleled" in the Court's modern church-state decisions.[41] Thus, to attain clarity in interpreting the Court's Establishment Clause jurisprudence regarding governmental assistance to religious organizations, a review of the historical context of the Establishment Clause is essential.

---

[36] Neil Joseph, *Let History Repeat Itself: Solving Originalism's History Problem in Interpreting the Establishment Clause*, 15 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 1, 1 (2020) (quoting Utah Highway Patrol Ass'n v. American Atheists, Inc. 132 S. Ct. 12, 13 (2011) (Thomas, J., dissenting from denial of certiorari)).

[37] Steven G. Gey, *Reconciling the Supreme Court's Four Establishment Clauses*, 8 U. PA. J. CONST. L. 725, 725 (2006).

[38] *Id.* Gey contended that "[o]n a purely doctrinal level, the Court cannot even settle on one standard to apply in all Establishment Clause cases. At some point during the last ten years, one or more of the nine Justices have articulated ten different Establishment Clause standards." *Id.* Additionally, for a recent illustration of this discord on the Court, see generally the Court's most recent church-state decision, Espinoza v. Montana Department of Revenue, 140 S. Ct. 2246 (2020). There, in addition to Chief Justice Roberts' majority opinion, three Justices issued separate concurrences, and three Justices issued separate dissents. *Id.* The number of separate opinions alone is perhaps indicative of the apparent lack of consensus among the Justices regarding how to examine issues regarding financial assistance to religious organizations.

[39] *See* Gey, *supra* note 37, at 725.

[40] Douglas Laycock, *Why the Supreme Court Changed Its Mind About Government Aid to Religious Institutions: It's a Lot More than Just Republican Appointments*, 2008 BYU L. REV. 275, 278–79 (2008).

[41] Vincent Phillip Munoz, *The Original Meaning of the Establishment Clause and the Impossibility of Its Incorporation*, 8 U. PA. J. CONST. L. 585, 585 (2006); *see also* DANIEL L. DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE 99 (2002). Dreisbach asserted that "[h]istorians and jurists, not surprisingly, have been drawn to the saga of church and state . . . 'because the sources are uniquely ample, the struggle was important and dramatic, and the opinions of Madison, the principal framer of the First Amendment, and of Jefferson are fully elicited.' " *Id.*

B. The Precarious Historical Foundation of the "Wall of Separation" and No-Aid Strict Separationism

Since the Supreme Court of the United States decided *Everson v. Board of Education*, many have assumed that the Framers believed government to be categorically "forbidden from forcing taxpayers to subsidize religious activity."[42] In *Everson*, which is widely considered to be the bedrock of modern Establishment Clause doctrine,[43] Justice Hugo Black referenced Thomas Jefferson's and James Madison's arguments for religious freedom at the time of the founding[44] to support the conclusion that the Establishment Clause "forbids forcing citizens to pay for religion they oppose."[45] For example, Justice Black invoked a metaphor attributed to Thomas Jefferson, averring that "the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.' "[46] Justice Black additionally proffered Jefferson's contention "that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical."[47]

The majority opinion also paraphrased James Madison's arguments in favor of religious liberties and asserted that citizens should not be taxed to provide financial support for any religious institutions.[48] Based on these historical sentiments, Justice Black determined that "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions."[49] Following *Everson*, many accepted Jefferson's "wall of separation"

---

[42] Mark Storslee, *Church Taxes and the Original Understanding of the Establishment Clause*, 169 U. PA. L. REV. 111, 117 (2020).

[43] David E. Steinberg, *Thomas Jefferson's Establishment Clause Federalism*, 40 HASTINGS CONST. L.Q. 277, 309 (2013).

[44] *See* Everson v. Bd. of Educ., 330 U.S. 1, 11–13 (1947); *but see* Steinberg, *supra* note 43, at 309, 310 (critiquing the *Everson* Court's historical research).

[45] Storslee, *supra* note 42, at 112.

[46] *Everson*, 330 U.S. at 16 (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878)).

[47] *Id*. at 13 (quoting the preamble of Thomas Jefferson's *Bill for Establishing Religious Freedom*). *See also* Thomas Jefferson, *An Act for Establishing Religious Freedom (1786),* ENCYC. VA. (Dec. 7, 2020), https://encyclopediavirginia.org/entries/an-act-for-establishing-religious-freedom-1786 [https://perma.cc/Q33P-VYRX].

[48] *Everson*, 330 U.S. at 11–12. Justice Black noted that in James Madison's *Memorial and Remonstrance*, Madison "eloquently argued that a true religion did not need the support of law; that no person, either believer or non-believer, should be taxed to support a religious institution of any kind; that the best interest of a society required that the minds of men always be wholly free; and that cruel persecutions were the inevitable result of government-established religions." *Id.*

[49] *Id.* at 16.

as "an authoritative expression of the First Amendment,"[50] which fundamentally shaped the no-aid strict separationist approach to Establishment Clause interpretation.[51]

However, legal scholars have rightly criticized the *Everson* Court for a variety of reasons,[52] including its misplaced reliance on Jefferson's "wall of separation" metaphor.[53] First, Jefferson only used the phrase "wall of separation" in a private letter that he wrote in 1802,[54] nearly a decade after the Establishment Clause was ratified.[55] Additionally, Jefferson did not participate in drafting the Bill of Rights—Madison was the principal draftsman of the First Amendment.[56] Accordingly, scholars have asserted that "Jefferson's views" regarding the "wall of separation" are "clearly a *post hoc* gloss on the constitutional text by an individual" who neither drafted the text nor ratified the final version of the First Amendment, and cannot properly be applied to analyzing Establishment Clause claims.[57]

---

[50] DREISBACH, *supra* note 41, at 17.

[51] *See* Daniel L. Dreisbach, *A Lively and Fair Experiment: Religion and the American Constitutional Tradition*, 49 EMORY L.J. 223, 224 (2000) ("The most enduring legacy of *Everson v. Board of Education*—more important than the legal holding—is the lavish use of strict separationist rhetoric in both the majority and minority opinions.").

[52] *See* Steinberg, *supra* note 43, at 311. In *Everson*, "Justice Black's highly selective discussion of historical documents" led to a "badly compromised historical account." *Id.*

[53] *Id.* at 302–03 ("The Supreme Court erred by taking Jefferson's metaphorical wall out of context, and then using this wall as a basis for regulating relationships between state governments and religion."); *see* DREISBACH, *supra* note 41, at 98; *see also* Douglas G. Smith, *Thomas Jefferson's Retrospective on the Establishment Clause*, 26 HARV. J.L. & PUB. POL'Y 369, 378 (2003) (reviewing DREISBACH, *supra* note 41).

[54] DREISBACH, *supra* note 41, at 17.

[55] "The Establishment Clause was ratified on December 15, 1791." Storslee, *supra* note 42, at 163.

[56] DREISBACH, *supra* note 41, at 99. Jefferson's "letter's elevation to virtual constitutional status [is] surprising, because, as the American Minister to France from 1785 to 1789, Jefferson participated in neither the Constitutional Convention nor the First Federal Congress." *Id.* at 98. Additionally, the "First Congress debated the content of [what] came to be known as the First Amendment, in the summer of 1789 and approved the final text in September; Jefferson returned to American shores in November 1789." *Id.* at 98–99.

[57] Smith, *supra* note 53, at 378; *see* DREISBACH, *supra* note 41, at 99 (Jefferson's "influence on the actual text of the First Amendment was at most indirect"); *see also* Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933, 939 (1986) ("Exponents of strict separation are embarrassed by the many breaches in the wall of separation countenanced by those who adopted the [F]irst [A]mendment").

Scholars have subsequently denounced *Everson* for its resulting strict separationist approach[58] and the "no-aid" theory.[59] Those jurists and scholars who subscribe to the no-aid strict separationist approach contend that the Establishment Clause proscribes nearly all forms of governmental assistance to religious institutions.[60] However, in many respects, the strict separationist approach—built on that "wall of separation" between church and state—was inconsistent with the founding generation's understanding of religious freedom, which never required the complete detachment of the religious from the secular.[61] On the contrary, religion was "deeply intertwined" with founding-era American culture.[62] Indeed, during the Age of Enlightenment,[63] freedom of religion was rooted in a nearly unwavering belief in freedom of conscience.[64]

The Founders considered religion to be the expression of beliefs that were dictated by conscience, and understood freedom of conscience as a "distinctly rational process . . . involv[ing] . . . human reason, judgment, and understanding."[65] Additionally, those in the founding generation believed that freedom of conscience was the underpinning of the "moral principles on which civil society and republican governmental systems depended."[66] Freedom of conscience was

---

[58] *See* Steinberg, *supra* note 43, at 303; McConnell, *supra* note 57, at 933–34 ("One no longer can maintain . . . that the Framers originally intended the religion clauses 'to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.' ") (quoting Everson v. Bd. of Educ., 330 U.S. 1, 31–32 (1947) (Rutledge, J., dissenting)).

[59] *See* Storslee, *supra* note 42, at 183–84.

[60] Carl H. Esbeck, *Myths, Miscues, and Misconceptions: No-Aid Separationism and the Establishment Clause*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 285, 288 n.13 (1999).

[61] Laura Underkuffler-Freund, *The Separation of the Religious and the Secular: A Foundational Challenge to First Amendment Theory*, 36 WM. & MARY L. REV. 837, 844–45, 873 (1995).

[62] *Id.* at 960.

[63] Because an examination of freedom of conscience falls outside the parameters of this Note, for a comprehensive analysis of several philosophers' influence on eighteenth-century American thought and John Locke's foundational contribution to freedom of conscience applied to religious liberty, see generally Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346 (2002).

[64] Underkuffler-Freund, *supra* note 61, at 893 ("It has been written that at the time of the drafting of the Constitution, the idea of freedom of conscience knew no opposition.").

[65] *Id.* at 893, 919.

[66] *Id.* at 956.

critical to religious freedom, both from a practical standpoint as well as for the fundamental "protection of the very process of religious belief and conviction."[67] Thus, freedom of conscience was the primary concern among the Framers, who were intent on safeguarding religious liberties,[68] and who believed that "[o]nly conscience, rooted in transcendent moral or religious values . . . could provide . . . for the survival of government by the people."[69]

The determination to prevent a merger between governmental and religious institutions represented the marked exception to the general acceptance of the interconnectedness of the secular and the religious in early America.[70] The conception of the Establishment Clause—intended to limit the government's ability to interact or blend with religious institutions—was "a testament" to the founding generation's conviction that freedom of religion, rooted in freedom of conscience, demanded paramount protections.[71] The Framers believed that religious institutions represented fundamental manifestations of religious freedom and were necessary for the inculcation of moral values.[72] Nevertheless, the Framers cautioned that the fusion between those independent religious institutions and the government—creating an establishment[73]—could weaken freedom of religion in the young republic and destroy "the very freedom of conscience that their existence represented."[74] Nowhere was this more evident than in the prohibition of financial assistance to religious institutions in the form of church taxes.[75]

---

[67] *Id.* at 894.

[68] *Id.* at 844 ("The religious freedom that was the core of concern at the time was freedom of conscience; its preservation represented the highest common factor of agreement among anti-clericalists (such as Jefferson and Madison) and those composing other parts of the religious and political spectra.").

[69] *Id.* at 912.

[70] *Id.* at 845.

[71] *See id.* at 848.

[72] *Id.* at 959.

[73] *See* Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2131 (2003) ("An establishment is the promotion and inculcation of a common set of beliefs through governmental authority.").

[74] Underkuffler-Freund, *supra* note 61, at 959.

[75] Storslee, *supra* note 42, at 127; Underkuffler-Freund, *supra* note 61, at 930 ("Whatever the particular intentions of the framers of this document, it is clear that an 'establishment,' in the general understanding of the time, encompassed any tax monies given directly to a religious institution, whether designated by the state or by the taxpayer's choice.").

Ardent proponents of religious liberty opposed church taxes because the taxes constituted state-mandated "coerced religious observance[s]" that directly contravened ideas of religious freedom.[76] Leaders in the founding era viewed these taxes as "compelled sacrifice[s] to God," as the monies were "taken by force, solely to finance the religious function of ministers and churches."[77] The taxes were collected "to support religious worship by paying for clergy salaries and church buildings."[78] Where "individual conviction" was the central facet of religious faith,[79] church taxes "deprived citizens of the right to worship only as they wished," as directed by their consciences.[80] Therefore, constraints on religious exercise were restrictions on "freedom of conscience itself."[81]

In James Madison's *Memorial and Remonstrance Against Religious Assessments*, he forcefully argued against church taxes and wrote that religion "must be left to the conviction and conscience of every man."[82] Moreover, he argued that "in matters of [r]eligion, no man's right is abridged by the institution of Civil Society" and religion should be "wholly exempt from its cognizance."[83] Accordingly, Madison contended that a system which compels the payment of religious taxes is only slightly removed from a system which induces conformity with specific religious worship.[84] As Madison and his contemporaries advocated for religious liberties, they focused on "compelled worship, not compelled subsidy" in their objections to church taxes.[85] If the government could implement a church tax, even one as insignificant as three pence, the "government could mandate *any* act of religious worship," and that was an impermissible encroachment on religious freedom, vis-à-vis freedom of conscience.[86]

---

[76] Storslee, *supra* note 42, at 126.
[77] *Id.* at 118.
[78] *Id.* at 121.
[79] Underkuffler-Freund, *supra* note 61, at 945–46.
[80] Storslee, *supra* note 42, at 125.
[81] Underkuffler-Freund, *supra* note 61, at 919.
[82] James Madison, *To the Honorable General Assembly of the Commonwealth of Virginia: A Memorial and Remonstrance* (1785), *reprinted in* JAMES MADISON, SELECTED WRITINGS OF JAMES MADISON 21, 22 (Ralph Ketcham ed., 2006).
[83] *Id* at 22.
[84] *See id.* at 23.
[85] Storslee, *supra* note 42, at 127.
[86] *Id.* at 125–26.

While many leaders of the founding generation opposed financial assistance to churches in the form of coerced church taxes, they did not object to government funding of religious schools.[87] Indeed, the Founders identified a discernable distinction between church taxes, which were exceptional efforts to finance religious worship,[88] and taxes used to fund and support religious schools.[89] It was a common practice for governments to provide financial assistance to religious schools through tax money because those funds advanced a public good—education.[90] The government could financially support education because, as an institution, education aimed to enhance various other "goods that governments" were, in fact, "created to protect," including "personal security" and "material prosperity."[91]

The historical evidence thus lends itself to finding that "high and impregnable"[92] wall between churches, as such, and state. Taxes supporting clergy salaries and the religious functioning of churches constituted an impermissible breach of that wall.[93] However, the historical evidence further demonstrates that the founding generation overwhelmingly approved of providing taxpayer funds to certain religious institutions, such as schools.[94] Accordingly, the *Everson* Court erred in reading the historical accounts that were opposed to church taxes as unqualified objections to subsidizing religious organizations.[95]

II. THE MODERN ESTABLISHMENT CLAUSE AND FINANCIAL ASSISTANCE TO RELIGIOUS INSTITUTIONS

A. Overview

Over the past several decades, as the Court has moved away from no-aid separationism and increasingly toward a principle of neutrality, it has not explained how its present approach to

---

[87] *Id.* at 129. While an in-depth examination of tax monies directed to religious schools during the founding era is outside the scope of this Note, see generally *id.* at 150–69 for a thorough analysis of early American financial support for religious schools in nearly every state, as well as at the federal level.

[88] *Id.* at 133.

[89] *Id.*

[90] *Id.* at 150.

[91] *Id.* at 132.

[92] Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947).

[93] *See* Storslee, *supra* note 42, at 118.

[94] *See id.* at 150.

[95] *See id.* at 117, 126.

evaluating funding programs under the Establishment Clause comports with either *Everson*'s historical account or "with Founding-era history."[96] It appears, however, that like the Framers, the Court has implicitly perceived a discrete distinction between the government offering funding to support explicitly religious activities and providing financial assistance for public goods, like education.[97] Noticeably absent from the Court's jurisprudence are cases involving government funding used to subsidize clergy salaries and church functions.[98] Instead, the funding disputes in the collection of cases since *Everson* focus almost exclusively on neutrally offered governmental funding, provided either directly or indirectly to religious schools.[99] Moreover, in these cases, the organizations that received governmental assistance offered a "service that [could] be provided either by religious or secular organizations," and "[u]sually," the supported activity was "mostly or entirely secular even when provided by a church."[100]

B. The Caveat: Secular Uses Only

The *Everson* Court constructed the no-aid strict separationist approach for analyzing governmental financial assistance to religious schools on an unstable foundation.[101] Indeed, in the paragraph following Justice Black's contention that contributing any tax-raised funds to support an institution "which teaches the

---

[96] *Id.* at 115.

[97] *See id.* at 119 (footnote omitted) ("Members of the Founding generation who opposed church taxes did not object to funding religious schools. On the contrary, foreshadowing cases like *Espinoza*, many of them argued that *refusing* to fund certain schools because of their religious activity was a form of discrimination, and their fellow citizens agreed. On this view, government was not forbidden from providing funds to religious entities in pursuit of public goods. Rather, it was forbidden from taking religion into account—either by extracting funds solely to finance a recipient's religion, or by denying funds where the sole reason for doing so was disapproval of a recipient's religion.").

[98] BRANNON, *supra* note 3, at 4.

[99] Douglas Laycock, *Churches, Playgrounds, Government Dollars—and Schools?*, 131 HARV. L. REV. 133, 143 (2017) (contending that these cases have involved "funding of some broader category of private activity—medical care, social services, education, or . . . playground surfaces").

[100] *Id.*

[101] *See* Steinberg, *supra* note 43, at 311 ("Whatever the reason for Justice Black's highly selective discussion of historical documents, the result is a badly compromised historical account."); Laycock, *supra* note 99, at 138 ("The Court has never acknowledged the conflict between . . . [the no-funding principle and the nondiscrimination principle], but it has struggled with that conflict for seventy years.").

tenets and faith of any church" violated the Establishment Clause, the Court nevertheless decided the case on the basis of nondiscrimination.[102] The *Everson* Court held that no state could "exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation."[103] The absolute prohibition of financial assistance to religious schools was, therefore, "never true, not even in *Everson* itself."[104]

Lemon v. Kurtzman was likely the closest realization of the no-aid strict separationist approach.[105] There, the Court invoked the belief in an alleged "long political tradition of no aid"[106] to invalidate a financial assistance program designed to support teachers' salaries at a religious school.[107] Nevertheless, the Court asserted that "the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."[108] After *Lemon*, the Court capitalized on this "blurred, indistinct, and variable barrier" between religious schools and the government, and shifted toward the viewpoint that "government funding of secular services, including education, can flow to religious providers so long as it is distributed in religiously neutral ways."[109]

Everson's "nondiscrimination principle," based on neutrality toward and among religions, has overtaken its "no-aid principle" for issues involving governmental financial assistance provided to religious schools.[110] For example, in *Mitchell v. Helms*, a plurality of the Court applied a dismantled *Lemon* test[111] to conclude that religious schools could receive federal aid as long as they put the funding toward "secular, neutral, and nonideological" uses.[112] In

---

[102] Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947).

[103] *Id.*

[104] Laycock, *supra* note 99, at 137–38.

[105] *Id.* at 138–39; *see also* Laycock, *supra* note 40, at 277.

[106] Laycock, *supra* note 99, at 138–39.

[107] Lemon v. Kurtzman, 403 U.S. 602, 625 (1971).

[108] *Id.* at 614.

[109] *Id.*; Laycock, *supra* note 99, at 140.

[110] Laycock, *supra* note 99, at 140.

[111] Mitchell v. Helms, 530 U.S. 793, 807–08 (2000) (citations omitted) ("[I]n *Agostini* we modified *Lemon* for purposes of evaluating aid to schools and examined only the first and second factors. We acknowledged that our cases discussing excessive entanglement had applied many of the same considerations as had our cases discussing primary effect, and we therefore recast *Lemon*'s entanglement inquiry as simply one criterion relevant to determining a statute's effect.").

[112] *Id.* at 831, 861.

reaching this conclusion, the plurality examined neither the first prong nor the third prong [113] of the *Lemon* test.[114] Instead, the *Mitchell* plurality relied exclusively on a redefined second prong of the *Lemon* test[115] and considered whether the government financial aid program "ha[d] the effect of advancing religion" using three factors: whether the aid (1) "result[ed] in "governmental indoctrination," (2) "define[d] its recipients by reference to religion," or (3) "create[d] an excessive entanglement."[116]

The Court emphasized the principle of neutrality when considering the indoctrination element and indicated that it would uphold financial assistance programs that "offered [aid] to a broad range of groups or persons without regard to their religion."[117] The Court continued, holding that "[i]f the religious, irreligious, and areligious" were all eligible for governmental financial aid, it would be unlikely for anyone to presume that the government itself had conducted "any indoctrination."[118] Justice O'Connor's controlling concurrence, however, required aid that was "delivered directly from the government to the school"[119] be put only toward secular uses.[120]

In *Zelman v. Simmons-Harris*, the Court reduced what little remained of the *Lemon* test for governmental financial assistance issues "to a broad neutrality requirement."[121] There, the Court held that a governmental funding program was not subject to challenges under the Establishment Clause because it was "neutral with respect to religion" and "provide[d] assistance directly to a broad class of citizens who," according to their "own genuine and independent private choice," decided to direct the governmental financial aid to religious schools.[122] *Zelman* encapsulated the distinction between direct and indirect financial

---

[113] *See Lemon*, 403 U.S. at 612–13 ("Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; . . . finally, the statute must not foster 'an excessive government entanglement with religion.' ").

[114] *Mitchell*, 530 U.S. at 807–08.

[115] *See id.* at 612 (The second prong of the *Lemon* test requires that a statute's "principal or primary effect must be one that neither advances nor inhibits religion.").

[116] *Mitchell*, 530 U.S. at 808 (quoting Agostini v. Felton, 521 U.S. 203, 234 (1997)).

[117] *Id.* at 809.

[118] *Id.*

[119] Laycock, *supra* note 99, at 141.

[120] *Mitchell*, 530 U.S. at 831.

[121] Gey, *supra* note 37, at 732.

[122] Zelman v. Simmons-Harris, 536 U.S. 639, 652 (2002).

assistance programs to religious schools.[123] The government's role ended with the disbursements of the benefits—any incidental advancement of a religious message would be attributable only to the individual recipients of the aid, not the government.[124] Again, the Court decided that the Establishment Clause was not offended by neutral government aid programs which supported religious schools.[125]

Contrastingly, in *Locke v. Davey*, the Court upheld a statute that prohibited a recipient of a state-subsidized scholarship from using the funding to pursue a degree in devotional theology.[126] *Locke* foremost involved a Free Exercise challenge, but due to frequent tension between the Religion Clauses, the Court acknowledged that the Establishment Clause was also implicated.[127] The Court stated that "there is room for play in the joints" between the Religion Clauses because actions that may be permitted by the Establishment Clause may not likewise be required under the Free Exercise Clause.[128]

Relying on historical evidence, Chief Justice Rehnquist noted that most states in the founding era intended to "avoid an establishment of religion" by including "prohibitions against using tax funds to support the ministry" in their constitutions.[129] Additionally, the Chief Justice asserted that a plain reading of those constitutional provisions demonstrated that they "prohibited *any* tax dollars from supporting the clergy."[130] Chief Justice Rehnquist stated that early state constitutions approved of "explicitly excluding *only* the ministry from receiving state dollars," which strengthened the Court's contention "that religious instruction" is inherently "different" in character.[131] Thus, the Court rejected the argument that because the scholarship program "fund[ed] training for . . . secular professions, . . . the State must also fund training for religious professions."[132] In contrast to providing education and training for a secular profession,

---

[123] *See* Laycock, *supra* note 99, at 153; *Zelman*, 536 U.S. at 649.

[124] *Zelman*, 536 U.S. at 652–53.

[125] *Id.* at 662–63.

[126] Locke v. Davey, 540 U.S. 712, 724 (2004).

[127] *Id.* at 718–19.

[128] *Id.* at 718–20 (quoting Walz v. Tax Comm'n of New York, 397 U.S. 664, 669 (1970)).

[129] *Locke*, 540 U.S. at 722–23.

[130] *Id.* at 723.

[131] *Id.*

[132] *Id.* at 721.

"[t]raining someone to lead a congregation [was] an essentially religious endeavor."[133] The Court further asserted that since the nation's founding, "there have been popular uprisings against procuring taxpayer funds to support church leaders, which was one of the hallmarks of an 'established' religion."[134] Therefore, the Court determined that, given the significant historic interests at issue, a state could refuse to provide taxpayer-based funding for explicitly religious uses, such as training to join the ministry.[135]

The Court distinguished *Locke* in *Trinity Lutheran Church v. Comer* based on the secular use of the taxpayer money in the particular funding program at issue.[136] Chief Justice Roberts contended that in *Locke*, the scholarship recipient was denied such funding "not . . . because of who he *was*," but "because of what he proposed *to do*—use the funds to prepare for the ministry."[137] The Chief Justice stated that "there is no question that Trinity Lutheran was denied a grant simply because of what it is—a church."[138] Similar to *Locke*, *Trinity Lutheran* involved a Free Exercise claim.[139] The Court nevertheless referenced the Establishment Clause issue, albeit briefly, in a footnote, stating: "This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding."[140] Accordingly, without exploring the "uses" of the funding at issue, the Court implicitly affirmed that when providing funding to religious schools, or even a church that runs a pre-school, the aid must be "restrict[ed] . . . to secular uses."[141]

Unlike training for the ministry, playground resurfacing did not involve an "essentially religious endeavor"; rather, the resurfacing program supported an unquestionably secular

---

[133] *Id.*

[134] *Id.* at 722.

[135] *Id.* at 725.

[136] Trinity Lutheran Church v. Comer, 137 S. Ct. 2012, 2022–23 (2017).

[137] *Id.* at 2023.

[138] *Id.*

[139] *Id.* at 2019; Corbin, *supra* note 34, at 641 ("Although Trinity Lutheran Church brought a Free Exercise Clause claim, the government's defense was establishment-based."); Kermit V. Lipez, *Reflections on the Church / State Puzzle*, 72 ME. L. REV. 325, 335 (2020) (noting that *Trinity Lutheran* was a Free Exercise case with Establishment Clause implications).

[140] *Trinity Lutheran*, 137 S. Ct. at 2024 n.3.

[141] Storslee, *supra* note 42, at 114 ("Under current doctrine, government may provide money directly to churches and religious schools that deliver secular goods so long as it restricts the aid to secular uses.").

activity.[142] The limited "focus on something so secular as playgrounds and the safety of children" also perhaps explains the Court's 7-2 decision to uphold the funding program.[143] The Court's holding thus endorsed the underlying requirement that governmental funding provided to religious institutions must be used for "some activity that falls within a neutrally funded secular category."[144]

Everson's progeny demonstrate that the Court has "essentially abandoned any effort to separate church and state" when evaluating issues surrounding governmental financial assistance to religious organizations such as schools.[145] However, the Court has left "open the possibility [that] a useful distinction" may still be "drawn between laws that discriminate on the basis of religious *status* and religious *use*."[146] The Court relied on such a distinction in *Espinoza v. Montana Department of Revenue*.[147] In *Espinoz*a, as in *Trinity Lutheran* before it, the Court first distinguished *Locke*, noting that there was neither an "essentially religious endeavor," nor a "historic and substantial" interest at issue in the funding program.[148] *Espinoza* was deemed more analogous to *Trinity Lutheran* and, therefore, "the proper resolution of *Espinoza* was a straightforward application of *Trinity Lutheran*."[149]

The Court contended that, like *Trinity Lutheran*, where the majority held that the funding policy impermissibly "discriminated 'based on religious identity,' " *Espinoza* also

---

[142] *Trinity Lutheran*, 137 S. Ct. at 2023 (citation omitted) (quoting Locke v. Davey, 540 U.S. 712, 721–22 (2004)) ("The claimant in *Locke* sought funding for an 'essentially religious endeavor . . . akin to a religious calling as well as an academic pursuit,' and opposition to such funding 'to support church leaders' lay at the historic core of the Religion Clauses. Here nothing of the sort can be said about a program to use recycled tires to resurface playgrounds.").

[143] Laycock, *supra* note 99, at 133.

[144] *Id.* at 157.

[145] Gey, *supra* note 37, at 726.

[146] *Trinity Lutheran*, 137 S. Ct. at 2025 (Gorsuch, J., concurring); Laycock, *supra* note 99, at 157 ("Footnote 3 reserves the question of religious uses . . . . [r]eligious schools may or may not become eligible for direct funding, and if they do, the money may or may not have to be segregated and restricted to secular uses.").

[147] Stephanie H. Barclay, *Unentangling Entanglement*, 97 WASH. U. L. REV. 1701, 1713–14 (2020) ("In its recent *Espinoza* decision, the Court based its decision requiring public support for a religious school on a distinction between religious status and religious use.").

[148] Espinoza v. Montana Dep't of Revenue, 140 S. Ct. 2246, 2257–58 (2020).

[149] Michael Bindas, *The Status of Use-Based Exclusions & Educational Choice After* Espinoza, 21 FEDERALIST SOC'Y REV. 204, 208 (2020).

"turn[ed] expressly on religious status and not religious use."[150] Chief Justice Roberts concluded that a state "cannot disqualify some private schools solely because they are religious."[151] The word "solely" incorporated the Chief Justice's reliance on the distinction between religious status and religious use.[152] While Chief Justice Roberts acknowledged that other Justices questioned the utility of the status-use distinction,[153] he nevertheless concluded that the Court need not further examine it because under *Trinity Lutheran*, "such status-based discrimination is subject to 'the strictest scrutiny.' "[154]

Although "jurisprudence grounded on a status-use distinction" may lead to "more questions than answers,"[155] even those Justices who were skeptical of the line between religious status and religious use acknowledged its continued existence.[156] The Chief Justice's explicit reliance on the status-use distinction, as well as his reluctance to elaborate on or analyze the religious use of the funding, affirmed the status-use distinction's place in the Court's current church-state doctrine.[157] The possibility that the government may preclude taxpayer funds from being put to fundamentally religious use remains.[158] Therefore, while the neutrality approach reigns when determining whether religious

---

[150] *Espinoza*, 140 S. Ct. at 2255–56.

[151] *Id.* at 2261.

[152] Lipez, *supra* note 139, at 374–75 (arguing that the "distinction in *Espinoza* [is] not new").

[153] *Espinoza*, 140 S. Ct. at 2257. Chief Justice Roberts cited Justice Gorsuch's concurrence in *Trinity Lutheran*, in which Justice Gorsuch noted that he "harbor[ed] doubts about the stability of such a line." Trinity Lutheran Church v. Comer, 137 S. Ct. 2012, 2025 (2017) (Gorsuch, J., concurring). Justice Gorsuch continued: "Is it a religious group that built the playground? Or did a group build the playground so it might be used to advance a religious mission? The distinction blurs in much the same way the line between acts and omissions can blur when stared at too long." *Id.*

[154] *Espinoza*, 140 S. Ct. at 2257.

[155] *Id.* at 2275 (Gorsuch, J., concurring).

[156] *See id.* (citation omitted) ("The Court characterizes the Montana Constitution as discriminating against parents and schools based on 'religious status and not religious use.' No doubt, the Court proceeds as it does to underscore how the outcome of this case follows from *Trinity Lutheran Church of Columbia, Inc. v. Comer*, where the Court struck down a similar public benefits restriction that, it held, discriminated on the basis of religious status."); *id.* at 2285 (Breyer, J., dissenting) ("Even if the schools' status were relevant, I do not see what bearing the majority's distinction could have here.").

[157] Lipez, *supra* note 139, at 375–76. In *Espinoza*, Chief Justice Roberts remained "notably circumspect about the meaning of the status/use distinction," and consequently, "the ultimate significance of the distinction will only become clear with future litigation." *Id.*

[158] Barclay, *supra* note 147, at 1713–14.

organizations are eligible to receive financial assistance, the government may not provide taxpayer funding to religious institutions in support of inherently religious activities without violating the Establishment Clause.[159]

III. THE PPP LOANS PROVIDED TO SUBSIDIZE CLERGY SALARIES LIKELY VIOLATED THE ESTABLISHMENT CLAUSE

It is manifestly unclear whether or how the SBA's guidance for disbursement of PPP loans to religious organizations comports with either the relevant historical evidence or the modern Court's interpretation and application of the Establishment Clause.[160] The PPP's stated purpose was to cover payroll expenses, including that of clergy and "other staff engaged in the religious mission of institutions."[161] Notwithstanding the various ways in which a recipient could use the PPP funding,[162] in order for the government to eventually forgive the loans, at least sixty percent of the loan was required to go toward salary payments.[163] However, the SBA's contention that the PPP loans could be used to pay clergy members' salaries is likely impermissible under the Establishment Clause.[164]

Directing taxpayer money either to one established church or to all churches to be shared on some neutral basis to finance religion represents the quintessential Establishment Clause violation that the founding generation contemplated centuries ago.[165] Taxpayer money provided through the PPP to churches is not synonymous with the church taxes that the Framers prohibited in pursuit of religious liberty. However, the method through which the taxes were collected and disbursed does not appear to be the controlling element.[166] That the funds dispensed under the PPP were from a general, federal tax fund and not earmarked for religious entities at collection should not be

---

[159] *See* Laycock, *supra* note 99, at 157.

[160] Nelson Tebbe et al., *The Quiet Demise of the Separation of Church and State*, N.Y. TIMES (June 8, 2020), https://www.nytimes.com/2020/06/08/opinion/us-constitution-church-state.html ("Now the core constitutional rule against using taxpayer dollars to pay clergy is slipping away in [the] face of the coronavirus crisis.").

[161] U.S. SMALL BUS. ADMIN., *supra* note 13, at 1–2.

[162] *See* Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Pub. L. No. 116-136, § 1102, 134 Stat. 281, 288 (2020); (codified at 15 U.S.C. §§ 636, 9001 et. seq. (West 2021)).

[163] U.S. SMALL BUS. ADMIN., *supra* note 8.

[164] Tebbe et al., *supra* note 160.

[165] Laycock, *supra* note 99, at 143.

[166] *See* Storslee, *supra* note 42, at 170.

regarded as dispositive evidence of the PPP's constitutionality.[167] What ultimately mattered for the Founders was the redistribution of taxes "for the purpose of financing religious functions."[168] The PPP directly contradicts this fundamental component of the Establishment Clause. The Framers settled the debate of providing taxpayer money to churches—government funding for the religious functioning of churches, and specifically clergy salaries, is unconstitutional.[169]

A grounding principle in modern Supreme Court precedent for government financial assistance cases is the requirement that when taxpayer funding is offered on religiously neutral criteria, religious organizations must put that money to "secular uses."[170] This qualification has survived notwithstanding the evolution of the Court's jurisprudence from merely permitting to expressly requiring government aid be provided to religious organizations "in instances where the government chooses to fund comparable secular recipients."[171] The PPP appears to offer financial aid to a wide range of organizations, religious and nonreligious, and manifests the secular purpose of providing broad economic assistance so that small businesses could retain, rehire, and pay their employees.[172] Nevertheless, the PPP funds provided to religious organizations were not required to be put to secular use, nor were there any "safeguards" in the legislation itself to ensure the loans would not be used to support ideological activities.[173]

In contrast, under the PPP, taxpayer money was not only permitted to be used for intrinsically religious purposes—the program required that the funding cover salary expenses for clergy

---

[167] *See id.* An important feature of church taxes in the founding era was "that they involved taxes earmarked for religious entities at collection, rather than generic taxes paid into the general treasury." *Id.* However, "the fact that taxes were sometimes earmarked for religious recipients was not in itself sufficient to trigger this objection." *Id.* Indeed, "where the eventual expenditure was aimed exclusively at financing religion, an earmark may not have been necessary." *Id.*

[168] *Id.* at 169; Underkuffler-Freund, *supra* note 61, at 930 (arguing that "an 'establishment,' . . . encompassed any tax monies given directly to a religious institution, whether designated by the state or by the taxpayer's choice.").

[169] *See* Laycock, *supra* note 99, at 142–43.

[170] Storslee, *supra* note 42, at 114.

[171] *Id.* at 115; *see also* Espinoza v. Montana Dep't of Revenue, 140 S. Ct. 2246 (2020).

[172] *See* BRANNON, *supra* note 3, at 2, 4.

[173] *Contra* Mitchell v. Helms, 530 U.S. 793, 861 (2000) (O'Connor, J., concurring) ("The safeguards employed by the program are constitutionally sufficient. At a federal level, the statute limits aid to 'secular, neutral, and nonideological services' . . . .").

if the loans were to be forgivable.[174] The Court has already determined that providing funding to teach a student to lead a congregation is one such use of governmental financial assistance that may be proscribed by the Establishment Clause.[175] If "[t]raining someone to lead a congregation is an essentially religious endeavor," [176] for which funding is impermissible, surely subsidizing the salaries of clergy, who are already engaged in leading congregations, is similarly an unconstitutional use of taxpayer funds. The Court has also noted the potential dangers to civil liberties that stem from supporting the clergy with public funds, and providing taxpayer money to pay clergy salaries remains a "historic and substantial" interest.[177] There are likely few areas where "antiestablishment interests come more into play."[178] Thus, the PPP commanded that taxpayer money support the essentially religious endeavors of clergy in direct contravention of the Supreme Court's Establishment Clause precedent.

It appears that the SBA contemplated *Trinity Lutheran*'s nondiscrimination and religious status-based reasoning[179] when it determined that no organization would be disqualified from receiving a PPP loan based solely on its religious nature, identity, or speech.[180] However, reliance on *Trinity Lutheran* is unavailing and reflects an incomplete interpretation of the Court's current Establishment Clause doctrine.[181] In reaching its holding in *Trinity Lutheran*, the Court expressly distinguished providing government financial assistance on the basis of religious status

---

[174] *See* U.S. SMALL BUS. ADMIN., *supra* note 8.

[175] Locke v. Davey, 540 U.S. 712, 721 (2004).

[176] *Id.*

[177] *See id.* at 722–23, 725.

[178] *Id.* at 722.

[179] The Court had not yet decided *Espinoza* when the SBA released its FAQ Document on April 3, 2020, so the determination on the constitutionality of the eligibility requirements was likely based on *Trinity Lutheran* as the most recent precedent. Nevertheless, *Espinoza* was decided along *Trinity Lutheran*'s lines, and likely would not change this analysis. *See* Bindas, *supra* note 149, at 208.

[180] BRANNON, *supra* note 3, at 3–4; *see also* Tebbe et al., *supra* note 160. When the SBA waived "its normal rules prohibiting aid for religious activities," it "relied implicitly but unmistakably on a reading of the First Amendment that not only permits cash aid to houses of worship for core religious activities, but requires the government to pay for those activities." *Id.*

[181] *See supra* pp. 116–18; *see* BRANNON, *supra* note 3, at 5 ("*Locke* and *Trinity Lutheran* suggest that the government might still be able to prohibit federal funds from being used for religious activities.").

from offering such funding for religious use.[182] In its inconspicuous but critical footnote, the Court reserved the possibility that it would hold government funds put to religious use as impermissible.[183] The Court's recent *Espinoza* decision also affirmed the Court's reliance on the distinction between religious status and religious use.[184] Thus, while an organization may not be discriminated against because of its religious character—for being a church—government financial assistance used for fundamentally religious functions and activities may be denied.[185] Religious organizations do not have unrestricted budgetary freedom upon receipt of governmental funding.[186] The funding must be for some activity that falls within a neutrally funded secular category, and not inherently religious endeavors.[187]

In a conclusory statement after noting that nonprofit entities could receive PPP loans and that the CARES Act established their eligibility without regard to provision of secular social services, the SBA appropriated that same logic and misapplied it to religious organizations.[188] The SBA's decision indicating that religious organizations were eligible for PPP loans regardless of whether they offered secular social services[189] immediately raises heightened Establishment Clause concerns. Government financial assistance cases since *Everson* have involved evaluating religiously neutral funding provided to private, secular activities, ranging from education to playground resurfacing.[190] Funding secular activities, like education, was a public good that even the Framers endorsed.[191] And in each of the modern Supreme Court

---

[182] Trinity Lutheran Church v. Comer, 137 S. Ct. 2012, 2022–23 (2017) ("Davey was not denied a scholarship because of who he *was*; he was denied a scholarship because of what he proposed *to do*—use the funds to prepare for the ministry. Here there is no question that Trinity Lutheran was denied a grant simply because of what it is—a church.").

[183] *Id.* at 2024 n.3; Laycock, *supra* note 99, at 157–58 (arguing that the footnote in *Trinity Lutheran* "reserves the question of religious uses, including mixed religious and secular uses.").

[184] Espinoza v. Montana Dep't of Revenue, 140 S. Ct. 2246, 2256 (2020) ("This case also turns expressly on religious status and not religious use."); Barclay, *supra* note 147, at 1713–14; Lipez, *supra* note 139, at 375 (suggesting that the Court will address the status-use distinction at a later date).

[185] Barclay, *supra* note 147, at 1713–14 n.107; *see Espinoza*, 140 S. Ct. at 2257.

[186] Laycock, *supra* note 99, at 157–58.

[187] *Id.*

[188] U.S. SMALL BUS. ADMIN., *supra* note 13, at 1.

[189] *Id.*

[190] Laycock, *supra* note 99, at 143.

[191] *See* Storslee, *supra* note 42, at 119, 150.

cases, taxpayer money funded secular services, primarily education, in religious environments—not purely religious activities and programs.[192] Taxpayer money granted to churches for their religious functioning and "to support church leaders" with no regard for the secular services that they may or may not provide, is the "hallmark[ ] of an 'established' religion."[193]

Moreover, even in viewing the PPP as an indirect funding program guided by private choice, [194] such an indirect provision of federal taxpayer money to religious organizations would not pass constitutional muster. Under the PPP, the SBA guaranteed loans made by third-party lenders, namely large financial institutions and banks.[195] The banks, and not the SBA, remitted the loans to the eligible recipients and served as ostensible intermediaries between the government and the religious organizations.[196] An attempt to analogize the PPP to previous cases involving indirect government funding to religious organizations, however, is misguided. One cannot sincerely argue that the executives at banks—tasked with dispensing billions of dollars to churches across the country upon a grant of authority from the SBA—possessed the same independent "private choice" afforded to parents deciding where to spend a voucher and send their children to school.[197] It is unlikely that the individual bankers could conceivably "exercise genuine choice among options public and private, secular and religious" [198] when distributing billions of dollars to churches and other religious organizations. Therefore, the PPP as applied to religious organizations is not a program of "true private choice"; rather, it is a program which "carries with it the *imprimatur* of government endorsement."[199]

Further, because the link between government and religion was not attenuated by true private choice,[200] the advancement of a religious mission was not "incidental."[201] The federal government itself paid the salaries of clergy, whose primary responsibility is to advance religious missions in churches, not religious schools or

---

[192] Laycock, *supra* note 40, at 276.
[193] Locke v. Davey, 540 U.S. 712, 722 (2004).
[194] BRANNON, *supra* note 3, at 4.
[195] *Id.*
[196] *Id.*
[197] *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 649–54 (2002).
[198] *Id.* at 662.
[199] *Id.* at 653, 655.
[200] *Contra* Espinoza v. Montana Dep't of Revenue, 140 S. Ct. 2246, 2261 (2020).
[201] *Contra Zelman*, 536 U.S. at 652.

related social service programs.[202] Providing up to $3.5 billion to the U.S. Catholic Church did not evince an "incidental" advancement at all—it was a direct endorsement.[203] This endorsement of a religious message is reasonably attributable not to the individual executives who remitted the funds, but rather to the federal government. The extraordinary sum of money provided to the U.S Catholic Church perhaps indicates not only an endorsement, but also a hierarchical and structural favoritism between religious and secular organizations, as well as among other religious organizations.[204] The government's exceptional dispensation, evidencing partiality toward the Catholic Church, was worth billions of dollars.[205] Thus, an argument espousing an analogy between indirect government funding of religious schools and "indirect" government subsidizing of billions of dollars to pay clergy salaries must fail.

Even in cases where the Court has allowed indirect funding of religious organizations, independent choices made by private individuals do not "bypass the fundamental constitutional rule against special funding for the religious functions of churches."[206] As such, it is immaterial that bankers at JPMorgan Chase remitted over $7 million to the Archdiocese of New York.[207] At issue is the impermissible use of taxpayer money to fund inherently religious activities. Accordingly, regardless of how the money arrived at the religious organizations—whether directly from the government or through an intermediary bank—the PPP funds for clergy salaries were put to an inherently religious use.

The Court has never before considered the question presented by the PPP funding, and the grant of billions of dollars to the U.S. Catholic Church, explicitly intended to pay for clergy members' salaries, is unprecedented.[208] Surely given the well-defined "historic and substantial"[209] interest at issue, the government retains a compelling reason for denying funds for the employment of clergy and staff whose principal responsibility is to teach,

---

[202] Schwartzman et al., *supra* note 20, at 3–4.
[203] Dunklin & Rezendes, *supra* note 5.
[204] Schwartzman et al., *supra* note 20, at 2, 4.
[205] Dunklin & Rezendes, *supra* note 5.
[206] Laycock, *supra* note 99, at 157.
[207] U.S. SMALL BUS. ADMIN., *supra* note 26.
[208] Schwartzman et al., *supra* note 20.
[209] Locke v. Davey, 540 U.S. 712, 725 (2004).

indoctrinate, advocate, and advance religious missions.[210] Thus, the PPP impermissibly contravened the fundamental constitutional principle of prohibiting government funding for the religious functions of churches by providing taxpayer money to finance clergy members' salaries.

CONCLUSION

The government's dispensation of billions of taxpayers' dollars to Catholic churches, intended to subsidize clergy members' salaries, violated the Establishment Clause. Providing government money to clergy is a boundary that the federal government has never before crossed, and the PPP should elicit from the Court strict scrutiny of the financial assistance program, as applied to religious organizations. Moreover, for a Court that has relentlessly relied on historical evidence in formulating its myriad approaches to Establishment Clause challenges, upholding the PPP would represent a glaring, exceptional effort that would bulldoze any part of the wall that remains standing between churches and state. A democratic government demands "religious agnosticism—a renunciation of the idea that any majority is permitted to define and enforce any set of absolute political or religious truths."[211] Going forward, "any interpretation of the Establishment Clause that would permit" even "a mild . . . theocratic government would also contradict the basic structure of democracy, as set forth in the Constitution."[212]

---

[210] *See* Schwartzman et al., *supra* note 20 (arguing that if the PPP funding rules "are constitutional, even as they allow more direct financial support for churches than at any other point in American history, then the establishment clause has lost its meaning."). *See also* BRANNON, *supra* note 3, at 1.

[211] Gey, *supra* note 37, at 727–28.

[212] *Id.* at 727.