***KENNEDY V. BREMERTON SCHOOL DISTRICT*: THE FINAL DEMISE OF *LEMON* AND THE FUTURE OF THE ESTABLISHMENT CLAUSE**

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Nearly three decades ago, Justice Scalia famously lamented that the much-maligned test from *Lemon v. Kurtzman*[2] remained binding precedent: "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 jurisprudence."[3] This past June, in *Kennedy v. Bremerton School District*, the Supreme Court finally interred *Lemon* once and for all, declaring that "this Court long ago abandoned *Lemon* and its endorsement test offshoot."[4] Though the precise time of death is indeterminate, all nine members of the Court now agree that *Lemon* no longer governs.[5]

In place of *Lemon*'s "ambitious, abstract, and ahistorical approach," the Court returned to "original meaning and history," concluding that "the Establishment Clause must be interpreted by reference to historical practices and understandings."[6] This nuanced historical approach not only offers the best way forward for resolving Establishment Clause controversies, but will also prove largely consistent with existing Supreme Court precedent.

I. THE *LEMON* TEST AND THE DEPARTURE FROM HISTORY

Modern Establishment Clause jurisprudence began in 1947 with *Everson v. Board of Education of Ewing*, when the Supreme Court for the first time incorporated the Establishment Clause against the States.[7] From that time onwards, the Court looked primarily to historical practice to guide its Establishment Clause analyses. In *Everson*, although the majority and dissent disagreed about what precisely constituted a religious establishment, both sides agreed that history served

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[2] 403 U.S. 602 (1971).

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

[4] 142 S. Ct. 2407, 2427 (2022); *see also id.* at 2449 (Sotomayor, J., dissenting) ("The Court now goes much further, overruling *Lemon* entirely and in all contexts.").

[5] *See id.*

[6] *Id.* at 2428 (quoting *Town of Greece, N.Y. v. Galloway*, 572 U.S. 565, 576 (2014)).

[7] 330 U.S. 1 (1947).

as the touchstone for their inquiries.[8] This historical method dominated the Court's Establishment Clause jurisprudence for decades.[9]

In 1971, in *Lemon v. Kurtzman*, the Court departed from this historical inquiry.[10] The case concerned an Establishment Clause challenge to Pennsylvania's and Rhode Island's statutes providing aid to nonpublic schools.[11] The Pennsylvania statute provided financial reimbursements to private schools for secular educational services including teachers' salaries, textbooks, and educational materials.[12] The Rhode Island statute supplemented the salaries of teachers of secular subjects in private schools provided the teacher did not inculcate religion in his or her classes.[13] The Court held, in an 8-1 decision, that both laws violated the Establishment Clause because private parochial schools were able to obtain funding on equal footing with private secular schools.[14]

The Court began its analysis by stating "[t]he language of the Religion Clauses of the First Amendment is at best opaque," and that it could "only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law."[15] But instead of even attempting the type of textual or historical inquiry long demanded by its precedents, the Court assessed "cumulative criteria developed by the Court" and "gleaned" a novel three-part test to govern all Establishment Clause cases.[16] The so-called *Lemon* test prohibited any government action that (1) lacks a secular purpose, (2) has the primary effect of advancing or inhibiting religion, or (3) excessively entangles the government in religion.[17] The Court held that Pennsylvania's and Rhode Island's statutes ran afoul of the third prong and invalidated both statutes.[18]

Before long, the *Lemon* test became the subject of withering criticism by commentators and jurists alike.[19] The test was inherently malleable: what was meant by "secular purpose," what was

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[8] *Compare id.* at 9–15 (surveying history of religious establishments in England and the colonies) *with id.* at 33 (Rutledge, J., dissenting) ("No provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment.").

[9] *See, e.g.*, McGowan v. Maryland, 366 U.S. 420, 437–40 (1961) (examining "the place of Sunday Closing Laws in the First Amendment's history"); Torcaso v. Watkins, 367 U.S. 488, 490 (1961) (invalidating religious test oaths because they were one of the elements of "the formal or practical" religious establishments that "many of the early colonists left Europe and came here hoping to" escape); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 294 (1963) (Brennan, J., concurring) ("[T]he line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers"); Walz v. Tax Comm'n of City of N.Y., 397 U.S. 664, 680 (1970) (upholding tax exemptions for churches based on "more than a century of our history and uninterrupted practice"); *see also* Shurtleff v. City of Boston, 142 S. Ct. 1583, 1606 n.6 (2022) (Gorsuch, J., concurring) (collecting these cases).

[10] 403 U.S. 602 (1971).

[11] *Id.* at 607–610.

[12] *Id.*

[13] *Id.*

[14] *Id.* at 625.

[15] *Id.* at 612.

[16] *Id*.

[17] *Id.*

[18] *Id.* at 614–22.

[19] *See, e.g.*, Mark V. Tushnet, *Reflections on the Role of Purpose in the Jurisprudence of the Religion Clauses*, 27 WM. & MARY L. REV. 997, 1004 (1986) (explaining that cases involving "'deeply ingrained practices'" as "not readily susceptible to analysis under the ordinary *Lemon* approach"); Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1380–88 (1981) (criticizing the "unstructured

the baseline to compare whether religion was advanced or inhibited, and what kinds of "entanglement" were permitted or prohibited? This baked-in indeterminacy led to unpredictability in results and conflicting (or nonexistent) guidance to lower courts. And the criticism came across the ideological spectrum. For example, Professor Jesse Choper summarized the Court's early applications of *Lemon* thusly:[20]

> [A] provision for therapeutic and diagnostic health services to parochial school pupils by public employees is invalid if provided *in* the parochial school,[21] but not if offered at a neutral site, even if in a mobile unit adjacent to the parochial school.[22] Reimbursement to parochial schools for the expense of administering teacher-prepared tests required by state law is invalid,[23] but the state may reimburse parochial schools for the expense of administering state-prepared tests.[24] The state may lend school textbooks to parochial school pupils because, the Court has explained, the books can be checked in advance for religious content and are "self-policing";[25] but the state may not lend other seemingly self-policing instructional items such as tape recorders and maps.[26] The state may pay the cost of bus transportation to parochial schools,[27] which the Court has ruled are "permeated" with religion; but the state is forbidden to pay for field trip transportation visits "to governmental, industrial, cultural, and scientific centers designed to enrich the secular studies of students.[28]

The Court itself acknowledged this embarrassing jurisprudence but attempted to justify its decisions as "sacrific[ing] clarity and predictability for flexibility."[29] But to many, this was but "a euphemism . . . for . . . the absence of any principled rationale."[30] Indeed, over time, the Court was forced to overrule many of its early decisions based on *Lemon*.[31]

Given this state of affairs, the Court attempted to clarify its Establishment Clause jurisprudence by modifying *Lemon*'s "effects" prong, beginning with Justice O'Connor 1984 concurrence in *Lynch v. Donnelly*.[32] This new "endorsement" test asked whether a "reasonable observer" would consider the challenged government action to endorse religion. But this test fared no better.

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expansiveness of the entanglement notion" and the potential that certain constructions of the effects prong may result in "the establishment clause threaten[ing] to swallow the free exercise clause"); Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 680–81 (1980); Lamb's Chapel v. Ctr. Moriches Union Free School Dist., 508 U.S. 384, 398–99 (Scalia, J., concurring) ("[As of 1993], no fewer than five of the currently sitting Justices have" called for *Lemon* to be overruled, "and a sixth has joined an opinion doing so." (collecting cases)).

[20] Choper, *supra* note 19, at 680–81.

[21] Meek v. Pittenger, 421 U.S. 349 (1975).

[22] Wolman v. Walter, 433 U.S. 229 (1977).

[23] Levitt v. Comm. for Pub. Educ., 413 U.S. 472 (1973).

[24] Comm. for Pub. Educ. v. Regan, 444 U.S. 646 (1980).

[25] Board of Educ. v. Allen, 392 U.S. 236 (1968).

[26] *Meek*, 421 U.S. 349.

[27] Everson v. Board of Educ., 330 U.S. 1 (1947).

[28] Wolman v. Walter, 433 U.S. 229, 252 (1977).

[29] *Regan*, 444. U.S. at 662.

[30] Choper, *supra* note 19, at 681.

[31] Michael W. McConnell, *No More (Old) Symbol Cases*, 2019 CATO SUP. CT. REV. 91, 104 (2019) (citing *Agostini v. Felton*, 521 U.S. 203 (1997) (overruling *Sch. Dist. v. Ball*, 473 U.S. 373 (1985) and *Aguilar v. Felton*, 473 U.S. 402 (1985)); Mitchell v. Helms, 530 U.S. 793 (2000) (plurality) (overruling *Wolman v. Walter*, 433 U.S. 229 (1977), and *Meek v. Pittenger*, 421 U.S. 349 (1975)).

[32] 465 U.S. 668, 688 (1984) (O'Connor, J., concurring); *see, e.g.*, County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 593 (1989); *Allegheny*, 492 U.S. at 630 (O'Connor, J., concurring in part and concurring in judgment).

Utilizing the endorsement test, the Court held, for instance, that a single crèche, surrounded by a "fence-and-floral frame," bearing a plaque stating a private organization donated the display, and located in the "most public" part of a county courthouse was unconstitutional.[33] But what about a crèche located in the "heart of the shopping district" that displayed a banner reading "SEASONS GREETINGS" along with miniature and life-sized figures of Jesus, Mary, Joseph, angels, shepherds, kings, and animals—all surrounded by a Santa Claus house, reindeer, candy-striped poles, a Christmas tree, carolers, a clown, an elephant, a teddy bear, and hundreds of colored lights?[34] Constitutional, of course.[35]

Just like *Lemon*, the endorsement test relied on "little more than intuition and a tape measure,"[36] "unguided examination of marginalia," and an "Establishment Clause geometry of crooked lines and wavering shapes."[37] This was a jurisprudence in which "a judge [could] do little but announce his gestalt."[38]

Given these shortcomings, the Court began departing from *Lemon* and the endorsement test, "repeatedly emphasiz[ing] [its] unwillingness to be confined to any single test or criterion in this sensitive area,"[39] and that *Lemon*'s three elements were "no more than helpful signposts."[40] In fact, the Court has not applied *Lemon* in Establishment Clause cases in almost two decades, and in recent years, it has come back to focus on history.

II. THE RETURN TO HISTORY

The push to refocus on history first occurred in *Marsh v. Chambers*.[41] There, the Court upheld the practice of opening a state legislature session with a prayer by a chaplain paid with public funds, explaining that such practices were "deeply embedded in the history and tradition of this country," such that "[f]rom colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom."[42] Interestingly, *Marsh* was decided only twelve years after *Lemon*, but the Court did not mention *Lemon*, leading Justice Brennan to state in dissent that the Court was merely "carving out an exception to the Establishment Clause, rather than reshaping" it.[43]

Town of Greece v. Galloway came three decades later.[44] The decision expressly relied on *Marsh* to conclude that a municipality's decision to open its monthly board meetings with a prayer did

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[33] *Allegheny*, 492 U.S. at 579–81.
[34] *Lynch*, 465 U.S. at 671.
[35] *Id.*
[36] *Allegheny*, 492 U.S. at 675–76 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part).
[37] Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 399 (1993) (Scalia, J., concurring).
[38] Am. Jewish Congress v. City of Chicago, 827 F.2d 120, 129 (7th Cir. 1987) (Easterbrook, J., dissenting); *see also* Utah Highway Patrol Ass'n v. Am. Atheists, Inc., 132 S. Ct. 13, 14–15, 17, 19, 21–22 & n.3 (2011) (Thomas, J., dissenting from denial of certiorari) ("Establishment Clause jurisprudence [is] in shambles," "nebulous," "erratic," "no principled basis," "Establishment Clause purgatory," "impenetrable," "ad hoc patchwork," "limbo," "incapable of consistent application," and a "mess.").
[39] Lynch v. Donnelly, 465 U.S. 668, 679 (1984).
[40] Van Order v. Perry, 545 U.S. 677, 686 (2005) (quoting *Hunt v. McNair*, 413 U.S. 734, 741 (1973)).
[41] 463 U.S. 783 (1983).
[42] *Id.* at 786.
[43] *Id.* at 796 (Brennan, J., dissenting).
[44] 572 U.S. 565 (2014).

not violate the Establishment Clause.[45] To begin, the Court rejected the notion that it "carv[ed] out an exception" in *Marsh* and instead held that "*Marsh* stands for the proposition that it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted."[46] "Any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change."[47] In short, "the Establishment Clause *must be* interpreted by reference to historical practices and understandings."[48]

Most recently, in *American Legion v. American Humanist Association*, a plurality of the Court explained that "the *Lemon* court ambitiously attempted to find a grand unified theory of the Establishment Clause," but later cases had "taken a more modest approach that focuses on the particular issue at hand and looks to history for guidance."[49] Notably, six members of the Court agreed *Lemon* did not govern, and the dissent never once invoked *Lemon* to justify its reasoning.[50]

III. *KENNEDY V. BREMERTON SCHOOL DISTRICT*

The Court's decision in *Kennedy* thus enters the scene at a time when the Supreme Court had effectively overruled *Lemon*, yet lower courts had repeatedly failed to heed that instruction. The lower court opinion in *Kennedy* was a prime example of this.[51]

Joseph Kennedy, a high school football coach at Bremerton High School, made it his practice to quietly pray and give thanks at the conclusion of football games.[52] After shaking hands with players and coaches, Kennedy would take a knee at the 50-yard line and give a brief, quiet prayer.[53] Sometimes, Kennedy prayed on his own; other times, players would voluntarily join him; still other times, opposing players would join.[54] Separately, Kennedy would give motivational speeches with religious imagery and pray in the locker room with his players.[55]

The District eventually learned about Kennedy's locker-room prayers and religious speeches and asked him to cease those practices.[56] Kennedy complied with the District's request, but also felt pressure to abandon his own private practice of quiet, on-field post-game prayers.[57] Kennedy asked the District to allow him to continue this private religious expression, but the District refused.[58] Although it noted that Kennedy had complied with its previous request, it forbade him

[45] *Id.* at 575.
[46] *Id*. at 575, 577.
[47] 572 U.S. at 577.
[48] *Id*. at 576 (emphasis added).
[49] Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2087 (2019).
[50] 139 S. Ct. at 2103–13 (Ginsburg, J., dissenting).
[51] *See* Kennedy v. Bremerton Sch. Dist., 991 F.3d 1004 (9th Cir. 2021).
[52] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2416 (2022).
[53] *Id*.
[54] *Id*.
[55] *Id.* The dissent asserted that these facts should have played a part in the majority's reasoning. But at the time of its decision, the District only justified its actions based on Kennedy's private post-game prayers. As the Court explained, "[g]overnment 'justification[s]' for interfering with First Amendment rights 'must be genuine, not hypothesized or invented *post hoc* in response to litigation.'" *Id.* at 2432 (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996)).
[56] *Id.* at 2416.
[57] *Id.* at 2417.
[58] *Id.*

from engaging in any "overt actions that could appear to a reasonable observer to endorse prayer."[59] Kennedy refused to cease his practices, and the District placed him on administrative leave.[60]

Kennedy sued under the Free Exercise Clause and the Free Speech Clause.[61] Kennedy sought a preliminary injunction but lost in the lower courts. The Supreme Court denied certiorari, but four Justices explained that their votes were based on the preliminary posture of the case and that the denial of certiorari should not be interpreted as agreement with the lower courts' reasoning.[62]

The case went back down, and the Ninth Circuit again ruled against Kennedy.[63] First, the panel again rejected his Free Speech claim because it found that his expression qualified as government speech since it occurred on the field during his time as a government employee.[64] The Ninth Circuit also noted that even if Kennedy's practices were private speech, the District had an "adequate justification" for its disciplinary measures: an "objective observer" would conclude that the District had "endorsed" his religious activity by refusing to censor it, thereby violating the Establishment Clause.[65] As to Kennedy's Free Exercise claim, the District conceded that it targeted Kennedy specifically because his conduct was religious.[66] Nonetheless, the Ninth Circuit, applying the endorsement test, upheld the District's actions.[67] It concluded that the District had satisfied strict scrutiny because had it failed to discipline Kennedy, the District would have violated the Establishment Clause.[68]

The Ninth Circuit denied a petition for rehearing en banc, but eleven judges dissented. Notably, Judge Nelson explained that "the Supreme Court ha[d] effectively killed *Lemon*," so the panel's reliance on that decision was misguided.[69]

The Supreme Court began its analysis with the Free Exercise Clause.[70] The majority explained that because the District restricted Kennedy's activities "because of their religious character," its actions were by definition not neutral.[71] Nor were the District's actions generally applicable.[72] The District created a "bespoke requirement" that only applied to Kennedy's religious exercise and then pretextually claimed that he had failed to supervise students after games, even though other coaching staff were not required to do so.[73]

What's important here is that even amidst ongoing discussions about the state of Free Exercise law, how to analyze neutrality and general applicability,[74] and whether *Employment Division v.*

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[59] *Id.* at 2418.
[60] *Id.* at 2418–19.
[61] *Id.* at 2419.
[62] 139 S. Ct. 643 (2019).
[63] 991 F.3d 1004 (9th Cir. 2021).
[64] *Id.* at 1014–16.
[65] *Id.* at 1018–19.
[66] *Id.* at 1020.
[67] *Id.* at 1020–21.
[68] *Id.*
[69] 4 F.4th 910, 945–46 (9th Cir. 2021) (Nelson, J., dissenting from the denial of rehearing en banc).
[70] 142 S. Ct. at 2421.
[71] *Id.* at 2422.
[72] *Id.*
[73] *Id.* at 2423.
[74] *See, e.g.*, Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020); Tandon v. Newsom, 141 S. Ct. 1294 (2021).

Smith[75] should be overruled,[76] all members of the Court—including those in dissent—agreed that the District's actions did not fall under *Smith*'s lenient standard.[77] Indeed, the District had to concede that its policies were not neutral or generally applicable.[78]

The Court then addressed Kennedy's Free Speech claim.[79] The Court analyzed Kennedy's situation under the *Pickering-Garcetti* framework, which sets a different, more lenient standard for restricting the speech rights of government employees.[80] It concluded that Kennedy's prayers were his own private speech because they were not "'ordinarily within the scope' of his duties as a coach."[81] Moreover, Kennedy would pray at times when other coaches were permitted to attend to personal matters, including checking sports scores on their phones and greeting friends in the stands.[82]

What's interesting about the Court's Free Speech analysis is that the Court was not as unified as on the Free Exercise analysis. To begin, Justice Kavanaugh did not join the Court's opinion as to the Free Speech Clause at all.[83] This is significant: the Court's Free Speech analysis explains in a footnote that because the prayer was private speech and could not be credited to the District, the Court did "not decide whether the Free Exercise Clause may sometimes demand a different analysis" under the *Pickering-Garcetti* framework.[84] Justice Kavanaugh's refusal to join this part of the opinion raises the question whether he would subject Free Exercise claims to *Pickering-Garcetti* at all—which could mean that he believes religious expression is entitled to greater protection. This would align with his earlier stated views that government actions violating "the bedrock principle of religious equality" are unconstitutional and wholly distinguishable from cases "where the government itself is engaging in religious speech."[85]

Justice Thomas's concurrence is similar. Justice Thomas reiterated that the Court's decision does not decide whether or how government employees' Free Exercise rights may be different from those belonging to the general public.[86] But in so doing, he cited to a concurrence from Justice Scalia in *Borough of Duryea, Pa. v. Guarnieri*, which cautioned against importing a doctrine from the Free Speech Clause into the Petition Clause.[87] Justice Scalia's concurrence states, and Justice Thomas quotes, that any limitations on a constitutional provision must be justified by the provision's "history" and "tradition."[88] And to top it off, Justice Thomas noted that "the Court

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[75] 494 U.S. 872 (1990).
[76] Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1883 (Alito, J., concurring).
[77] *See Kennedy*, 142 S. Ct. at 2426 n.3; *id.* at 2446 (Sotomayor, J., dissenting).
[78] *Id.* at 2422.
[79] *Id.* at 2423.
[80] *Id.*
[81] *Id.* at 2424.
[82] *Id.* at 2425.
[83] *Id.* at 2411.
[84] *Id.* at 2425 n.2.
[85] Morris Cty Bd. of Chosen Freeholders v. Freedom from Religion Found., 139 S. Ct. 909 (2019) (Kavanaugh, J., respecting the denial of certiorari); Shurtleff v. City of Boston, 142 S. Ct. 1583, 1594–95 (2022) (Kavanaugh, J., concurring).
[86] *Kennedy*, 142 S. Ct. at 2433 (Thomas, J., concurring).
[87] *Id.* (citing *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379. 405–06 (2011) (Scalia, J., concurring in part)).
[88] *Kennedy*, 142 S. Ct. at 2433 (Thomas, J., concurring).

has never before applied *Pickering* balancing to a claim brought under the Free Exercise Clause," strongly indicating that he would not apply *Pickering* in such cases.[89]

Justice Alito's one-paragraph concurrence is of a piece, clarifying his view of the free speech issue. Justice Alito stated that the speech at issue was "unlike that in any of our prior cases" and agreed that the Court did not decide what standard applied under the Free Speech Clause, instead holding that the District's actions could not be justified by any standard.[90] That may indicate, consistent with Justice Kavanaugh and Justice Thomas, that religious exercise issues may be categorically different from free speech issues. And this may be the case because unlike free speech—where almost anything goes—religious exercise must be both religious and sincere,[91] meaning the types of actions protected by the Free Exercise Clause are far more limited than those protected by the Free Speech Clause.

This brings us to the Court's Establishment Clause holding, arguably the most important part of the case. Because the Court found that the Free Exercise Clause and the Free Speech Clause protected Kennedy's religious expression, the Court had to assess whether the Establishment Clause provided any justification for the District's actions. The Court held it did not because there was "only the 'mere shadow' of a conflict" based on "a misconstruction of the Establishment Clause."[92]

That "misconstruction" was the District's and the Ninth Circuit's reliance on *Lemon* and the endorsement test.[93] The Court reiterated that "the 'shortcomings' associated" with *Lemon's* "ambitious, abstract, and ahistorical approach to the Establishment Clause became so apparent that this Court long ago abandoned *Lemon* and its endorsement test offshoot."[94] Citing *Town of Greece* and *American Legion*, the Court stated that *Lemon* and the endorsement test had been supplanted by a test based on "historical practices and understandings."[95]

The Court, however, did not explain precisely how the historical analysis cashes out. To be sure, the Court held that "a historically sensitive understanding of the Establishment Clause" must take "coercion" into account because "coercion . . . was among the foremost hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment."[96] And it concluded that on the facts here, the District had not demonstrated that Kennedy's private, post-game prayers coerced any students into praying.[97] Indeed, the Court took pains to explain that "[t]he exercise in question involves . . . giving 'thanks through prayer' briefly and by himself 'on the playing field' at the conclusion of each game he coaches" and "does not involve leading prayers with the team or before any other captive audience."[98]

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[89] *Id.*

[90] *Id.* at 2433–34 (Alito, J., concurring).

[91] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 235 (1972) ("The Amish in this case have convincingly demonstrated the sincerity of their religious beliefs[.]"); *id*. at 216 (belief that is "philosophical and personal rather than religious . . . does not rise to the demands of the Religion Clauses.").

[92] *Kennedy*, 142 S. Ct. at 2432.

[93] *Id.*

[94] *Id.* at 2427.

[95] *Id.* at 2428.

[96] *Id.* at 2429.

[97] *Id.*

[98] *Id.* at 2416; *see also id.* at 2432 n.7.

But at first glance, the *Kennedy* opinion itself offers little more about the "hallmarks of religious establishments," leading the dissent to claim that the majority's "test offers essentially no guidance for school administrators."[99] A closer examination of the opinion, however, strongly suggests the path forward for future Establishment Clause cases.

IV. SO WHAT IS AN ESTABLISHMENT OF RELIGION?

In a section explaining that the Establishment Clause prohibits government coercion of religious exercise, *Kennedy* states that "[n]o doubt, too, coercion along these lines was among the foremost hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment."[100] Then, curiously, the opinion includes a footnote at the end of that sentence that includes four notable citations.[101] That footnote, footnote 5, is a cipher for interpreting how the Court interprets the Establishment Clause by reference to history and tradition.

The first citation is to a specific portion of Justice Scalia's dissent in *Lee v. Weisman*, where he explains that "one of the hallmarks of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*."[102] Another citation concerns James Madison's statements during the ratification debates, where he explained that Establishment Clause prohibited Congress from "establish[ing] a religion to which they would compel others to conform."[103]

The remaining two sources are where things get really interesting. Those sources are Justice Gorsuch's concurrence in *Shurtleff v. City of Boston*,[104] a case decided earlier this Term, and well-known scholarship authored by Professor Michael McConnell,[105] perhaps the leading law and religion scholar in the country.

In *Shurtleff*, the City of Boston created a public forum by permitting private groups to raise their own flags at City Hall.[106] Boston permitted all types of speakers to host their events and raise flags, never rejecting a single request until a religious group sought to raise a flag that included religious imagery.[107] Boston refused access to the religious group, asserting that permitting the group's speech would endorse religion.[108] The Court rejected that argument, holding that Boston could not exclude speech based on the speech's religious viewpoint.[109]

Though the majority opinion did not mention *Lemon*, Justice Gorsuch's *Shurtleff* concurrence explained that *Lemon* was the root of the problem but had long been overruled, and in its place,

[99] *Id.* at 2450 (Sotomayor, J., dissenting).
[100] *Id.* at 2429.
[101] *Id.* at 2429 n.5.
[102] 505 U.S. 577, 640–42 (1992) (Scalia, J., concurring) (emphasis in original).
[103] 1 Annals of Cong. 730–31 (1789).
[104] 142 S. Ct. 1583, 1609 (Gorsuch, J., concurring).
[105] Michael W. McConnell, Establishment and Disestablishment at the Founding, Part I: Establishment of Religion, 44 WM. & MARY L. REV. 2105 (2003).
[106] Shurtleff v. City of Boston, 142 S. Ct. 1583 (2022).
[107] *Id.* at 1588.
[108] *Id.*
[109] *Id.* at 1593.

courts must consult history.[110] Importantly, his concurrence stated that "our constitutional history contains some helpful hallmarks that localities and lower courts can rely on."[111]

Citing to Professor McConnell's scholarship and adopting that position in whole, Justice Gorsuch concluded that historical establishments "often bore certain other telling traits": (1) "the government exerted control over the doctrine and personnel of the established church," (2) "the government mandated attendance in the established church and punished people for failing to participate," (3) "the government punished dissenting churches and individuals for their religious exercise," (4) "the government restricted political participation by dissenters," (5) "the government provided financial support for the established church, often in a way that preferred the established denomination over other churches," and (6) "the government used the established church to carry out certain civil functions, often by giving the established church a monopoly over a specific function."[112]

Indeed, we know that the *Kennedy* opinion adopts these six hallmarks as the touchstone for future Establishment Clause challenges because it cites not just broadly to Justice Gorsuch's concurrence, but specifically to the very pages containing this analysis.[113] And if there were any remaining doubt, footnote 5 refers specifically to Professor McConnell's original scholarship laying out these six categories.[114] Thus, by incorporating the *Shurtleff* concurrence and Professor McConnell's work, *Kennedy* makes clear that government conduct violates the Establishment Clause only when that conduct exhibits these historical characteristics of a religious establishment.[115]

Some commentators have claimed that any historical approach is lacking and would allow for religious indoctrination by public schools.[116] But the *Kennedy* opinion itself refutes this premise, explaining that the case concerned only Kennedy's private prayers, not his locker-room sermons.[117] Indeed, the opinion strongly indicated that such cases would come out differently due to concerns about "a captive audience" and "compell[ing] attendance and participation in a religious exercise."[118]

This makes sense under the historical approach. Professor McConnell has explained that "[t]he historical approach is consistent with the vast majority of the Court's existing precedent, and indeed provides a better explanation for most of the cases."[119] This includes *Torcaso v. Watkins*[120] because with test oaths, the government restricts political participation by dissenters.[121]

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[110] *Id.* at 1604 (Gorsuch, J., concurring).

[111] *Id.* at 1609.

[112] *Id.* (citing McConnell, *supra* note 105, at 2131–81).

[113] *Kennedy*, 142 S. Ct. at 2429 n.5 (citing *Shurtleff*, 142 S. Ct. at 1609–10 (Gorsuch, J., concurring).

[114] *Id.* at 2429 n.5.

[115] *Shurtleff*, 142 S. Ct. at 1609–10 (Gorsuch, J., concurring); McConnell, *supra* note 105 at 2115–30 (explaining different hallmarks of establishment present in various degrees among the colonies).

[116] *See, e.g.*, Mark Joseph Stern, *Supreme Court Lets Public Schools Coerce Students Into Practicing Christianity*, SLATE (June 27, 2022, 4:19 PM), https://slate.com/news-and-politics/2022/06/coach-kennedy-bremerton-prayer-football-public-school.html.

[117] *Kennedy*, 142 S. Ct. at 2422.

[118] *Id.* at 2431–32 (cleaned up).

[119] Michael W. McConnell, *The Supreme Court And The Cross*, HOOVER INSTITUTION (Mar. 1, 2019), https://www.hoover.org/research/supreme-court-and-cross.

[120] 367 U.S. 488 (1961).

[121] McConnell, *supra* note 119.

It includes *Larkin v. Grendel's Den*[122] because granting churches veto power over liquor licenses assigns civil authority to religious groups.[123] And it also includes *Engel v. Vitale*[124] because in school prayer, the government controls religious doctrine by composing an official prayer.[125]

It is important to note, then, that the historical approach will not be as disruptive as some claim.[126] And in its favor, the historical approach provides objectivity and predictability to the Establishment Clause analysis. Rather than "assume a baseline of complete secularism in government affairs," which "is ahistoric, produces hostility toward religion, and impoverishes public culture," "[a] more objective baseline consists of the body of historical practices that have been widely accepted throughout the nation's history and are consistent with the historical meaning of the Establishment Clause."[127]

To be sure, important questions remain unanswered. Most notably, is sharing a single characteristic of a historical religious establishment enough to render government conduct unconstitutional? The examples from *Torcaso*, *Grendel's Den*, and *Engel* suggest that at least in some circumstances, yes, a single hallmark is enough. But that leads to additional questions: does it depend on the specific historical establishment? Are some hallmarks more important than others? And if more than a single hallmark is necessary, should a "sliding scale" approach apply whereby stronger showings on some hallmarks make up for weaker showings on others?

Kennedy doesn't answer these questions, but that isn't unusual. Often, when the Court announces a new rule of constitutional law, it provides a general principle that requires future elaboration. For example, even in the religious liberty context, lawyers need only look back ten years to *Hosanna-Tabor Lutheran Church v. EEOC*,[128] where the Supreme Court recognized the existence of the ministerial exception. There, the Court determined that the plaintiff's formal title, the substance reflected in that title, the plaintiff's own use of that title, and the important religious functions performed by the plaintiff all weighed in favor of concluding that she was a minister.[129]

Though the Court looked at these four factors, it did not fully explain whether all four were necessary or how they might relate to each other.[130] But it didn't have to, as the case was easily resolved because the plaintiff fulfilled all four of them.[131] Over time, however, the lower courts applied and refined the factors and concluded that the fourth factor—the important religious

[122] 459 U.S. 116 (1982).

[123] McConnell, *supra* note 119.

[124] 370 U.S. 421 (1962).

[125] McConnell, *supra* note 119. *See also Shurtleff*, 142 S. Ct. at 1609 (Gorsuch, J., concurring).

[126] Indeed, *Lemon* has already been overruled in its original context of assessing whether religious organizations can be included in public-benefit programs. The Court now determines whether the government program grants benefits based on "neutral, secular criteria" and whether there exists a "historic and substantial" tradition against including religious organizations. Zelman v. Simmons-Harris, 536 U.S. 639, 653 (2002); Espinoza v. Montana Dep't of Revenue, 140 S. Ct. 2246, 2258 (2020).

[127] McConnell, *supra* note 119.

[128] 565 U.S. 171 (2012).

[129] *Id.* at 192.

[130] *Id.* at 190 ("We are reluctant, however, to adopt a rigid formula for deciding when an employee qualifies as a minister.").

[131] *Id.* at 190 ("It is enough for us to conclude, in this our first case involving the ministerial exception, that the exception covers Perich, given all the circumstances of her employment.").

functions performed by an employee—was the most important.[132] And before long, the Supreme Court confirmed this by holding that "the significance of th[e] factors" in *Hosanna-Tabor* "did not mean that they must be met—or even that they are necessarily important—in all other cases."[133] Instead, "[w]hat matters, at bottom, is what an employee does."[134]

Kennedy utilizes this same approach. This does create a measure of ambiguity, but it can also be considered "a commendable example of judicial minimalism" whereby "the Court decides this case, and states a general principle, but does not try to work out all its implications in advance, in the abstract."[135] Instead, Establishment Clause jurisprudence will be decided in future cases with concrete facts, and it will require additional legal scholarship to further elaborate the contours of historical religious establishments.

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[132] *See, e.g.,* Temple Emanuel of Newton v. Mass. Comm'n Against Discrimination, 463 Mass. 472, 486, 975 N.E.2d 433, 443 (2012) ("Therefore, the ministerial exception applies to the school's employment decision regardless whether a religious teacher is called a minister or holds any title of clergy."); Cannata v. Cath. Diocese of Austin, 700 F.3d 169, 177 (5th Cir. 2012) ("Application of the exception, however, does not depend on a finding that Cannata satisfies the same considerations that motivated the Court to find that Perich was a minister within the meaning of the exception. Rather, it is enough to note that there is no genuine dispute that Cannata played an integral role in the celebration of Mass and that by playing the piano during services, Cannata furthered the mission of the church and helped convey its message to the congregants."); Conlon v. InterVarsity Christian Fellowship, 777 F.3d 829, 835 (6th Cir. 2015) ("[W]e . . . hold that where both factors—formal title and religious function—are present, the ministerial exception clearly applies."); Fratello v. Archdiocese of N.Y., 863 F.3d 190, 205 (2d Cir. 2017) ("Where, as here, the four considerations are relevant in a particular case, 'courts should focus' primarily 'on the function[s] performed by persons who work for religious bodies.'" (citation omitted)); Grussgott v. Milwaukee Jewish Day Sch., Inc., 882 F.3d 655, 658 (7th Cir. 2018) ("[O]ther courts of appeals have explained that the same four considerations need not be present in every case involving the exception.").

[133] Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2063, 207 L. Ed. 2d 870 (2020).

[134] *Id*. at 2064.

[135] Michael W. McConnell, *Reflections on* Hosanna-Tabor, 35 HARV. J. L. & PUB. POL'Y 821, 835 (2012).