Who Let the Ghouls Out? The History and Tradition Test’s Embrace of Neutrality and Pluralism in Establishment Cases

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Who Let the Ghouls Out? The History and Tradition Test’s Embrace of Neutrality and Pluralism in Establishment Cases

ABSTRACT

In June of 2022, the Supreme Court decided in Kennedy v. Bremerton School District that an Establishment Clause inquiry “focused on original meaning and history” would replace Lemon’s endorsement test. But after announcing the test, the Court neglected to describe or apply it. This Comment attempts to fill that void. After analyzing the Court’s Establishment Clause jurisprudence, this Comment proposes tenets of the history and tradition test and applies those tenets to Allegheny County v. ACLU, a case decided under Lemon. Finally, this Comment concludes by arguing that the history and tradition inquiry supports pluralism, humility, tolerance, and a healthy separation of church and state.
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“The future ain’t what it used to be.”
Yogi Berra¹

I. INTRODUCTION

Although Justice Antonin Scalia may best be remembered for his originalist interpretation of the Constitution, the language he used in his authored opinions was often far from traditional.² Among his most spirited tirades, Justice Scalia deplored the Court’s Lemon v. Kurtzman Establishment Clause test.³ In Lamb’s Chapel v. Center Moriches Union Free School District, he famously wrote: “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.”⁴ Justice Scalia was not alone in his criticism of the Lemon test: Justice White opined that Lemon “is at once both insolubly paradoxical . . . and as the Court has

¹ Nate Scott, The 50 Greatest Yogi Berra Quotes, USA Today: For the Win (Mar. 28, 2019, 8:00 AM), https://ftw.usatoday.com/2019/03/the-50-greatest-yogi-berra-quotes. A celebrated baseball player known for his contradicting adages—known as “Berra-isms”—Berra’s saying encapsulates Establishment Clause jurisprudence: decades of inconsistent case law with contradicting results. See infra Sections II.C–D. However, with the Court’s recent commitment to an analysis focused on history and tradition, future Establishment jurisprudence now attempts to look at the past to mirror what “used to be.” See generally Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2428 (2022) (“In place of Lemon and the endorsement test, the Court has instructed that the Establishment Clause must be interpreted by ‘reference to historical practices and understandings.’” (quoting Town of Greece v. Galloway, 572 U.S. 572, 576 (2014))).

² See, e.g., PGA Tour, Inc. v. Martin, 532 U.S. 661, 700 (2001) (Scalia, J., dissenting) (“It has been rendered the solemn duty of the Supreme Court of the United States, laid upon it by Congress in pursuance of the Federal Government’s power [t]o regulate Commerce with foreign Nations, and among the several States,” U.S. Const., Art. I, § 8, cl. 3, to decide What Is Golf. I am sure that the Framers of the Constitution, aware of the 1457 edict of King James II of Scotland prohibiting golf because it interfered with the practice of archery, fully expected that sooner or later the paths of golf and government, the law and the links, would once again cross, and that the judges of this august Court would some day have to wrestle with that age-old jurisprudential question, for which their years of study in the law have so well prepared them: Is someone riding around a golf course from shot to shot really a golfer?”).

³ See Lee v. Weisman, 505 U.S. 577, 644 (1992) (Scalia, J., dissenting) (“The Court today demonstrates the irrelevance of Lemon by essentially ignoring it, and the internment of that case may be the one happy byproduct of the Court’s otherwise lamentable decision.”) (citation omitted). See generally Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (affirming the use of the traditional purpose and effect prongs, while adding the excessive entanglement prong for an Establishment Clause analysis).

conceded from the outset a ‘blurred, indistinct, and variable barrier.’”5 Similarly, other Justices criticized how the test “invited chaos”6 and gave power to a “modified heckler’s veto.”7 Still others drastically altered the inquiry to avoid its deficiencies or simply declined to follow the test at all.8 The root of these criticisms and alterations derived from the Court’s inconsistent application of Lemon’s broad prongs.9 While the test aimed to standardize Establishment Clause controversies, the subjective factors led to highly variable applications from Justices.10

In June of 2022, nearly five decades after the inception of the Lemon test and after years of ignoring the test altogether, the Court decided in Kennedy v. Bremerton School District that an Establishment Clause inquiry “focused on original meaning and history” would replace Lemon’s endorsement test.11 But after instituting the test, the Court neglected to apply it.12

The first purpose of this Comment aims to analyze what exactly this history and tradition inquiry entails by proposing potential tenets of the test.13 To this end, Part II summarizes the Court’s early Establishment Clause cases, adoption of the Lemon endorsement test, and subsequent criticism in favor of a test grounded in history.14 Part III then proposes the central tenets of the history and tradition test based on Court precedent.15 Part IV illustrates these

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9. See generally Mark Storslee, Church Taxes and the Original Understanding of the Establishment Clause, 169 U. PA. L. REV. 111, 113–17 (2020) (“In the aggregate, the results made the no-aid theory look like a guessing game, not a sound legal rule.”).
10. See infra Section II.C (describing the inconsistent holdings derived from the Lemon test).
11. Kennedy, 142 S. Ct. at 2428 (“In place of Lemon and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by ‘reference to historical practices and understandings.’”).
12. See id. at 2450 (Sotomayor, J., dissenting) (“The Court reserves any meaningful explanation of its history-and-tradition test for another day, content for now to disguise it as established law and move on.”).
13. The Establishment Clause is an expansive area of law, drawing in free exercise, public policy, and broad history concerns. See generally Robert A. Sedler, Understanding the Establishment Clause: A Revisit, 59 WAYNE L. REV. 589, 593–96 (2013) (discussing a variety of changes that occurred in Establishment Clause jurisprudence in recent years). This Comment will touch on these areas but is aimed at addressing the stated thesis.
14. See infra Part II.
15. See infra Part III.
findings by comparing *County of Allegheny v. ACLU* as originally decided under the *Lemon* endorsement test framework with an analysis based on the proposed tenets of the history and tradition test.\(^\text{16}\)

The second purpose of this Comment is to argue that, though imperfectly defined, the history and tradition test creates the potential for a less divisive country.\(^\text{17}\) To this end, Part V analyzes the equivocal impact of the Court adopting the history and tradition test but argues that this inquiry may support a more pluralistic society with a healthier separation between church and state.\(^\text{18}\)

II. ESTABLISHMENT Clause Jurisprudence

The First Amendment’s Religion Clauses state that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”\(^\text{19}\) The Supreme Court separates this clause into two parts: the Establishment Clause and the Free Exercise Clause.\(^\text{20}\) These clauses frequently interact with each other, and Justices often disagree about their relationship to

\(^{16}\) See infra Part IV.

\(^{17}\) See generally John D. Inazu, *A Confident Pluralism*, 88 S. CAL. L. REV. 587, 589 (2015) (noting that “[t]he ongoing tension between religious liberty and gay rights is perhaps the most prominent example today of the profound and deep differences in our county. But we are also divided over many other issues: immigration, criminal justice, abortion and contraception, poverty, and education, to name a few.”).

\(^{18}\) See infra Part V.

\(^{19}\) U.S. CONST. amend. I. These restrictions on Congress have been interpreted to extend to the states as well. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (“The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.”); see also John Witte, Jr., *Back to the Sources? What’s Clear and Not So Clear About the Original Intent of the First Amendment*, 47 BYU L. REV. 1303, 1317–23 (2022) (discussing religious protections adopted in state constitutions). Taking the perspective of a legal historian, Witte, Jr. sifts through founding-era documents in an effort to discern the intent behind the Religion Clauses of the First Amendment. *See id.* at 1348–73. Although there are some thematic takeaways, such as the importance of freedom of conscience, he notes the difficulty of finding the original intent of an amendment which went through twenty-five drafts to amount to sixteen words. *See id.* at 1348.

\(^{20}\) See generally Espinosa v. Mont. Dep’t of Revenue, 140 S. Ct. 2246, 2254 (2020) (“The Religion Clauses of the First Amendment provide that ‘Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.’ We have recognized a ‘play in the joints’ between what the Establishment Clause permits and the Free Exercise Clause compels.”).
one another.\footnote{21} Thus, while this section focuses on the history of Establishment Clause jurisprudence, the clauses often “intertwine” in Court decisions, so some discussion of the Free Exercise Clause will be necessary, particularly in Section II.D.\footnote{22}

\textbf{A. Nuance of Early Establishment Clause Cases}

Modern Establishment Clause doctrine originates in \textit{Everson v. Board of Education}\footnote{23} where the Court incorporated the clause to the states\footnote{24} and upheld a decision by a New Jersey school district to reimburse parents who sent their children to school on buses, including parents who sent their children to parochial schools.\footnote{25} Despite holding in favor of the religious parents, \textit{Everson} echoed the infamous imagery from \textit{Reynolds v. United States} in concluding, “The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable.”\footnote{26} Notably, the Court drew on the history of religious freedom in the United States’ founding to hold that granting tax money to religious schools as part of a general program was within the meaning of the First Amendment: “That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers . . . . State power is no more to be used so as to handicap religions, than it is to

\begin{footnotes}
\footnotetext{21}{See, e.g., Walz v. Tax Comm’n of N.Y., 397 U.S. 664, 668–69 (1970) (“The Establishment and Free Exercise Clauses of the First Amendment are not the most precisely drawn portions of the Constitution. . . . The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other.”).}
\footnotetext{22}{See infra Section II.D (discussing the Free Exercise Clause because of the current Court’s emphasis on the Religion Clauses’ complementary relationship).}
\footnotetext{23}{See Everson v. Bd. of Educ. of Ewing Tp, 330 U.S. 1, 16 (1947); see also Zelman v. Simmons-Harris, 536 U.S. 639, 686–87 (2002) (Souter, J., dissenting) (arguing that \textit{Everson} “inaugurated the modern era of establishment doctrine”).}
\footnotetext{24}{But see Erwin Chemerinsky & Barry P. McDonald, \textit{Eviscerating a Healthy Church-State Separation}, 96 WASH. U. L. REV. 1009, 1011 (2019) (discussing how the Establishment Clause was intended to be a check on the federal government—not state governments—and how conservatives have ignored this despite advocating for originalism).}
\footnotetext{25}{\textit{Everson}, 330 U.S. at 17–18. In a stark contrast to later Establishment Clause opinions, \textit{Everson’s} majority consisted of only 18 pages. See id. at 18.}
\footnotetext{26}{Id.; see also Reynolds v. United States, 98 U.S. 145, 164 (1878) (“I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should ‘make no law respecting an establishment of religion or prohibiting the free exercise thereof,’ thus building a wall of separation between church and State.”).}
\end{footnotes}
favor them.”

Thus, the Court entrenched a neutrality that was defined by equal treatment toward both religion and non-religion.

After upholding the reimbursement system in *Everson*, the Court attempted to further define the balance of religious neutrality and the “wall of separation,” first by striking down overtly religious practices that were endorsed in public schools. In *Engel v. Vitale*, the Court prohibited the morning reading of a “non-denominational” prayer in New York public schools, relying heavily on the history of American colonists leaving England for religious freedom. One year later, in *School District of Abington v. Schempp*, the Court struck down the practice of reading Bible verses in school, emphasizing neutrality toward religion by holding that laws must have a “secular legislative purpose and a primary effect that neither advances nor inhibits religion.”

Likewise, in *McCollum v. Board of Education*, the Court invalidated the practice of religious teachers coming into public school classrooms during the school day and teaching religious lessons.

However, the Court’s definition of neutrality did not prohibit all religious expression. In *Zorach v. Clauson*, the Court upheld the practice of allowing

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28. See, e.g., JAMES RAPP, EDUCATION LAW § 2.01 (2023) (“While a state could provide transportation only to children attending public schools, the Establishment Clause does not prohibit a state from extending its general state law benefits to all its citizens without regard to their religious belief.”).
29. *Engel v. Vitale*, 370 U.S. 421, 436 (1962) (“It is proper to take alarm at the first experiment on our liberties . . . . Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?” (alteration in original) (quoting James Madison, *Memo

rial and Remonstrance Against Religious Assessments*, in THE FOUNDER’S CONSTITUTION 183, 185–86 (William T. Hutchinson et al. eds., 2000)).
30. Id. at 425–33.
31. Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 222 (1963). *But see id.* at 294 (Brennan, J., concurring) (“I believe that the line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers.”).
33. See id. at 234 (Jackson, J., concurring). Justice Jackson effectively conveys the challenge facing the Court while offering a respect to local decision-making:

The task of separating the secular from the religious in education is one of magnitude, intricacy and delicacy. To lay down a sweeping constitutional doctrine as demanded by complainant and apparently approved by the Court, applicable alike to all school boards of the nation, “to immediately adopt and enforce rules and regulations prohibiting all

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public school students to leave during the school day and attend religious instruction at a religious institution:

Government may not . . . blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.34

Thus, McCollum prohibited religious teachers from coming to public schools, but Zorach permitted public school students to leave schools for religious institutions during the day.35

The struggle to define neutrality became more pronounced when extended to controversies outside of the public school context, where the Court was less prohibitive involving funding of religious schools, institutions, and even beliefs.36 In Board of Education v. Allen, the Court held that the Establishment Clause did not prohibit supplying teaching materials to religious private schools, using the “primary effect” language from Abington v. Schempp to find that the purpose was merely to further educational opportunities, not to promote religion.37 Likewise, in Sherbert v. Verner, the Court again ruled

instruction in and teaching to religious education in all public schools," is to decree a uniform, rigid and, if we are consistent, an unchanging standard for countless school boards representing and serving highly localized groups which not only differ from each other but which themselves from time to time change attitudes. It seems to me that to do so is to allow zeal for our own ideas of what is good in public instruction to induce us to accept the role of a super board of education for every school district in the nation.

See id. at 237.


35. Compare id. at 315 (“Here, . . . the public schools do no more than accommodate their schedules to a program of outside religious instruction.”) with McCollum, 333 U.S. at 209–10 (“The operation of the state’s compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects. Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes. This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith.”).

36. See Michael W. McConnell, Churches and Government Funding, 21 J. MKTS. & MORALITY 49, 61–62 (2018) (“For several decades, the Court struggled to draw a line between forms of aid that could constitutionally be provided to accredited elementary and secondary schools that are religiously affiliated, and forms of aid that could not.”).

37. Bd. of Educ. v. Allen, 392 U.S. 236, 243–44 (1968) (“This test is not easy to apply . . . . The statute upheld in [Everson] would be considered a law having ‘a secular legislative purpose and a
in favor of the religious party in holding that South Carolina must provide unemployment benefits to a Seventh Day Adventist who was fired because she refused to work on the Sabbath. The Court clarified that this result did not indicate an establishment of the Seventh Day Adventist religion—it merely upheld the appellant’s Free Exercise Clause right to receive public benefits without having to pick between her faith and her work. And again, in *Walz v. Tax Commission of New York*, the Court held that state and federal tax exemptions for religious institutions did not violate the First Amendment because of its neutral treatment toward religion and historical precedence.

In sum, these early establishment cases showcase the difficulty in defining the “overriding principle of complete official neutrality toward religion” when balancing the interests of preventing religious coercion with respecting religion as a fundamental part of the United States’ beliefs and history. As *Walz* aptly noted: “The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other.” Consequently, the Court often invoked nuanced and case-specific determinations that lacked a unifying theme. Particularly, while the Court

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38. *Sherbert v. Verner*, 374 U.S. 398, 409–10 (1963) (“This holding but reaffirms a principle that we announced a decade and a half ago, namely that no State may ‘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.’”).
39. *Id.* at 410.
41. Sedler, *supra* note 13, at 598 (“This overriding principle, of course, does not provide much guidance for determining whether a particular governmental action involving religion violates the Establishment Clause.”).
42. *See Walz*, 397 U.S. at 672 (“With all the risks inherent in programs that bring about administrative relationships between public education bodies and church-sponsored schools, we have been able to chart a course that preserved the autonomy and freedom of religious bodies while avoiding any semblance of established religion. This is a ‘tight rope’ and one we have successfully traversed.”).
43. *Id.* at 668–69.
44. *Id.* at 668 (“The Establishment and Free Exercise Clauses of the First Amendment are not the most precisely drawn portions of the Constitution.”).
seemed to equate neutrality with secularity in the public school context, it equated neutrality with equality in the funding of religious institutions. This alternating attitude is partially due to shifting between using the practice’s effect and its history as methodological guides. Facing these inconsistencies, the Court searched for a solution to its Establishment Clause discrepancies.

B. Further Confusion in Lemon v. Kurtzman

With high ambitions, the Court sought to standardize Establishment conflicts in Lemon v. Kurtzman. Chief Justice Warren Burger’s majority opinion insisted that “lines must be drawn” to clarify the Religion Clauses’ “at best opaque” language. To this end, Lemon drew upon previous cases to institute a now-infamous three prong test to analyze Establishment Clause controversies: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, . . . [and] finally, the statute must not foster ‘an excessive government entanglement with religion.’”

After defining the three prongs, Lemon applied this test to the Rhode Island and Pennsylvania statutes at issue. Rhode Island’s statute supplemented the income of teachers of secular subjects in private schools, including religious schools, where the average spending per pupil was less than the average spending per pupil in public schools. Pennsylvania’s statute similarly

45. Compare Engel v. Vitale, 370 U.S. 421, 431 (1962) (noting that no one should have to support religious beliefs they do not agree with) with Sherbert v. Verner, 374 U.S. 398, 410 (1963) (holding that the plaintiff’s faith should not exclude them from public benefits).
46. Compare Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 212–17 (1963) (analyzing the history of the religious practice) with Walz, 397 U.S. at 672 (measuring the statute’s “primary effect”).
48. See generally Storslee, supra note 9, at 113 (“Over time, that situation produced some strikingly unpersuasive distinctions. Paying for textbooks was permissible, but paying for maps was not. Subsidizing rides to religious schools was acceptable, but rides from those schools to museums was not. Paying for special education teachers in religious schools to diagnose learning difficulties was allowed, but paying for them to treat those difficulties was not. In the aggregate, the results made the no-aid theory look like a guessing game, not a sound legal rule.”).
49. Lemon, 403 U.S. at 612, 625.
50. Id. at 612–13 (citation omitted).
51. Id. at 615–22.
52. Id. at 607.
reimbursed such schools for the salaries of teachers who taught secular subjects.\textsuperscript{53}

The Court briefly acknowledged that neither of these statutes violated the first prong because legislative inquiries found that there was no religious purpose.\textsuperscript{54} The Court then decided not to consider the second prong—whether the statutes promoted or inhibited religion—despite having just defined the prong.\textsuperscript{55} Instead, the Court found that the third prong—the excessive entanglement prong—was most determinative.\textsuperscript{56}

The Court started its analysis by characterizing this prong as “a matter of pure form and style.”\textsuperscript{57} Specifically, the prong considers: “[1] the character and purposes of the institutions that are benefited, [2] the nature of the aid that the State provides, and [3] the resulting relationship between the government and the religious authority.”\textsuperscript{58} For both the Rhode Island and Pennsylvania programs, the Court found that the character and purposes of the institutions promote religious faith and activity.\textsuperscript{59} For the nature of aid, the Court found that while precedents allowed governments to fund religious private schools’

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\textsuperscript{53} Id. at 609–10.
\textsuperscript{54} Id. at 613 (finding “no basis for a conclusion that the legislative intent was to advance religion”).
\textsuperscript{55} See id. at 613–14.

All these provisions are precautions taken in candid recognition that these programs approached, even if they did not intrude upon, the forbidden areas under the Religion Clauses. We need not decide whether these legislative precautions restrict the principal or primary effect of the programs to the point where they do not offend the Religion Clauses, for we conclude that the cumulative impact of the entire relationship arising under the statutes in each State involves excessive entanglement between government and religion.

\textit{Id.}

The Court’s analysis that the programs “approached” but did not “intrude” the “forbidden areas under the Religion Clauses” does not provide any guidance for this prong even though the point of a judicial test is to provide guidance to lower courts in discerning future controversies. \textit{See id.; see also Jon Veen, Where Do We Go from Here? The Need for Consistent Establishment Clause Jurisprudence, 52 Rutgers L. Rev. 1195, 1206 (2000) (“Scholars criticize [the primary effects prong] because ‘the particular effects of a given state action are not often readily apparent and will therefore depend on the Court’s subjective value judgments.’”)} (quoting Ann E. Stockman, Comment, ACLU v. Black Horse Pike Regional Board of Education: The Black Sheep of Graduation Prayer Cases, 83 Minn. L. Rev. 1805, 1815 n.45 (1999)).

\textsuperscript{56} Lemon, 403 U.S. at 614.
\textsuperscript{57} Id. (“Here we examine the form of the relationship for the light that it casts on the substance.”).
\textsuperscript{58} Id. at 615.
\textsuperscript{59} Id. at 615–16, 620–21 (finding the Rhode Island schools “involve substantial religious activity and purpose” and the Pennsylvania schools “have the purpose of propagating and promoting a particular religious faith, and conduct their operations to fulfill that purpose”).
“[b]us transportation, school lunches, public health services, and secular textbooks,” Rhode Island’s statute allowing funding a teacher of a secular subject impermissibly entangled with religion because of the conflict between a teacher under the control of a religious structure being forced to separate religious conviction from their secular subject. The Court reasoned that this conflict would require state inspection which would create an excessive relationship between the government and religious schools.61

The Court similarly criticized the Pennsylvania statute for its entanglement of religious schoolteachers teaching secular subjects but mainly focused on how the statute permitted the state to directly reimburse the private schools.62 Finding that Walz and other precedents specifically warned about a direct reimbursement to religious institutions, the Court derided the “intimate and continuing relationship between church and state” involved in this form of subsidy.63

Finally, the Court criticized these programs’ potential for political divisiveness, noting that it could cause people to vote based on their faith.64 The Court claimed that the First Amendment aims to prevent this hypothetical

60. Id. at 616–17.
61. Id. at 616–17, 619–20. The Court’s concern with mixing religion and secular subjects here reveals a distrust in religious institutions following the statute’s mandates; Justice White’s dissent similarly criticizes the “excessive entanglement” line of thinking:

The reasoning is a curious and mystifying blend, but a critical factor appears to be an unwillingness to accept the District Court’s express findings that, on the evidence before it, none of the teachers here involved mixed religious and secular instruction. Rather, the District Court struck down the Rhode Island statute because it concluded that activities outside the secular classroom would probably have a religious content and that support for religious education therefore necessarily resulted from the financial aid to the secular programs, since that aid generally strengthened the parochial schools and increased the number of their students. . . . The Court points to nothing in this record indicating that any participating teacher had inserted religion into his secular teaching, or had had any difficulty in avoiding doing so. The testimony of the teachers was quite the contrary. Id. at 665–67 (White, J., concurring in part and dissenting in part).

62. Id. at 621–22 (majority opinion) (“[T]he government’s post-audit power to inspect and evaluate a church-related school’s financial records and to determine which expenditures are religious and which are secular creates an intimate and continuing relationship between church and state.”). But see generally Richard W. Garnett, Religion, Division, and the First Amendment, 94 GEO. L.J. 1667, 1690 (2006) (“[T]o support his ‘broader base of entanglement’ argument, Chief Justice Burger relied entirely on [a law review article] and on concurring opinions by Justices Harlan and Goldberg in Walz, Board of Education v. Allen, and School District v. Schempp.”).

63. See Lemon, 403 U.S. at 621–22.

64. Id. at 622; see also Garnett, supra note 62, at 1690 (“Chief Justice Burger provided no evidence to support his observations and predictions about the division associated with certain issues or for his political judgment that certain issues are less important, and more distracting, than others.”).
situation despite conceding that people of faith will be passionate about a number of issues based on their faith. Nevertheless, the potential slippery slope of these statutes concerned the Court too much. The Court then concluded, without any evidence, that “[t]he Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice.”

In sum, Lemon sought to clarify the Establishment Clause by creating three factors from the line of inconsistent cases it was trying to reconcile. The Court offered substantive guidance only for the third factor—excessive entanglement—but its reasoning for this factor centered around unfounded claims involving the trustworthiness of teachers with religious convictions, the speculative potential for political divisiveness, and the Constitution’s “decre[ ] that religion must be a private matter.” Thus, Lemon began its journey as a “ghoul in a late-night horror movie.”

C. Inconsistency Following Lemon

Unsurprisingly, while the goal of Lemon was to standardize Establishment Clause analysis, the Court only further contributed to the doctrine’s muddied jurisprudence. Chief Justice Burger’s opinion resulted in decades of case law where the Court at times adopted, modified, or completely ignored Lemon’s “non-endorsement” test. This section primarily looks at the division surrounding the primary effect and excessive entanglement prongs and the later decisions by the Court to modify or abandon the prongs altogether.

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66. Id. at 623–24.
67. Id. at 625.
68. See id. at 612.
69. See id. at 622–25.
71. See Am. Legion v. Am. Humanist Ass’n, 139 S. Ct. 2067, 2080 (2019) (plurality opinion) (“After grappling with such cases for more than 20 years, Lemon ambitiously attempted to distill from the Court’s existing case law a test that would bring order and predictability to Establishment Clause decisionmaking. . . . If the Lemon Court thought that its test would provide a framework for all future Establishment Clause decisions, its expectation has not been met. In many cases, this Court has either expressly declined to apply the test or has simply ignored it.”).
72. See Veen, supra note 55, at 1209–12 (providing the Supreme Court’s history of modifications to the Lemon test).
73. See infra Section II.C.
In Committee for Public Education & Religious Liberty v. Nyquist—one of the first cases decided under Lemon’s framework—the Court found that New York’s reimbursement programs advanced religion by compensating parents of students at parochial schools and paying parochial schools for maintenance and repair expenses.74 Despite writing the majority opinion in Lemon only two years earlier, Chief Justice Burger partially dissented from the Court’s Lemon analysis, arguing that the reimbursement programs were supported by precedent.75 Perplexingly, he argued that history must supersede logic in order to respect precedent, even though he had authored the Lemon prongs to analyze future Establishment Clause controversies.76 Chief Justice Burger’s disagreement with the Court’s analysis—particularly with the primary effect prong—vividly illustrates its subjective nature considering he was the architect of the test.77

75. Id. at 801 (Burger, C.J., concurring in part and dissenting in part) (“The essence of all these decisions, I suggest, is that government aid to individuals generally stands on an entirely different footing from direct aid to religious institutions.”).
76. Id. at 802–03. The Chief Justice’s argument for respecting Establishment precedent over logic despite creating a test that is meant to logically analyze these conflicts is puzzling because in the same section he claims it is based on history at one point and policies in another:
This fundamental principle which I see running through our prior decisions in this difficult and sensitive field of law, and which I believe governs the present cases, is premised more on experience and history than on logic. It is admittedly difficult to articulate the reasons why a State should be permitted to reimburse parents of private schoolchildren—partially at least—to take into account the State’s enormous savings in not having to provide schools for those children, when a State is not allowed to pay the same benefit directly to sectarian schools on a per-pupil basis. In either case, the private individual makes the ultimate decision that may indirectly benefit church-sponsored schools; to that extent the state involvement with religion is substantially attenuated. The answer, I believe, lies in the experienced judgment of various members of this Court over the years that the balance between the policies of free exercise and establishment of religion tips in favor of the former when the legislation moves away from direct aid to religious institutions and takes on the character of general aid to individual families. This judgment reflects the caution with which we scrutinize any effort to give official support to religion and the tolerance with which we treat general welfare legislation. But, whatever its basis, that principle is established in our cases, from the early case of Quick Bear to the more recent holdings in Everson and Allen, and it ought to be followed here.

Id.

77. Id. at 804–05 (“The ‘primary effect’ branch of our three-pronged test was never, at least to my understanding, intended to vary with the number of churches benefited by a statute under which state aid is distributed to private citizens.”). How can the co-creator of a test question his understanding of it? See Veen, supra note 55, at 1206 (“Scholars criticize this prong because ‘the particular effects of a given state action are not often readily apparent and will therefore depend on the Court’s subjective value judgments.”) (quoting Stockman, supra note 55, at 1815 n.45).
The Court’s division over the primary effect prong continued within the religion in schools context.\(^\text{78}\) *Meek v. Pittinger*—a 6–3 opinion with six Justices concurring in part and dissenting in part—upheld a statute permitting the loaning of public school teaching equipment and materials to students but struck down loaning the materials directly to the parochial school.\(^\text{79}\) In a 5–4 decision in *Mueller v. Allen*, the Court seemed to limit *Nyquist* and align more with *Meek* by upholding a Minnesota law that allowed parents—including those who sent their children to private sectarian schools—to include education expenses as a tax deduction.\(^\text{80}\) The four Justices in dissent disagreed with the application of the “primary effect” prong, arguing that whether “parents receive a reduction of their tax liability, rather than a direct reimbursement, is of no greater significance here than it was in *Nyquist*.”\(^\text{81}\)

The Court’s division also extended to the excessive entanglement prong as demonstrated in *Aguilar v. Felton* and *Grand Rapids School District v. Ball*, decided on the same day in 1985.\(^\text{82}\) Both of these cases involved programs providing secular supplemental education in religious schools: in *Aguilar*, the

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\(^\text{78}\) See Pew Forum on Religion & Pub. Life, Shifting Boundaries: The Establishment Clause and Government Funding of Religious Schools and Other Faith-Based Organizations 5 (2009), https://www.pewresearch.org/religion/2009/05/14/shifting-boundaries6/ (outlining key cases of government funding of religion); see also Garnett, supra note 62, at 1693 (“During the decade or so following *Nyquist*, the Court, time and again, confronted efforts by governments to provide educational aid, in various forms, to children attending religious schools. In the published decisions that resulted, the Justices’ efforts to apply the *Lemon* test to programs involving slide projectors, atlases, maps, standardized testing, and field trips were—as the Justices could not help admitting—not always edifying.”). Professor Garnett’s argument is that the inconsistency originates from a subjective, and consequently differing, view of how religion can divide the public. *Id.*


\[^{\text{W}}\text{e are asked to decide whether Minnesota’s tax deduction bears greater resemblance to those types of assistance to parochial schools we have approved, or to those we have struck down. Petitioners place particular reliance on our decision in Committee for Public Education v. *Nyquist*, where we held invalid a New York statute providing public funds for the maintenance and repair of the physical facilities of private schools and granting thinly disguised “tax benefits,” actually amounting to tuition grants, to the parents of children attending private schools. As explained below, we conclude that § 290.09(22) bears less resemblance to the arrangement struck down in *Nyquist* than it does to assistance programs upheld in our prior decisions and those discussed with approval in *Nyquist*.”* *Id.* at 393–94 (citation omitted).

\(^\text{81}\) *Id.* at 407–408 (Marshall, J., dissenting).

program aided low income students that were “educationally deprived”\(^83\) while \textit{Ball} concerned publicly financed supplementary educational classes in private schools.\(^84\) In a 5–4 decision, the Court in \textit{Aguilar} struck down the low income program on the basis that it impermissibly entangled government and religion because it mandated an active relationship between the state and religious schools.\(^85\) Chief Justice Burger again disagreed with the operation of this \textit{Lemon} prong, stating the Court has historically understood that some relationship between church and state is unavoidable, and that it is impractical to hold otherwise.\(^86\)

Likewise, \textit{Ball} was a 6–3 decision striking down the state’s program, with Justice O’Connor concurring in part and dissenting in part.\(^87\) Similar to Chief Justice Burger’s dissent in \textit{Aguilar}, Justice Rehnquist disagreed that a “symbolic link” between government and religion creates an impermissible effect of advancing religion.\(^88\) Further illustrating the Court’s division, \textit{Agostini v. Felton} overruled both of these cases just twelve years later using a modified version of the \textit{Lemon} test and holding that the Court’s understanding of the Establishment Clause had changed during that time period.\(^89\)

\(^83\). \textit{Aguilar}, 473 U.S. at 405–06 (“The proposed programs must also meet the following statutory requirements: the children involved in the program must be educationally deprived, § 3804(a), the children must reside in areas comprising a high concentration of low-income families, § 3805(b), and the programs must supplement, not supplant, programs that would exist absent funding under Title I. § 3807(b).”).

\(^84\). \textit{Ball}, 473 U.S. at 375–76 (“Although Shared Time itself is a program offered only in the nonpublic schools, there was testimony that the courses included in that program are offered, albeit perhaps in a somewhat different form, in the public schools as well.”).

\(^85\). \textit{Aguilar}, 473 U.S. at 412–13 (finding that the program “would require a permanent and pervasive state presence in the sectarian schools receiving aid”).

\(^86\). \textit{Id.} at 419 (Burger, C.J., dissenting) (“Many of these children now will not receive the special training they need, simply because their parents desire that they attend religiously affiliated schools.”); \textit{see also id.} at 420 (Burger, C.J., dissenting) (noting that some relationship “between church and state is unavoidable, and that an attempt to eliminate all contact between the two would be both futile and undesirable.”).

\(^87\). \textit{Ball}, 473 U.S. at 398–99 (O’Connor, J., concurring in part and dissenting in part).

\(^88\). \textit{Id.} at 401 (Rehnquist, J., dissenting) (“A most unfortunate result of this case is that to support its holding the Court, despite its disclaimers, impugns the integrity of public school teachers. Contrary to the law and the teachers’ promises, they are assumed to be eager inculcators of religious dogma, requiring, in the Court’s words, ‘ongoing inspection.’” (citation omitted)).

\(^89\). \textit{Agostini v. Felton}, 521 U.S. 203, 236 (1997) (“[O]ur Establishment Clause jurisprudence has changed significantly since we decided \textit{Ball} and \textit{Aguilar}, so our decision to overturn those cases rests on far more than ‘a present doctrinal disposition to come out differently from the Court of [1985]. We therefore overrule \textit{Ball} and \textit{Aguilar} to the extent those decisions are inconsistent with our current
Holistically, the Court’s division and subjective *Lemon* interpretation created nonsensical jurisprudence. 90 In the parochial school context, the Court permitted tax deductions but not tax credits; allowed government-reimbursed student bus rides to school but not on field trips; approved state-prepared tests for private schools but not public school teacher-prepared tests; permitted government-funded therapeutic, counseling, and remedial services to parochial students off-campus but not on-campus; and allowed government-aided scholarships to religious colleges but not parochial lower schools. 91 In the religious symbols context, the Court—in the same case—approved a menorah in front of a city building but not a crèche in front of a county courthouse based on their discernment of the surrounding “secular” displays. 92 However, a crèche was later approved in *Lynch v. Donnelly*, 93 and Circuit Courts similarly came to inconsistent results concerning the religious symbol. 94

Apart from disputes over the test’s application, Justices also disputed whether to apply *Lemon* at all. 95 This dispute is best summarized in *Lynch*, where Chief Justice Burger’s majority opinion noted that the Court “repeatedly emphasized [its] unwillingness to be confined to any single test or criterion in this sensitive area.” 96 In *Wallace v. Jaffree*, Chief Justice Burger again questioned *Lemon*’s relevance when calling it a signpost rather than a *per se* rule. 97 And in the prayer in public schools context, the Court opted to ignore

90. See generally Garnett, supra note 62, at 1693 (“In the published decisions that resulted, the Justices’ efforts to apply the *Lemon* test to programs involving slide projectors, atlases, maps, standardized testing, and field trips were—as the Justices could not help admitting—not always edifying. In these cases, observations about and predictions of sectarian strife or political division along religious lines were frequently offered as relevant to, if not outcome-determinative of, a school-aid program’s constitutional validity.”).


92. Cty. of Allegheny v. ACLU, 492 U.S. 573, 621 (1989) (“The display of the crèche in the county courthouse has [an] unconstitutional effect. The display of the menorah in front of the City–County Building, however, does not have this effect, given its ‘particular physical setting.’”).


97. *Wallace v. Jaffree*, 472 U.S. 38, 89 (1985) (Burger, C.J., dissenting) (“[O]ur responsibility is not to apply tidy formulas by rote; our duty is to determine whether the statute or practice at issue is a
Lemon for a test measuring if the prayer was coercive or not.\textsuperscript{98} Over the years, the Court routinely declined to follow Lemon and—especially in the last ten years—almost exclusively ignored its prongs in Establishment controversies.\textsuperscript{99} In American Legion v. American Humanist Ass’n, Justice Alito went into detail about Lemon’s shortcomings, providing four reasons why not to apply it and a list of cases where the Court ignored or chose not to apply Lemon, including discontent from both conservative and liberal Justices.\textsuperscript{100}

In sum, Lemon was far from a solution to Establishment Clause disputes because of its subjective factors.\textsuperscript{101} Numerous scholars attacked the test for its subjective balancing and perceived hostility toward religion.\textsuperscript{102} Arbitrary distinctions were drawn that led to unpredictable results.\textsuperscript{103} This unpredictability was compounded when Justices started modifying Lemon or substituting a completely different test.\textsuperscript{104} Ironically, division became worse, not
The need for a more consistent framework was obvious.

D. Recent Cases and Defining Neutrality Through History and Tradition

Following the appointment of conservative Justices in the early 2000s, the Court again pivoted its analysis. This pivot has been alluded to above, with cases like Lynch and American Legion declining to analyze Establishment Clause controversies under Lemon’s prongs. Instead, the Court—similar to its analysis in other Constitutional rights areas—began to discern whether the practice lined up with the United States’ history and tradition. For example, the Court applied this history-based inquiry in Town of Greece v. Galloway, where the Court upheld a city’s longstanding practice of leading a prayer before townhalls because of its tradition, as well as in Espinoza v. Montana Department of Revenue, where the Court held that religious schools were entitled to equal participation in a state’s private school tuition assistance.
This section focuses on three recent decisions from the Court’s October 2021 Term that delivered the final blows to Lemon and solidified history and tradition as the Establishment Clause’s test.

1. **Shurtleff v. City of Boston**

Although Shurtleff v. City of Boston’s majority opinion did not influence Establishment Clause jurisprudence, Justice Gorsuch’s concurrence provides a wealth of insight into his reasoning in Kennedy v. Bremerton School District’s majority opinion, which overruled Lemon just one month later. In Shurtleff, the City of Boston denied a Christian civic organization’s request to raise their flag that included a cross, despite the city’s longstanding tradition of allowing any organization’s flags to be raised—including a secular group that included a cross in their flag. The Court ruled that Boston’s tradition regulated private speech instead of public speech, so the city’s denial amounted to viewpoint discrimination.

While the majority opinion did not focus on the Establishment Clause, Justice Gorsuch’s concurrence provided a scathing account of Lemon that would be significantly toned down in his majority opinion in Kennedy. Though not a controlling precedent, this more “unfiltered” opinion may help inform the tenets of the history and tradition test, considering that Justice Gorsuch cited his Shurtleff concurrence five times in his majority opinion in

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112. Espinoza v. Mont. Dep’t of Revenue, 140 S. Ct. 2246, 2258 (2020) (“[N]o comparable ‘historic and substantial’ tradition supports Montana’s decision to disqualify religious schools from government aid. In the founding era and the early 19th century, governments provided financial support to private schools, including denominational ones.”).

113. See Ramirez v. Collier, 595 U.S. 411, 427 (2022) (describing the long history of audible prayer in execution chambers and the state’s lack of substantial reasoning to end that history). Ramirez, also in the October 2021 Term, was a statutory case concerning RLUIPA—not the Religion Clauses—but may still be informative as to its commentary on history and tradition. See id. at 421.


115. Id. at 279–80 (Gorsuch, J., concurring).

116. Id. at 258 (“When a government does not speak for itself, it may not exclude speech based on ‘religious viewpoint . . . .’”).

117. See generally id. at 276–88 (Gorsuch, J., concurring) (“Lemon sought to devise a one-size-fits-all test for resolving Establishment Clause disputes. That project bypassed any inquiry into the Clause’s original meaning. It ignored longstanding precedents. And instead of bringing clarity to the area, Lemon produced only chaos.”).
Kennedy.\textsuperscript{118}

Justice Gorsuch framed the problem in \textit{Shurtleff} as a consequence of \textit{Lemon}’s unclear standards rather than a government speech issue,\textsuperscript{119} likening \textit{Lemon}’s progeny to an unpredictable children’s game where one arbitrarily asks if a reasonable observer “feels [the state action] ‘endorses’ religion.”\textsuperscript{120} This unpredictability continues to cause local officials to discriminate against free exercise rights in order to avoid an Establishment Clause violation.\textsuperscript{121} Additionally, Justice Gorsuch alleged that others use \textit{Lemon} for its policy outcomes—he noted that the city stated in its oral argument that it “wanted to celebrate only ‘a particular kind of diversity.’”\textsuperscript{122}

As a solution, Justice Gorsuch offered “historical hallmarks” for cities and states to rely on in order to discern the existence of an establishment of religion.\textsuperscript{123} These hallmarks are derived from Professor Michael McConnell’s influential law review article exemplifying establishments in the Founding Era.\textsuperscript{124} In sum, the article argues that establishment involves coercion through giving the church preferential financial support, the ability to punish dissenters, or a monopoly over a civil function.\textsuperscript{125} After appealing to the reliability of history, Justice Gorsuch concluded with a foretelling nod to his majority opinion a month later:

\begin{itemize}
\item \textsuperscript{118} Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427, 2428 n.4, 2429 n.5 (2022).
\item \textsuperscript{119} \textit{Shurtleff}, 596 U.S. at 276–77 (Gorsuch, J., concurring) (“How did the city get it so wrong? To be fair, at least some of the blame belongs here and traces back to \textit{Lemon}. Issued during a ‘bygone era’ when this Court took a more freewheeling approach to interpreting legal texts, \textit{Lemon} sought to devise a one-size-fits-all test for resolving Establishment Clause disputes.” (citations omitted)).
\item \textsuperscript{120} \textit{Id.} at 278–79 (Gorsuch, J., concurring) (“And just like the test itself, the results proved a garble. May a State or local government display a Christmas nativity scene? Some courts said yes, others no. How about a menorah? Again, the answers ran both ways. What about a city seal that features a cross? Good luck.”).
\item \textsuperscript{121} \textit{Id.} at 280 (Gorsuch, J., concurring) (“To avoid a spurious First Amendment problem, Boston wound up inviting a real one. Call it a \textit{Lemon} trade.”).
\item \textsuperscript{122} \textit{Id.} at 284 (Gorsuch, J., concurring) (“Just dial down your hypothetical observer’s concern with facts and history, dial up his inclination to offense, and the test is guaranteed to spit out results more hostile to religion than anything a careful inquiry into the original understanding of the Constitution could sustain. \textit{Lemon} may promote an unserious, results-oriented approach to constitutional interpretation. But for some, that may be more a virtue than a vice.”).
\item \textsuperscript{123} See \textit{id.} at 286–88 (Gorsuch, J., concurring) (describing six historical hallmarks).
\item \textsuperscript{124} See Michael W. McConnell, \textit{Establishment and Disestablishment at the Founding, Part I: Establishment of Religion}, 44 WM. & MARY L. REV. 2105, 2110–12, 2131 (2003); see also infra note 183 (citing Supreme Court cases that have referenced Professor McConnell’s article).
\item \textsuperscript{125} See McConnell, \textit{supra} note 124, at 2119; \textit{Shurtleff}, 596 U.S. at 285–88 (Gorsuch, J., concurring).
\end{itemize}
To justify a policy that discriminated against religion, Boston sought to drag Lemon once more from its grave. It was a strategy as risky as it was unsound. Lemon ignored the original meaning of the Establishment Clause, it disregarded mountains of precedent, and it substituted a serious constitutional inquiry with a guessing game. This Court long ago interred Lemon, and it is past time for local officials and lower courts to let it lie.126


“In place of Lemon and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by ‘reference to historical practices and understandings.’”127 In no uncertain terms, Kennedy v. Bremerton School District delivered the final blow to Lemon and solidified history and tradition as the controlling Establishment Clause inquiry.128

Kennedy involved a high school football coach—Joe Kennedy—who refused to stop his custom of saying a prayer at the fifty yard line after football games.129 In an effort to avoid an establishment violation, the school district suspended him and gave him poor performance reviews that led to his departure from the team.130 Both the District Court and Circuit Court found that the coach’s speech should be considered government speech, and consequently, that his prayers amounted to an Establishment Clause violation.131 In a 6–3 decision—divided by Justices who were appointed by Republican and Democratic presidents132—the Supreme Court reversed, holding that Kennedy’s
actions were private speech and protected under the Free Exercise Clause.\footnote{133}{Kennedy, 142 S. Ct. at 2425 (“Others working for the District were free to engage briefly in personal speech and activity. That Mr. Kennedy chose to use the same time to pray does not transform his speech into government speech. To hold differently would be to treat religious expression as second-class speech and eviscerate this Court’s repeated promise that teachers do not ‘shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.’” (citation omitted) (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S 503, 506 (1969)).}

This ruling disrupts what one scholar calls the “détente” of previous rulings that affirmed the Court’s non-coercion policy in public schools while allowing religious students some leeway in their faith.\footnote{134}{Driver, supra note 128, at 238 (“But it is surely not incidental that the ‘field’ in question sat on public school property, the ‘individual’ in question was a public school official, and the ‘government entity’ or ‘the government’ in question was a public school district. Until Kennedy, those important particulars would have driven the Supreme Court’s analysis. Their marginalization in Kennedy indicates that the public school may well be on the verge of becoming just another governmental office building—at least for Establishment Clause purposes.”).}

By upholding Joe Kennedy’s free exercise rights—as a public employee on public property—the Court made a major shift in the school prayer progeny which previously held that schools cannot promote any prayer of any kind.\footnote{135}{See id. at 239 (“Justice Kennedy’s opinion for the Court in Weisman highlighted ‘indirect coercion’ and ‘subtle coercive pressure’ as triggering constitutional concerns. Justice Scalia famously ridiculed Weisman’s ‘psychojourney,’ sniping that ‘interior decorating is a rock-hard science compared to psychology practiced by amateurs.’”).}

However, Kennedy reverberates well beyond the Free Exercise Clause context.\footnote{136}{Kennedy, 142 S. Ct. at 2433 (Thomas, J., concurring) (“[T]he Court refrains from deciding whether or how public employees’ rights under the Free Exercise Clause may or may not be different from those enjoyed by the general public.”). As Justice Thomas makes clear, this is not a limited decision to just school employees; in fact, he assures that this decision does not ride on the distinction between a public employee and others. See id.}

Particularly, Kennedy’s ruling on the free exercise rights of public employees directly affects the Court’s Establishment Clause analysis in two significant ways: (1) the Court framed the clauses as “complementary,” a significant departure from previous Court decisions that portrayed the two clauses as in tension;\footnote{137}{See generally id. at 2447 (Sotomayor, J., dissenting) (“The proper response is to identify the tension and balance the interests based on a careful analysis of ‘whether [the] particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so.’” (alteration in original) (quoting Walz v. Tax Comm’n of N.Y., 397 U.S. 664, 669 (1970))). See generally Espinoza v. Mont. Dep’t of Revenue, 140 S. Ct. 2246, 2254 (holding that the Religion Clauses are contradictory if absolute).} and (2) as discussed above, the Court ruled that the Establishment Clause is no longer discerned by Lemon’s entanglement test but by voted as a bloc to accept such claims in the two opinions.”); cf. Zalman Rothschild, Free Exercise Partisanship, 107 CORNELL L. REV. 1067, 1081–82 (2022) (further discussion of political divide).}
history and tradition. Presumably through analyzing history and tradition, the Court implied that local officials should be able to interpret the appropriate complementary purposes of the Clauses instead of the false conflict caused by Lemon.

However, the Court did not actually apply this history and tradition test in *Kennedy*. There is no analysis of how Joe Kennedy’s prayer activities fall within the “original meaning and history” of the Establishment Clause. Instead, the Court mainly focused on dispelling any coercion concerns and presenting their argument that the Religion Clauses work together. Beyond this, there is no real practical advice for what the history and tradition test entails.

3. *Carson v. Makin*

*Carson v. Makin* involved a Maine statute where the state helped pay the tuition costs of students attending private schools in areas where public schools are not available; however, the state would not pay the tuition costs of students attending sectarian schools. The Court ruled that this nonsectarian requirement violated the Free Exercise Clause because it excluded

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138. *Kennedy*, 142 S. Ct. at 2426–28 (“It is true that this Court and others often refer to the ‘Establishment Clause,’ the ‘Free Exercise Clause,’ and the ‘Free Speech Clause’ as separate units. But the three Clauses appear in the same sentence of the same Amendment: ‘Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or

139. *Id.* at 2432 (“In truth, there is no conflict between the constitutional commands before us. There is only the ‘mere shadow’ of a conflict, a false choice premised on a misconception of the Establishment Clause.”).

140. *See id.* at 2431–32.

141. *See id.* at 2428, 2431–32.

142. *Id.* at 2429–33 (“There is no indication in the record that anyone expressed any coercion concerns to the District about the quiet, postgame prayers that Mr. Kennedy asked to continue and that led to his suspension. Nor is there any record evidence that students felt pressured to participate in these prayers. To the contrary, and as we have seen, not a single Bremerton student joined Mr. Kennedy’s quiet prayers following the three October 2015 games for which he was disciplined.”).


religious students from public benefits on the basis of their faith.\textsuperscript{145}

While primarily a free exercise issue, the Court’s commentary on neutrality is relevant for a historical analysis of the Establishment Clause: particularly, the Court made clear that antiestablishment interests cannot justify exclusion from public benefits based on religion.\textsuperscript{146} In other words, a state passing laws to create a larger separation of church and state than the Constitution’s establishment prohibitions is not neutral.\textsuperscript{147} However, the Court did recognize that a “‘historic and substantial’ tradition” may allow for an exception to a religious observer’s right to public benefits.\textsuperscript{148}

\textsuperscript{145} Id. at 1996, 2002 (“Maine’s ‘nonsectarian’ requirement for its otherwise generally available tuition assistance payments violates the Free Exercise Clause of the First Amendment. Regardless of how the benefit and restriction are described, the program operates to identify and exclude otherwise eligible schools on the basis of their religious exercise.”).

\textsuperscript{146} Id. at 1998 (“Justice Breyer[‘s dissent] stresses the importance of ‘government neutrality’ when it comes to religious matters, but there is nothing neutral about Maine’s program. The State pays tuition for certain students at private schools—so long as the schools are not religious. That is discrimination against religion.” (citation omitted)).

\textsuperscript{147} Id. (“But as we explained in both Trinity Lutheran and Espinoza, such an ‘interest in separating church and state “more fiercely” than the Federal Constitution . . . “cannot qualify as compelling” in the face of the infringement of free exercise.’” (alteration in original) (quoting Espinoza v. Mont. Dep’t of Revenue, 140 S. Ct. 2246, 2260 (2020))). But see Chemerinsky & McDonald, supra note 24, at 1031.

It is a basic canon of constitutional law that states, under their laws, may be more protective of constitutional rights guaranteed by the federal Constitution. And so even if the Court were correct to read the federal Establishment Clause as permitting direct non-preferential aid to churches in certain circumstances, this does not invalidate Missouri’s choice to maintain greater protection for anti-establishment rights than exists at the federal level. For the conservative justices who routinely inveigh against federal encroachment on state rights, the Trinity Lutheran decision stands as a stark example of the oft-asserted criticism that federalism principles only seem important when they are convenient to the result in a particular case.

III. TENETS OF THE HISTORY AND TRADITION TEST

Piecing together several of the decisions discussed in Part II, Part III analyzes the key tenets of the Court’s Establishment Clause history and tradition inquiry. In addition to Establishment Clause precedents discussed in Part II, these tenets rest upon the core themes in *Kennedy*—the framing of the Religion Clauses as complementary and the primacy of the history and tradition test—as well as the Court’s notion of neutrality as analyzed in *Carson*. This Part proceeds by discussing a preliminary question to the inquiry before discerning what does and does not qualify as establishment violations.

A. Preliminary Question: The Actor’s Status

Before discussing the current Court’s Establishment Clause doctrine, it is necessary to briefly discuss the parties and situations subject to the doctrine. This section is concerned with the distinction discussed in *Kennedy* of whether the actor is acting as a public official or a private person. *Kennedy* extended what is considered a private action for a public employee. Although Joe Kennedy was a public employee on public property,
his actions after the game were held to be in a private capacity.\textsuperscript{156} The Court’s relevant factors for distinguishing this were that Kennedy sought to have a private prayer that did not coerce students,\textsuperscript{157} did not involve the scope of his duties,\textsuperscript{158} and took place after his public duties were over.\textsuperscript{159}

In these situations where a public employee is acting \textit{privately}, the government is only subject to the Free Exercise Clause and can justify a restriction on religious expression by advocating that public interests outweigh the actor’s private interests.\textsuperscript{160} Alternatively, the government can prove that the government’s actions satisfy strict scrutiny.\textsuperscript{161} In contrast, when a government entity or actor is speaking, the government must satisfy Establishment Clause concerns.\textsuperscript{162}

In sum, the Establishment Clause is relevant when the government is speaking.\textsuperscript{163}

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156. \textit{Id.} at 2425 (“What matters is whether Mr. Kennedy offered his prayers while acting within the scope of his duties as a coach. And taken together, both the substance of Mr. Kennedy’s speech and the circumstances surrounding it point to the conclusion that he did not.”). \\
157. \textit{Id.} at 2430 (“There is no indication in the record that anyone expressed any coercion concerns to \textit{Bremerton School} District about the quiet, postgame prayers that Mr. Kennedy asked to continue and that led to his suspension. Nor is there any record evidence that students felt pressured to participate in these prayers.”). \\
158. \textit{Id.} at 2424 (“[Mr. Kennedy] was not instructing players, discussing strategy, encouraging better on-field performance, or engaged in any other speech the District paid him to produce as a coach. Simply put: Mr. Kennedy’s prayers did not ‘owe[ their] existence’ to Mr. Kennedy’s responsibilities as a public employee.”) (alteration in original) (citation omitted). \\
159. \textit{Id.} at 2425 (“We find it unlikely that Mr. Kennedy was fulfilling a responsibility imposed by his employment by praying during a period in which \textit{Bremerton School} District has acknowledged that its coaching staff was free to engage in all manner of private speech.”). \\
160. \textit{See id.} at 2428–29 (“\textit{Bremerton School District} still contends that its Establishment Clause concerns trump Mr. Kennedy’s free exercise and free speech rights. . . . The evidence cannot sustain it.”). \\
161. \textit{Id.} at 2426 (“Under the Free Exercise Clause, a government entity normally must satisfy at least ‘strict scrutiny,’ showing that its restrictions on the plaintiff’s protected rights serve a compelling interest and are narrowly tailored to that end.”). \\
162. \textit{Pleasant Grove City v. Summum}, 555 U.S. 460, 468 (2009) (“[G]overnment speech must comport with the Establishment Clause.”); \textit{see also Nelson Tebbe, Government Nonendorsement}, 98 \textit{MINN. L. REV.} 648, 654–57 (2013) (describing the state of government speech after \textit{Summum} and proposing a contrary view based on nonendorsement). It is beyond the scope of this Comment to discuss the government speech doctrine in great detail; Professor Tebbe’s article goes into greater depth of this First Amendment area and proposes greater limits. \textit{See id.} \\
163. \textit{See Brief for Kirk Cousins et al. as Amici Curiae Supporting Petitioner at 3, Kennedy}, 142 S. Ct. 2407 (No. 21-418) (Professor McConnell outlines the distinction between private and public speech in this amicus brief to the Court). \\

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B. Establishment Tenets

According to Kennedy, establishment violations rest upon “reference to historical practices and understandings.” Yet, historical practices and understandings are not always immediately clear, especially in contemporary situations like a high school football coach saying a prayer after a game. Thus, this section offers a practical guide to this analysis, basing its findings on the Court’s recent Establishment Clause jurisprudence and lower courts’ interpretations of Kennedy.

164. Kennedy, 142 S. Ct. at 2428. The Court cites American Legion, Town of Greece, and Schempp as supporting precedent. Id.; see also Sections I.A, C–D (discussing these cases).
165. Cf. Mitchell v. Helms, 530 U.S. 793, 877 (2000) (Souter, J., dissenting) (“After Everson and Allen, the state of the law applying the Establishment Clause to public expenditures producing some benefit to religious schools was this: 1. Government aid to religion is forbidden, and tax revenue may not be used to support a religious school or religious teaching. 2. Government provision of such paradigms of universally general welfare benefits as police and fire protection does not count as aid to religion. 3. Whether a law’s benefit is sufficiently close to universally general welfare paradigms to be classified with them, as distinct from religious aid, is a function of the purpose and effect of the challenged law in all its particularity. The judgment is not reducible to the application of any formula. Evenhandedness of distribution as between religious and secular beneficiaries is a relevant factor, but not a sufficiency test of constitutionality. There is no rule of religious equal protection to the effect that any expenditure for the benefit of religious school students is necessarily constitutional so long as public school pupils are favored on ostensibly identical terms. 4. Government must maintain neutrality as to religion, ‘neutrality’ being a conclusory label for the required position of government as neither aiding religion nor impeding religious exercise by believers. ‘Neutrality’ was not the name of any test to identify permissible action, and in particular, was not synonymous with evenhandedness in conferring benefit on the secular as well as the religious.”). Justice Souter’s dissent in Mitchell offers alternate tenets of the Establishment Clause. See id. The modern test disagrees with statements one and three and likely defines statement four’s “neutrality” differently. See generally Kennedy, 142 S. Ct. at 2407, 2429 (acknowledging members of the Court having different opinions regarding coercion).
166. Cf. Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1, 15–16 (1947) (“The ‘establishment of religion’ clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect ‘a wall of separation between Church and State.’”). Kennedy does not seem to totally align with Everson, the case that inaugurated modern Establishment Clause analysis because of its allowance of a tax being levied to religious institutions. See supra Section I.A.
1. Contextual Coercion

As discussed above, Kennedy highlighted how Joe Kennedy’s actions did not coerce others, an obvious example of an Establishment Clause violation. At its core, coercion involves a government requirement to observe a religious activity or attend a church, an obvious establishment violation discussed in more detail in Section III.B.3. But in less obvious situations, such as in Kennedy, the Justices have offered little guidance into how a historic understanding of coercion should be interpreted. There, the Court simply noted that coercion was not at issue because Joe Kennedy did not encourage, direct, or implicitly pressure students to join him in prayer.

The Fifth Circuit provided their insight for this tenet in Freedom from Religion Foundation v. Mack. There, the court found that a judge who regularly opened court with a message led by a chaplain did not violate the Establishment Clause because the chaplains came from different faith traditions and the court adherents were explicitly told that they could wait in the lobby, would be notified when the message was over, and would not be prejudiced in their proceedings before the court. In their discussion concerning However, Everson’s guidance—at least for the overarching relevance of the Establishment Clause—seemed to be a departure from the Court’s precedents at the time as well. See Sedler, supra note 13, at 614 (“However, the Court had held many years before Everson that the Establishment Clause was not violated by a governmental grant of funds to a religiously-affiliated institution, such as a hospital, in order to enable it to provide secular services.”).

167. See Kennedy, 142 S. Ct. at 2429 (“No 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.”).

168. Id. (“This Court has long held that government may not, consistent with a historically sensitive understanding of the Establishment Clause, ‘make a religious observance compulsory.’ Government ‘may not coerce anyone to attend church,’ nor may it force citizens to engage in ‘a formal religious exercise.’” (citations omitted) (quoting Zorach v. Clauson, 343 U.S. 306, 314 (1952); Lee v. Weisman, 505 U.S. 577, 589 (1992)); see also infra Section III.B.3.

169. See Kennedy, 142 S. Ct. at 2429 (“Members of this Court have sometimes disagreed on what exactly qualifies as impermissible coercion in light of the original meaning of the Establishment Clause. But in this case Mr. Kennedy’s private religious exercise did not come close to crossing any line one might imagine separating protected private expression from impermissible government coercion.” (citations omitted)).

170. Id. at 2429–30. (“Nor is there any record evidence that students felt pressured to participate in these prayers. To the contrary, and as we have seen, not a single Bremerton student joined Mr. Kennedy’s quiet prayers following the three October 2015 games for which he was disciplined.”).


172. Id. at 944. The bailiff would read the following script:
coercion, the circuit court relied on the a plurality opinion from *Town of Greece v. Galloway*, which found that coercion is proved from “objective evidence that a person has been treated differently from others, even if that difference is abstract,” but a “subjective offense” does not amount to coercion. In *Mack*, the Fifth Circuit found that the plaintiffs lacked “objectively reasonable” evidence to find coercion because its evidence was unconvincing and speculative. While the Supreme Court did not explicitly adopt the *Galloway* plurality’s definition of coercion in *Kennedy*, it did cite the plurality, suggesting that the Fifth Circuit’s analysis possibly reflects the Supreme Court’s eventual definition of coercion.

Thus, the current takeaway for coercion is that the government can neither compel adults nor pressure students to take part in religious exercise; yet, public display of religion will not automatically trigger coercion.

2. Historic Anti-Establishment State Interests

In addition to laws preventing religious coercion, a state’s historic anti-
establishment interest will withstand a free exercise challenge.\textsuperscript{177} In \textit{Locke v. Davey}, the Supreme Court upheld a state law prohibiting public scholarships for programs intended to “prepare students for the ministry” because of a historic state interest against providing taxpayer funds to prepare future ministers.\textsuperscript{178} But on the other hand, \textit{Carson} demonstrated that states do not have a “historic and substantial state interest” in categorically preventing public aid to sectarian schools when such aid is afforded to other private schools.\textsuperscript{179} Likewise, Justice Gorsuch’s concurrence in \textit{Shurtleff v. City of Boston} expanded on the importance of historic anti-establishment interests in early Establishment Clause controversies, highlighting that history often guided the Court in early establishment decisions.\textsuperscript{180} Thus, a state’s argument that its anti-establishment practice is rooted in this nation’s history and tradition can uphold a state’s anti-establishment law.\textsuperscript{181}

3. Obvious Establishment Violations and Coercion

Finally, Justice Gorsuch’s \textit{Shurtleff} concurrence recites overt establishments that are prohibited under the history and tradition inquiry.\textsuperscript{182} While not a majority opinion, these violations stem from Professor McConnell’s preeminent law review article on the original understanding of the Establishment

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\item \textsuperscript{178} \textit{Locke}, 540 U.S. at 719.
\item \textsuperscript{180} \textit{Shurtleff v. City of Boston}, 596 U.S. 243, 281 (2022) (Gorsuch, J., concurring) (“From the birth of modern Establishment Clause litigation in \textit{Everson v. Board of Ed. of Ewing}, this Court looked primarily to historical practices and analogues to guide its analysis. So, for example, while the dissent in \textit{Everson} disagreed with some of the majority’s conclusions about what qualifies as an establishment of religion, it readily agreed that ‘[n]o provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment.’” (alteration in original) (citation omitted)).
\item \textsuperscript{181} See \textit{Carson}, 142 S. Ct. at 2002. A state must be specific in their framing of the interest though. \textit{See id.} In \textit{Carson}, the Court ruled that there was no substantial historic state interest to exclude sectarian private schools from the same aid available to secular private schools because \textit{Locke}’s exclusion only applied to scholarships that prepared students for the ministry. \textit{Id.} (“\textit{Locke} cannot be read beyond its narrow focus on vocational religious degrees to generally authorize the State to exclude religious persons from the enjoyment of public benefits on the basis of their anticipated religious use of the benefits.”).
\item \textsuperscript{182} See \textit{Shurtleff}, 596 U.S. at 285–88 (Gorsuch, J., concurring).
\end{itemize}

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Clause—an article cited in five Supreme Court opinions, including Justice Gorsuch’s majority opinion in *Kennedy*. Beyond a formal declaration that a religious denomination was in fact the established church, it seems that founding-era religious establishments often bore certain other telling traits. See M. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2110–2112, 2131 (2003) (Establishment and Disestablishment). First, the government exerted control over the doctrine and personnel of the established church. Second, the government mandated attendance in the established church and punished people for failing to participate. Third, the government punished dissenting churches and individuals for their religious exercise. Fourth, the government restricted political participation by dissenters. Fifth, the government provided financial support for the established church, often in a way that preferred the established denomination over other churches. And sixth, the government used the established church to carry out certain civil functions, often by giving the established church a monopoly over a specific function.

These obvious violations tend to involve either an overt established religion by the government or coercion to participate in religious activities.

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183. See McConnell, supra note 124, at 2131–81; Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2060 n.9 (2020) (citing article in majority opinion); *Espinoza*, 140 S. Ct. at 2264 (Thomas, J., concurring) (citing article in concurring opinion); *Town of Greece v. Galloway*, 572 U.S. 565, 605, 608 (2014) (Thomas, J., concurring) (citing article in concurring opinion); *Cutter v. Wilkinson*, 544 U.S. 709, 729 n.1, 729 (2005) (Thomas, J., concurring) (citing article in concurring opinion); see also Driver, supra note 128, at 211–12 (referring to Professor McConnell as the “intellectual architect” of current Establishment Clause interpretation).


185. *Shurtleff*, 596 U.S. at 286 (Gorsuch, J., concurring).

186. See id. at 286–87 (Gorsuch, J., concurring); see also Cnty. of Allegheny v. ACLU, 492 U.S. 573, 659 (1989) (Kennedy, J., concurring in part and dissenting in part) (“The ability of the organized community to recognize and accommodate religion in a society with a pervasive public sector requires diligent observance of the border between accommodation and establishment. Our cases disclose two limiting principles: government may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact ‘establishes a [state] religion or religious faith, or tends to do so.’” (alteration in original) (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984))).
C. Pro-Government Freedom Tenets

In contrast to the immediately preceding section, this section generally defines what the Court does not consider to be Establishment Clause violations.187 These religious freedom tenets stem from the Free Exercise Clause and reflect the Religion Clauses’ focus on neutrality.188 The history and tradition analysis defines neutrality as at least requiring the government to (1) treat religious and non-religious people equally in regard to generally available public funds189 and (2) refrain from specifically targeting religious exercise in legislation.190 In addition, the Court emphasizes that—similar to the inhibitions discussed in Section III.B.2—religious exercises rooted in history and tradition will be upheld.191

1. Equal Treatment

As discussed in detail in Part II, the Court has historically stressed that the Constitution requires equal treatment of the religious and secular.192 Carson v. Makin recently exemplified this principle in holding that, under the history and tradition analysis, neutrality requires the state to include sectarian

187. See infra Section III.C.
188. See Sedler, supra note 13, at 598 (“The overriding principle of complete official neutrality toward religion is as close as the Court is likely to come in formulating an underlying theory as to the meaning of the Establishment Clause and its function in our constitutional system. Since the function of the Establishment Clause in our constitutional system is to promote complete official neutrality toward religion, it follows in theory that the constitutionality of any governmental action involving religion depends on whether or not that action is consistent with this overriding principle.”). Similar to my goal, Sedler’s 2013 law review article sought to establish a “law of the Establishment Clause” from the author’s litigation background and was an update to the author’s previous article. See id. at 590 n.1, 592, 594. The Court’s jurisprudence in the past ten years have greatly altered the “law”—or what I call the “tenets”—of the Establishment Clause, but the focus of neutrality has largely stayed the same. See id. at 596–97. The difference is that the focus on history and tradition defines neutrality much differently than Sedler’s analysis which is partially based on Lemon. Compare id. at 599–606 (summarizing Lemon’s application) with Kennedy, 142 S. Ct. at 2428 (solidifying history and tradition inquiry).
190. Kennedy, 142 S. Ct. at 2422 (“A government policy will not qualify as neutral if it is ‘specifically directed at . . . religious practice.’” (alteration in original) (quoting Emp. Div. v. Smith, 494 U.S. 872, 878 (1990))).
191. See supra Section III.B.2.
192. See generally supra Sections II.A–B (chronicling how early Establishment cases and Lemon sought neutrality—albeit different definitions).
schools when disbursing generally available public aid. Likewise, *Kennedy* held that Joe Kennedy had an equal right to use his private time praying as the other coaches did to check a text or socialize. In a different context, the Court recently ruled in *Fulton v. City of Philadelphia* that if a government official has unfettered discretion to grant exemptions to a law, it must also grant religious exemptions.

There is still significant uncertainty over how equal treatment extends into the school context, an area where the Court has consistently acknowledged heightened coercion concerns. The Ninth Circuit recently took on this issue using *Kennedy’s* guidance in *Waln v. Dysart School District*. In this case, a high school student who practiced her Native American tribe’s faith brought a religious freedom claim against her school district when they turned her away from her graduation for attaching a feather to her graduation cap, a violation of the dress code. However, other students in the district were not turned away for wearing caps with non-religious messages. Without naming the history and tradition test at all, the Ninth Circuit nonetheless leaned on *Kennedy* to reverse the district court’s dismissal of the student’s case, citing *Kennedy*’s call to pluralism and concluding that the school district did not “show that accommodating religious dress for an individual student

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193. *Carson*, 142 S. Ct. at 2002 (“Maine’s ‘nonsectarian’ requirement for its otherwise generally available tuition assistance payments violates the Free Exercise Clause of the First Amendment. Regardless of how the benefit and restriction are described, the program operates to identify and exclude otherwise eligible schools on the basis of their religious exercise.”); *see also* Espinoza v. Mont. Dep’t of Revenue, 140 S. Ct. 2246, 2261 (2020) (“A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious.”).

194. *Kennedy*, 142 S. Ct. at 2425 (“[The District Court held] that Mr. Kennedy’s actual job description left time for a private moment after the game to call home, check a text, socialize, or engage in any manner of secular activities. Others working for the District were free to engage briefly in personal speech and activity. That Mr. Kennedy chose to use the same time to pray does not transform his speech into government speech. To hold differently would be to treat religious expression as second-class speech . . . .”) (citation omitted).


197. *Waln* v. Dysart Sch. Dist., 54 F.4th 1152, 1164 (9th Cir. 2022).

198. *Id.* at 1156–57. For many Native Americans, wearing a feather on your graduation cap has an extra-religious meaning as well: it serves as a protest against the history of colonial assimilation. *Id.* at 1156.

199. *Id.* at 1157–58.
would have any effect on other students’ rights." \(^{200}\)

In sum, while the Supreme Court will inevitably need to further clarify the extent of religious freedom allowed in public school contexts, Justice Gorsuch’s charge that state actors cannot solely promote “a ‘particular’ type of diversity” at the expense of religion seems to be the current takeaway for neutrality and equal treatment under the history and tradition inquiry. \(^{201}\)

2. Exercise Rooted in History and Tradition

Although Section III.B.2 described how historic interests can protect anti-establishment concerns, this section analyzes how a historic interest in favor of free exercise rules out establishment concerns. \(^{202}\) Indeed, it makes sense that an essential tenet of the history and tradition test is actually analyzing the history and tradition of the religious practice or symbol. \(^{203}\) While this analysis changes based on the context of the case, the Court has exemplified this analysis in some areas. \(^{204}\) For example, in the religious symbols context, \textit{American Legion v. American Humanist Ass’n} recognized that historic symbols and practices that demonstrate inclusivity, respect, and the historic importance of religion are constitutional. \(^{205}\) This inclusion of overtly religious symbols greatly differs from the \textit{Lemon} framework, which considered the symbol’s
meaning to a reasonable person or the degree of entanglement it caused with the government.\footnote{206}

The Fifth Circuit’s \textit{Freedom from Religion Foundation v. Mack} reflected this analysis of historical practice in upholding Judge Mack’s practice of holding a prayer before he started court proceedings.\footnote{207} The appellate court followed the Court’s issue framing in \textit{Town of Greece} to analyze “whether courtroom prayer is consistent with a broader tradition of public, government-sponsored prayer.”\footnote{208} In an analysis that examined four types of historic evidence, the Fifth Circuit found that the practice was consistent with the tradition of American judges.\footnote{209} The court also weighed the plaintiff’s claims that the traditions were irrelevant examples of “law office history” and found that though some of the historic evidence was not convincing, the history of prayer before judicial proceedings was clear-cut from the defendant’s multiple categories of evidence.\footnote{210}

In sum, historic interests carry significant weight in the analysis of religious freedom issues and may be utilized by opposing sides to advocate their free exercise or anti-establishment arguments.\footnote{211}

\textbf{IV. \textit{County of Allegheny v. ACLU}, Re-Analyzed} 

Using the proposed tenets above, this Part highlights the changes in Establishment Clause analysis by using the history and tradition inquiry to re-analyze \textit{County of Allegheny v. ACLU}, a case decided under the \textit{Lemon} analysis that demonstrates the test’s inconsistent subjectivity.\footnote{212} This Part first examines the case under the original \textit{Lemon} analysis and then follows with an

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\item\footnote{207} \textit{Freedom from Religion Found., Inc. v. Mack}, 49 F.4th 941, 950–57 (5th Cir. 2022).
\item\footnote{208} \textit{Id.} at 951.
\item\footnote{209} \textit{Id.} at 951–54 (“Chief Justice Jay acknowledged, without apparent surprise, that it was the ‘ancient use[e]’ and ‘custom’ of some New England states to open court terms with a prayer. And Mack has located a prayer book from 1835 in which the clergyman-author included a model ‘Prayer for Courts of Justice’ just before the model ‘Prayer for a Legislative Assembly.’” (alterations in original) (footnotes omitted)).
\item\footnote{210} \textit{Id.} at 957 (“[O]n the whole, we have convincing evidence that it was common for Founding-era Justices to preside over court-term-opening ceremonies at which chaplains delivered prayers.”).\textit{generally id.} at 961 (“Just so. We do not overlook a religious establishment because it is a short prayer before a county justice court where all judgments will be reviewed \textit{de novo}. Instead, the ‘history, character, and context’ of Mack’s ceremony show that it is no establishment at all.”).
\item\footnote{212} See \textit{Cty. of Allegheny v. ACLU}, 492 U.S. 573, 589–97 (1989) (discussing and deciding the case under the \textit{Lemon} analysis).
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analysis under the history and tradition inquiry.  

A. The Original County of Allegheny v. ACLU

The unique structure of opinions in County of Allegheny v. ACLU encapsulates the divisive and subjective nature of Lemon.  

The opinion of the Court, authored by Justice Blackmun, carries five Justices for Parts III.A, IV, and V.  

Outside of this grouping, Justice Blackmun’s opinion consists of four different coalitions of Justices who agree with certain parts of his opinion but not the others.  

Justice O’Connor follows with an opinion of her own, concurring in part and dissenting in part, that agrees with the Court’s judgment, and three other Justices also wrote opinions concurring in part and dissenting in part with various factions of Justices joining their opinions as well.  

The confusing ruling of Allegheny helps explain the disjointed Justices.  

Allegheny involved a municipality that displayed a crèche at its courthouse that was separated from other exhibits and a menorah at a city-owned building.  

The crèche display was held to be unconstitutional under a modified

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213. See infra Sections IV.A–B.
214. See generally Allegheny, 492 U.S. at 578 (showing wide divisions among the Justices regarding this Establishment Clause question).
215. See id.
216. See id. at 578, 623, 637, 646, 654 (O’Connor, J., concurring in part and dissenting in part) (Brennan, J., concurring in part and dissenting in part) (Stevens, J., concurring in part and dissenting in part) (Kennedy, J., concurring in part and dissenting in part) (showing the four different opinions about Justice Blackmun’s opinion. Justice O’Connor, Justice Brennan, Justice Stevens, and Justice Kennedy each filed opinions concurring in part and dissenting in part).
217. See generally id. at 623, 637, 646, 654 (O’Connor, J., concurring in part and dissenting in part) (Brennan, J., concurring in part and dissenting in part) (Stevens, J., concurring in part and dissenting in part) (Kennedy, J., concurring in part and dissenting in part) (showing Justice O’Connor’s opinion, and the other opinions concurring in part and dissenting in part).
218. See generally Daniel Parish, Private Religious Displays in Public Fora, 61 U. Chi. L. Rev. 253, 261 (1994) (“Allegheny marked the first time a majority of the Court explicitly relied on the endorsement test. However, given the logistical confusion of Allegheny’s multiple opinions, the endorsement test’s ascendency was not complete. Three contenders for an Establishment Clause test therefore remained: the Lemon test, the endorsement test, and the coercion test.”). Parish notes that the disjointed Justices disagree on the appropriate test, signaling the need for a standard, reliable test. See generally infra Part V (arguing that the history and tradition test provides a more reliable basis for Establishment Clause controversies than the Lemon test).
Lemon analysis while the menorah display was held to be constitutional.\textsuperscript{220} To reach this conclusion, the Court used the “endorsement test” which reflected a “refined” understanding of the Lemon test.\textsuperscript{221} This test analyzed whether the government conveys that it prefers or promotes religion, takes a position on religious belief, or makes religious belief relevant to one’s standing in the community.\textsuperscript{222} Notably, this test is analyzed from the perspective of those who view the religious symbols.\textsuperscript{223}

In applying the endorsement test to the crèche, the Court noted that Lynch \textit{v. Donnelly}—which approved a city’s presentation of a crèche—revolved around the setting of the religious symbol.\textsuperscript{224} Here, the crèche was not surrounded by any other objects, which the Court held sent the “unmistakable message” that Christian doctrine was being promoted—despite the crèche’s sign that indicated it was maintained by the local Catholic church or the inclusion of the menorah, a symbol of a different faith, a few blocks down the street.\textsuperscript{225} The Court explained this difference in treatment by reasoning that residents would likely not perceive the menorah as promoting or disapproving of religion because of its setting with a Christmas tree and sign explaining the city’s promotion of liberty celebrated by the symbol.\textsuperscript{226} Thus, the Court found that one religious symbol outside of a public building did not violate the Establishment Clause while another religious symbol outside of a public

\begin{itemize}
  \item \textsuperscript{220} Id. at 579 (“We agree that the crèche display has that unconstitutional effect but reverse the Court of Appeals’ judgment regarding the menorah display.”).
  \item \textsuperscript{221} Id. at 592 (“Our subsequent decisions further have refined the definition of governmental action that unconstitutionally advances religion. In recent years, we have paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of ‘endorsing’ religion, a concern that has long had a place in our Establishment Clause jurisprudence.”).
  \item \textsuperscript{222} Id. at 593–94.
  \item \textsuperscript{223} Id. at 597 (“[W]e must ascertain whether ‘the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices.’ Accordingly, our present task is to determine whether the display of the crèche and the menorah, in their respective ‘particular physical settings,’ has the effect of endorsing or disapproving religious beliefs.” (citation omitted) (quoting Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373, 390 (1985))).
  \item \textsuperscript{224} Id. at 599.
  \item \textsuperscript{225} Id. at 600 (“Thus, by permitting the ‘display of the crèche in this particular physical setting,’ the county sends an unmistakable message that it supports and promotes the Christian praise to God that is the crèche’s religious message.” (citation omitted) (quoting Lynch v. Donnelly, 465 U.S. 668, 692 (1984))).
  \item \textsuperscript{226} Id. at 618–20.
\end{itemize}
building a few blocks away did.  

B. County of Allegheny v. ACLU Under the History and Tradition Inquiry

Applying the history and tradition test to Allegheny, the Court would likely uphold both displays. This analysis starts with the preliminary question in Section III.A, which addresses whether the entity must comply with the Establishment Clause: here, the county must adhere to the Establishment Clause’s limitations because it is clearly a government entity with no private speech exceptions.

Next, using the anti-establishment tenets in Section III.B, the inquiry asks whether the symbols coerce residents or whether there is a historic practice of prohibiting the symbols as they are presented. First, coercion is not at issue because the sole reason for the symbols were to “celebrate the season,” not to proselytize or represent the city’s beliefs. In fact, the Allegheny Court did not mention coercion at all—likely because it is unreasonable to conclude that people are coerced by mere observation of a seasonal crèche or menorah outside of a city building. While the ACLU argued in its brief that the symbols subtly coerce religious observation by being at the courthouse and city hall, where attendance is sometimes compelled, this argument confuses

227. Id. at 619–21 (“While no sign can disclaim an overwhelming message of endorsement, an ‘explanatory plaque’ may confirm that in particular contexts the government’s association with a religious symbol does not represent the government’s sponsorship of religious beliefs.” (citation omitted) (citing Stone v. Graham, 449 U.S. 39, 41 (1980); Lynch, 465 U.S. at 707)).

228. See generally Am. Legion v. Am. Humanist Ass’n, 139 S. Ct. 2067, 2080 (2019) (plurality opinion) (“As Establishment Clause cases involving a great array of laws and practices came to the Court, it became more and more apparent that the Lemon test could not resolve them.”); see also id. at 2081–85, 2087 (describing four reasons why Lemon should not be followed and advocating for a historical analysis instead).

229. See generally supra Section III.A (discussing that when a government entity or actor is speaking, the entity must comply with the Establishment Clause).

230. See generally supra Section III.B (discussing the Establishment Clause is violated when it coerces a resident to practice a religious activity, but practices rooted in history and tradition can be upheld).

231. Allegheny, 492 U.S. at 663 (Kennedy, J., concurring in part and dissenting in part) (“In permitting the displays on government property of the menorah and the crèche, the city and county sought to do no more than ‘celebrate the season,’ and to acknowledge, along with many of their citizens, the historical background and the religious, as well as secular, nature of the Chanukah and Christmas holidays.” (citation omitted)).

232. See generally id. at 578–621 (no mention of coercion).

233. See, e.g., Am. Legion, 139 S. Ct. at 2077, 2090 (utilizing history and tradition to uphold a publicly funded thirty-two-foot cross to memorialize fallen soldiers).
coercion with pluralism. As noted by the Court in American Legion v. American Humanist Ass’n, religious symbols inevitably carry different meanings for different people, but the First Amendment advocates for greater tolerance and respect of these different meanings by protecting controversial symbols.

By analyzing whether the symbol or practice is coercive, the history and tradition test significantly departs from the Lemon-endorsement test’s analysis of whether a third party would find that the symbol endorses religion. Indeed, the school district in Kennedy based their disciplinary actions based on endorsement, not coercion. The history and tradition test’s shift to a focus

234. See Brief for Respondents ACLU at 35, Allegheny, 492 U.S. 573 (Nos. 87-2050, 88-90 & 88-96) (“Adoption of Petitioners’ position, however, would enable government to coerce seasonal encounters with sectarian materials, a situation neither contemplated by the framers, nor ever previously countenanced by this Court.”).

235. Am. Legion, 139 S. Ct. at 2090 (“The cross is undoubtedly a Christian symbol, but that fact should not blind us to everything else that the Bladensburg Cross has come to represent. For some, that monument is a symbolic resting place for ancestors who never returned home. For others, it is a place for the community to gather and honor all veterans and their sacrifices for our Nation. For others still, it is a historical landmark. For many of these people, destroying or defacing the Cross that has stood undisturbed for nearly a century would not be neutral and would not further the ideals of respect and tolerance embodied in the First Amendment. For all these reasons, the Cross does not offend the Constitution.”).

236. See Freedom from Religion Found., Inc. v. Mack, 49 F.4th 941, 944 (5th Cir. 2022) (“The plaintiffs cry coercion because Texas Justice of the Peace Wayne Mack opens his court with a ceremony that includes a prayer. But Mack also takes great pains to convince attendees that they need not watch the ceremony—and that doing so will not affect their cases. Some attendees say they feel subjective pressure anyway. Yet the plaintiffs have no evidence suggesting that ‘coercion is a real and substantial likelihood.’” (quoting Town of Greece v. Galloway, 572 U.S. 565, 590 (2014) (plurality opinion)).

Mack does not stop there though:

There is, however, a limiting principle: “If the course and practice over time shows that the invitations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion,” the invitations are inconsistent with the public-prayer tradition. Prayer must be “solemn and respectful in tone” and invite officials to “reflect upon shared ideals and common ends.” Id. at 958 (citations omitted) (quoting Galloway, 572 U.S. at 583 (majority opinion)). This holistic analysis of the history of the practice, with a concern on coercion over a subjective analysis of endorsement best represents anti-establishment interests because it allows for religious practice without harm to those who do not share the same beliefs. See id. at 958–60.

237. See Transcript of Oral Argument at 37–43, Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022) (No. 21-418). Towards the end of Coach Kennedy’s oral argument, the rationalization centers on how the school district coercion versus endorsement. Id. at 38 (“If you look at their letter to the EEOC, . . . there are again eight references to endorsement, endorsing, no references to coercion. So it is clear what motivated their policy.”).
on coercion is important because endorsement is subjective; a focus on coercion ensures that people are not discriminated against, but it also protects the right to peacefully practice one’s religion.\(^\text{238}\)

Moving to the second tenet of anti-establishment interests, there is no historic interest against allowing these symbols because, as further explained below, there is a historic tradition of allowing these symbols.\(^\text{239}\) The third tenet, obvious endorsement of religion such as stating “Allegheny is a Judeo-Christian county,” is also not evident here because the county expressed that its intent was to display the historical background of the Christmas and Hanukkah seasons, incorporating both religious and secular components.\(^\text{240}\)

With no anti-establishment tenets preventing the activity, the proposed inquiry now looks to the pro-religious freedom tenets: (1) equal treatment of the religious and secular and (2) whether there is a history of allowing the religious speech.\(^\text{241}\) The equal treatment tenet is relevant here because the Court views “the Christmas tree as the preeminent secular symbol of the Christmas holiday season.”\(^\text{242}\) Without the complexity of a school setting, equal treatment is a straightforward analysis: does the government act neutrally by treating religious and non-religious symbols equally?\(^\text{243}\) Here, the answer is yes: the county sought to put the secular symbol of the Christmas tree alongside the religious symbols of the menorah and crèche.\(^\text{244}\)

\(^\text{238}\). See id. In fact, this shift in focus seems to be a motivating factor for Justice Gorsuch in overruling Lemon all together. See id. at 39–40. After asking Coach Kennedy’s counsel, Paul Clement, what the Court should do to prevent the confusion between endorsement and coercion, Clement acknowledges that overruling Lemon “would be very helpful.” Id. at 39.

\(^\text{239}\). See Allegheny, 492 U.S. at 663 (Kennedy, J., concurring in part and dissenting in part) (analyzing the county’s wish to acknowledge its religious history).

\(^\text{240}\). Id. (Kennedy, J., concurring in part and dissenting in part) (analyzing the city’s motivations for displaying the symbols).

\(^\text{241}\). See supra Section III.C (outlining the free exercise tenets of the history and tradition inquiry).

\(^\text{242}\). Allegheny, 492 U.S. at 616–17 (“The Christmas tree, unlike the menorah, is not itself a religious symbol. Although Christmas trees once carried religious connotations, today they typify the secular celebration of Christmas.”).

\(^\text{243}\). Id. at 659 (Kennedy, J., concurring in part and dissenting in part) (“The ability of the organized community to recognize and accommodate religion in a society with a pervasive public sector requires diligent observance of the border between accommodation and establishment. Our cases disclose two limiting principles: government may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact ‘establishes a [state] religion or religious faith, or tends to do so.’”) (alteration in original) (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984))).

\(^\text{244}\). See id. at 663–64 (“If government is to participate in its citizens’ celebration of a holiday that
The final tenet, the history and tradition of the practice, also favors the inclusion of the menorah and crèche because the city explicitly intended to acknowledge historical tradition by allowing the religiously diverse symbols to be displayed.\textsuperscript{245} An amicus brief filed on behalf of the government cited the traditional inclusion of religious symbols in the United States, citing \textit{Lynch v. Donnelly}.\textsuperscript{246} which provided “a litany of governmental displays [exhibiting religious messages] that are accepted.”\textsuperscript{247} These historic public displays include the religious origins of the Thanksgiving holiday, the national motto “In God We Trust,” national art galleries with prominent religious exhibits, and the continuing tradition of a “National Day of Prayer” announced by the President.\textsuperscript{248}

The brief also analogized to historic St. Patrick’s Day parades, an ongoing tradition in many cities since it became an annual celebration in New York City in 1853.\textsuperscript{249} With religious origins, this parade draws “numerous public officials from all levels of government and perhaps thousands of high school bands.”\textsuperscript{250} While Christmas undoubtedly carries greater religious connotations than contemporary St. Patrick’s Day celebrations, the City of Pittsburgh’s brief sufficiently describes the relevant analysis: “[T]he question is not one of degree, but rather whether the government can validly acknowledge, without being accused of endorsement, the backgrounds of our respective cultures.”\textsuperscript{251}

Indeed, \textit{Kennedy} clarified that establishment concerns must arise from real concerns about establishment of religion, not just comingling of religion contains both a secular and a religious component, enforced recognition of only the secular aspect would signify the callous indifference toward religious faith that our cases and traditions do not require; for by commemorating the holiday only as it is celebrated by nonadherents, the government would be refusing to acknowledge the plain fact, and the historical reality, that many of its citizens celebrate its religious aspects as well.”).

\textsuperscript{245.} See id. at 663 (analyzing county’s wish to acknowledge the religious history of the symbols).
\textsuperscript{246.} Lynch v. Donnelly, 465 U.S. 668, 687 (1984); see supra Section II.C (analyzing \textit{Lynch} in further detail).
\textsuperscript{247.} Brief for Petitioner, City of Pittsburgh at 8, Allegheny, 492 U.S. 573 (No. 88-96).
\textsuperscript{248.} \textit{Lynch}, 465 U.S. at 675–78.
\textsuperscript{249.} Brief for Petitioner, \textit{supra} note 247, at 9 (“The menorah inclusion in the City’s Christmas display is nothing more than government’s traditional acknowledgement of various celebrations, the origins of which were entirely, or partly, religious, but the celebrations of which in modern times are manifested entirely by social and cultural activities. St. Patrick’s Day is such an example.”); see Larry W. Yackle, \textit{Parading Ourselves: Freedom of Speech at the Feast of St. Patrick}, 73 B.U. L. REV. 791, 812–13 (1993).
\textsuperscript{250.} Brief for Petitioner, \textit{supra} note 247, at 9–10.
\textsuperscript{251.} Id. at 10.
and government. In other words, a government entity cannot infringe on free exercise rights in the name of preventing establishment violations if the action is a “phantom constitutional violation[]” rather than a real establishment issue. In Allegheny, the Court confused a “phantom constitutional violation[]” for an actual one by mistaking the inclusion of historic religious symbols for approval of those symbols.

This emphasis on history and tradition departs from Lemon: instead of valuing the physical setting of the symbol like the endorsement test, the history and tradition inquiry looks to historical support which is provided here by the public, non-coercive prominence of religious holidays in the nation’s history. In short, while the endorsement test struck down the crèche and upheld the menorah, the history and tradition test would uphold both.

Justice Blackmun put it plainly: “This Nation is heir to a history and tradition of religious diversity that dates from the settlement of the North American Continent.” The history and tradition test aims to honor that historic pluralism by protecting both secular and religious expressions that do not coerce others.

252. See Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2047, 2432 (2022) (“In the end, the [School District’s case hinges on the need to generate conflict between an individual’s rights under the Free Exercise and Free Speech Clauses and its own Establishment Clause duties—and then develop some explanation why one of these Clauses in the First Amendment should ‘trump’ the other two.’”).

253. See id.


255. See Kennedy, 142 S. Ct. at 2427 (“This Court has since [Lemon] made plain, too, that the Establishment Clause does not include anything like a ‘modified heckler’s veto, in which . . . religious activity can be proscribed’ based on ‘perceptions’ or ‘discomfort.’ An Establishment Clause violation does not automatically follow whenever a public school or other government entity ‘fail[s] to censor’ private religious speech.” (alterations in original) (citations omitted) (quoting Good News Club, 533 U.S. at 119; Bd. of Educ. v. Mergens, 496 U.S. 226, 250 (1990) (plurality opinion))).

256. See generally Am. Legion v. Am. Humanist Ass’n, 139 S. Ct. 2067, 2074 (2019) (holding that “the adoption of the cross as the Bladensburg memorial must be viewed in [its] historical context.”).

257. Allegheny, 492 U.S. at 589.

258. Id. at 657 (Kennedy, J., concurring in part and dissenting in part) (“Taken to its logical extreme, [previous Court statements about neutrality and anti-establishment] would require a relentless extirpation of all contact between government and religion. But that is not the history or the purpose of the Establishment Clause. Government policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage.”).

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V. IMPACT: NEUTRALITY AND PLURALISM

As demonstrated above, the history and tradition test significantly departs from Lemon and will allow for greater religious expression in public spheres. Understandably, this development concerns many advocates of a strict separation of church and state as well as scholars who point out the inconsistencies of the Court’s history and tradition inquiries in other constitutional issues. This Part aims to briefly analyze two selected criticisms of the inquiry as it relates to the Establishment Clause and ends with advocating for a pluralistic view of neutrality.

A. Criticisms of the History and Tradition Inquiry

Perhaps the most compelling argument against the history and tradition inquiry is that the test is inherently ahistorical. Notably, many of the original state constitutions explicitly restricted public funding to religious institutions before the passage of the First Amendment. Further, the Founders explicitly directed the Establishment Clause toward the federal government: several states had established religions at the founding, so the applicability of the clause to states is a legal fiction. Finally, states have always had the right to impose laws that provide greater protection of individual freedoms

259. See supra Sections III.A–B.
260. Lupu & Tuttle, supra note 143. Lupu and Tuttle, law professors at George Washington University, express the extreme end of such concerns: “The Christian Nationalists among us, and among the Justices, must be thrilled. For those of us who know and fear the consequences of a state dominated by a single faith, the Court’s trajectory is chilling.” Id.
261. See infra Sections V.A–B.
262. See Lupu & Tuttle, supra note 143 (noting that the Court, in Kennedy, “swept aside the last sixty-years of non-establishment law”).
263. See Chemerinsky & McDonald, supra note 24, at 1021 (“In sum, by the time the First Congress met in 1789 to consider a federal bill of rights, there appears to have been a widely shared understanding in all of the states—except three in New England—that protection against having to pay compulsory taxes to support religious faiths a person did not believe in was a key component of a broader right to the free exercise of religion. And even those New England States recognized a qualified form of the right against compelled taxation—limiting the use of such taxes for an individual’s own congregation.”).
264. McConnell, supra note 124, at 2107 (“[N]ine of the thirteen colonies had established churches on the eve of the Revolution, and about half the states continued to have some form of official religious establishment when the First Amendment was adopted.”).
than the federal Constitution. When the Court invokes history in allowing greater public aid to religious organizations, it largely sidesteps these historic realities.

Yet, religious history in America is more nuanced than this selected history. While disestablishment efforts were evident at the Founding, it was actually spearheaded from theological arguments made by religious people who believed in the importance of religion in society and who were concerned with disassociating from the English-based Anglican Church. Moreover, public funding of religious schools was common after the Revolution, and although this practice ended by the Civil War, most public schools were then entrusted to clergymen or missionary societies. In fact, those in the Founding Era who protested against church taxes did not oppose public funds

265. See Chemerinsky & McDonald, supra note 24, at 1031 (“It is a basic canon of constitutional law that states, under their laws, may be more protective of constitutional rights guaranteed by the federal Constitution.”).

266. See id. at 1010 (stating the “early understanding of free exercise rights” prohibited such religious funding).

267. Stephanie H. Barclay, Untangling Entanglement, 97 WASH. U. L. REV. 1701, 1724 (2020) (“Furthermore, as I and other scholars have argued elsewhere, the historical evidence does not support a conclusion that at the founding period any form of public support for religious organizations was viewed as equivalent to an establishment of religion. Rather, public support became problematic if it involved public support given in a way that preferred established churches to other congregations, or resembled a coerced church tithe in that it was a special earmarked tax directly given to churches.”).

268. See generally McConnell, supra note 124, at 2155 (“The Revolution was the final blow to the Anglican establishment. It made no sense to compel citizens to support a Church that was doctrinally committed to royal supremacy and whose clergy were predominantly Tory in their politics. In every colony—now we may shift to the term ‘state’—with an Anglican establishment, the system of public financial support was suspended. But that did not mean that, as a matter of principle, Americans discarded the long-held view that religion was worthy of governmental support.”).

269. Id. at 2173–74 (“Even after disestablishment of religion, most schools in the United States were conducted under religious auspices. Governmental financial support for education, especially in the more religiously diverse big cities, typically took the form of grants to private schools for the education of the poor, with the choice of schools left to the families involved. For example, in New York in 1805 there were schools conducted by Presbyterian, Episcopalian, Methodist, Quaker, and Dutch Reformed groups, as well as the ‘Free School Society,’ a nondenominational charitable group, with all receiving public support. Later these groups were joined by Baptists, Catholics, and Jews. Early federal aid, which typically took the form of land grants, went to private as well as public schools, including religious schools. Until 1864, education in the District of Columbia was provided entirely through private and semiprivate institutions, including denominational schools, partially at public expense.”).

270. Id. at 2174 (“In Democracy in America, based on his travels in the 1830s, Tocqueville reports that ‘[t]he greater part of education [in America] is entrusted to the clergy.’” (alterations in original)).
allocated to religious schools.\footnote{271} Although this nuanced history does not account for a state’s right to provide greater protections than the federal government, that argument assumes that these state restrictions would not negatively affect the individual freedom of free exercise.\footnote{272} The Court’s history and tradition inquiry counters that an overzealous anti-establishment concern runs afoul of an individual’s free exercise right and that a historic analysis focusing on a non-contradictory First Amendment reveals the coexistence of anti-establishment and religious freedom interests.\footnote{273}

Another influential argument alleges that the Court has deteriorated the wall of separation between church and state.\footnote{274} Proponents of this argument predict that nones and religious minorities will be pushed to the fringes\footnote{275}.

\begin{itemize}
\item \footnote{271}{Storslee, supra note 9, at 119 (“On the contrary, foreshadowing cases like Espinoza, many of [the members of the Founding generation] argued that refusing to fund certain schools because of their religious activity was a form of discrimination, and their fellow citizens agreed.”).
\item \footnote{272}{See generally Chemerinsky & McDonald supra note 24, at 1013 (“[I]t is one thing to prohibit states through the federal Establishment Clause from getting too involved with religious funding or sponsorship, but quite another thing altogether to say that such incorporation affects state choices to retain more protective rules against establishment that the Court has interpreted the federal clause to require. It is a basic canon of constitutional law that states can choose to be more protective of constitutional rights than the federal Constitution requires. Hence, forcing states, through the federal Free Exercise Clause, to effectively adhere to the conservative justices’ vision of what degree of church-state separation is desirable as a matter of federal Establishment Clause principles stands this canon on its head.”). The argument that state constitutions have historically been allowed to impose greater individual rights than the federal Constitution seems to be the most convincing legal rebuttal to the Court’s Establishment Clause history and tradition test. See id. Yet, the bulk of the test’s criticism seems to revolve around separation of church and state arguments, which is a less defined and unsettled doctrine not mentioned in the Constitution. See Lupu & Tuttle, supra note 143.
\item \footnote{273}{See generally Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2428 (2022) (“In place of Lemon and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by ‘reference to historical practices and understandings.’” (quoting Town of Greece v. Galloway, 572 U.S. 565, 576 (2014))).
\item \footnote{274}{See generally Lupu & Tuttle, supra note 143 (“It is for parents, not the State or its agents, to decide what religious experience their children should have. And unification of religious and secular authority ultimately invites a form of totalitarianism, against which church-state separation is a structural defense.”); see also City of Allegheny v. ACLU, 492 U.S. 573, 657 (1989) (Kennedy, J., concurring in part and dissenting in part) (discussing the “wall of separation”).
\item \footnote{275}{See Lupu & Tuttle, supra note 143 (“Although any teacher or coach is now free to pray on school premises and on school time, there is every reason to expect that Christian prayer will dominate the scene. Christians remain a majority in most schools, and Christians are far more likely to proselytize than members of other faiths in America. Prayer by Jews, Muslims, and others is more likely to roil the school’s fabric of cooperation and more likely to invite complaints by parents—not about prayer per se, but about the exposure of their children to prayer by ‘others.’”).
\end{itemize}
while the Court will prefer Christianity to the detriment of everyone else.\textsuperscript{276} And if the new history and tradition inquiry does lead to greater persecution of religious minorities, it is undoubtedly a failure; however, this slippery slope argument seems detached from reality.\textsuperscript{277} While it may be tempting for critics to paint \textit{Kennedy} as an alarming step toward Christian nationalism, the decision does nothing of the sort: the majority clearly addresses coercion concerns as part of the inquiry and points to evidence in the record that no student alleged coercion.\textsuperscript{278} Additionally, members of the American Jewish Committee,\textsuperscript{279} Native American church,\textsuperscript{280} and general First Amendment organizations\textsuperscript{281} endorsed Coach Kennedy’s position, which at the very least demonstrates that the alleged potential coercion against religious minorities is not as universally believed as this argument suggests.\textsuperscript{282} What this argument fails to acknowledge is that the decision popularizing the “wall of separation” language emanated from a decision that permitted state governments to fund the bus rides of students attending religious schools.\textsuperscript{283} The “wall” was never meant to isolate religion from the public completely.\textsuperscript{284}
B. Promoting a Pluralistic Society

A more optimistic view of the inquiry is its potential for greater religious pluralism, which supports the rights of both the religious and non-religious. Plainly stated, pluralism describes a community of “people who have different religious beliefs, backgrounds, and ways of expressing their convictions.” This section argues that valuing pluralism is important for a healthy society and that true neutrality—the focus of early establishment cases—lays the groundwork for this beneficial diversity to exist. To this end, this section outlines the positive consequences of valuing pluralism and the virtues pluralism creates.

1. Pluralism Leads to Healthy Separation of Church and State and Equal Treatment

First, valuing pluralism is important because it creates a healthy separation of church and state, which incentivizes the state to treat all beliefs equally. As discussed in the preceding section, the “wall of separation”

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285. See generally Volokh, supra note 277, at 345 (“Equality rings truer to our notions of the government’s proper role with regard to religion than does discrimination. The Constitution bars the ‘establishment of religion,’ and treating everyone the same without regard to religion is hard to see as ‘establishing’ anything—except equality.”).

286. Robin W. Lovin, Religion and Political Pluralism, 27 MISS. C. L. REV. 91, 91 (2007); see also John D. Inazu, The Four Freedoms and the Future of Religious Liberty, 92 N.C. L. REV. 787, 795–807 (2014) (laying out a vision of pluralism that relies on a cooperating relationship between the clauses of the First Amendment). Professor Inazu helps to inform this vision: From that premise, Justice Jackson continued, “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.” Id. at 804 (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).

287. See Everson, 330 U.S. at 18.

New Jersey cannot consistently with the “establishment of religion” clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church. On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot 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.

Id. at 16.

288. See infra Section V.B.1.

289. Inazu, supra note 17, at 591–92 (“The intuition for a confident pluralism flows out of what
narrative has muddled the historic relationship between church and state to allege that the two should be wholly separated rather than distinct.290 Professor Eugene Volokh argues that equal treatment of religion and non-religion helps achieve this healthy separation of church and state “by keeping the government scrupulously separate from people’s decisions about religion: The government facilitates a particular sort of behavior (whether it be university education, charitable giving, or K-12 education) without any concern about whether the behavior is religious or not.”291 Essentially, Professor Volokh argues that unequal treatment actually results in “excessive entanglement” because the government more actively affects choices about religion.292

Beyond government entanglement, unequal treatment leads to less protection of religious beliefs.293 Professor Michael McConnell argues that Court

John Rawls famously called ‘the fact of pluralism’—the recognition that we live in a society of a ‘plurality of conflicting, and indeed incommensurable, conceptions of the meaning, value and purpose of human life.’ The fact of pluralism creates a political and social question of whether and how we can live with these deep differences. A confident pluralism maintains that we can do so; in fact, we must embrace a ‘right to differ’ from state and majoritarian norms. It is not an aggressive pluralism that knows no boundaries, but a confident pluralism rooted in the conviction that protecting the integrity of one’s own beliefs and normative commitments does not depend on coercively silencing opposing views.”

290. See Paul Horwitz, Churches as First Amendment Institutions: Of Sovereignty and Spheres, 44 HARV. C.R.-C.L. L. REV. 79, 80 (2009) ("Scholars have argued over whether the ‘wall of separation’ is best understood in Jefferson’s largely secularly oriented sense, or in the religiously oriented sense of Roger Williams, who wrote of the dangers to religion of ‘open[ing] a gap in the hedge or wall of separation between the garden of the church and the wilderness of the world.’” (alteration in original)); see also supra Section V.A.

291. See Volokh, supra note 277, at 345–47 (“I oppose preference for religion as much as I do discrimination against religion. The government may neither give special preferences to religious schools nor teach a religion itself by adopting a religious curriculum or school prayers, because that would be governmental discrimination in favor of religion generally or even some religions in particular. But the government giving parents funds that they can then use to teach their children whatever values the parents choose is not preference for religion—it’s equal treatment without regard to religion.”).


293. See Carson v. Makin, 142 S. Ct. 1987, 2002 (2022) (state program granting tuition assistance to parents of secular private schools but not parents of religious private schools); Shurtleff v. City of Boston, 596 U.S. 243, 258 (2022) (city allowing the flags of secular groups at City Hall—even a secular cross—but not allowing the flag of a religious group); Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2433 (2022) (school district forbidding a coach from praying after the game during a break from his official duties); see also Adults in Maine: Religious Composition of Adults in Maine,
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precedent reveals that exclusion of religious entities from government programs equates to a fine on their religious expression.294 Denying benefits to religious groups because of a fear of entanglement is not neutral denial of a “mere ‘benefit’”—it is the government denying to provide funds to religious entities based solely on their religious affiliation while granting the funds to secular organizations based solely on their secular affiliation.295 This unhealthy separation of church and state is a discriminatory preference toward non-religion over religion and stifles the diversity of pluralism.296

294. See McConnell, supra note 36, at 54–55. Furthermore, Professor McConnell asserts that the “Establishment Clause is not about exclusion of religious organizations from the benefits of neutral laws, but about favoritism toward religious organizations or a particular religious denomination.” Id. at 57.

295. But see Scott W. Gaylord, Neutrality Without a Tape Measure: Accommodating Religion After American Legion, 19 AVE MARIA L. REV. 25, 28 (2021) (“Those favoring the wall of separation model articulated in Everson rely on the history of religious establishments in the sixteenth and seventeenth centuries and the growing pluralism to argue that the Establishment Clause requires neutrality between religions as well as between religion and nonreligion. These concerns found expression in Lemon and the endorsement test.”). Professor Gaylord, a First Amendment and constitutional law scholar at Elon University School of Law, disagrees with my argument and believes the Court’s conservative majority values neutrality between religions more than between religion and non-religion. See id. at 25, 27.
On the other hand, the history and tradition inquiry treats religious and non-religious entities the same, leading to the potential for neutrality and pluralism—hallmarks of a healthy separation of church and state. 297 As Chief Justice Roberts wrote in Carson, “A State’s antiestablishment interest does not justify enactments that exclude some members of the community from an otherwise generally available public benefit because of their religious exercise.” 298 In other words, a healthy separation of church and state prevents establishment of religion but does not overcompensate with a preference, financial or otherwise, for secular entities over religious entities when those funds are not used for ministry efforts. 299

Justice Gorsuch’s concurrence in Shurtleff points out that confusion from Lemon likely contributes to part of this secular preference. 300 Yet, Justice Gorsuch also points to the city’s stated desire to promote “only ‘a particular kind of diversity.’” 301 While individuals may favor some metrics of diversity over others, as Justice Gorsuch indicates, the First Amendment does not allow the government to limit the viewpoint of diverse groups it disagrees with outside of a constitutional limitation. 302 Stated succinctly: “[G]overnment control over religion offends the Constitution, but treating a church on par with

297. See Barclay, supra note 267, at 1727–28 (“If the Court were to modify its entanglement analysis to disregard ahistorical applications and embrace the historical ones, the upshot is this: Many ways in which the Establishment Clause and Free Exercise Clause have seemed to be in tension would fade away. Instead, both Religion Clauses would work together harmoniously to prevent problematic government interference with religious groups or preferential treatment of some religions, while still allowing government to even-handedly partner with and support religious groups. Such an interpretation could facilitate an increase in religious pluralism and human flourishing and a decrease in unnecessary cultural fights aimed at excluding religion from the public sphere.”).


299. Id.

300. Shurtleff v. City of Boston, 596 U.S. 243, 276–80 (2022) (Gorsuch, J., concurring) (“How did the city get it so wrong? To be fair, at least some of the blame belongs here and traces back to Lemon v. Kurtzman.” (citation omitted)).

301. Id. at 284 (Gorsuch, J., concurring). At least one indication of diversity, racial minorities, corresponds with religion at a higher rate; see Racial and Ethnic Composition, PEW RES. CTR, https://www.pewresearch.org/religion/religious-landscape-study/racial-and-ethnic-composition/ (last visited Nov. 12, 2023) (indicating that Black, Latinx, and Other/Mixed communities have a higher “[i]mportance of religion in one’s life” than the Caucasian community); see also supra notes 285–288 and accompanying text (addressing the claim that religion is divisive and should not be associated with government).

302. Shurtleff, 596 U.S. at 284 (Gorsuch, J., concurring) (“[I]f it is to celebrate only a ‘particular’ type of diversity consistent with popular ideology, the First Amendment is not exactly your friend. Dragging Lemon from its grave may be your only chance.”).
secular entities and other churches does not.” Thus, the history of religious pluralism in the United States is a better touchstone for protecting religious freedom and respecting a healthy separation of church and state than one focused on subjective factors that favor secularity.

In sum, by prioritizing equal treatment of a religiously pluralist society—and thus, neutrality—the history and tradition test promotes separation of church and state without religious discrimination.

2. The Societal Fruits of a “Confident Pluralism”

The failed logic of Lemon v. Kurtzman can be summed up in an excerpt from the decision: “Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect.”

The first part of the sentence is the argument of this section—accepting division is important for the rights of all; but the second part, advocating that the potential for division is a motive for curtailing religious expression, exposes the shaky underpinnings of Lemon’s subjective analysis and is wholly unsupported by history.

In contrast, the history and tradition test is based on the foundation that anti-establishment and free exercise can exist together. This foundation paves the way for a “confident pluralism,” defined by John Inazu as “pluralism rooted in the conviction that protecting the integrity of one’s own beliefs and normative commitments does not depend on coercively silencing opposing views.”

In other words, confident pluralism exists when people can hold their diverse beliefs—even when they are divisive—without being

303. Id. at 287 (Gorsuch, J., concurring).
304. Id. at 284–85 (Gorsuch, J., concurring) (“To the extent this is why some still invoke Lemon today, it reflects poorly on us all. Through history, the suppression of unpopular religious speech and exercise has been among the favorite tools of petty tyrants.”).
305. Cf. supra Section II.B (outlining Lemon’s subjective analysis) with supra Section II.D (analyzing October 2021 Term cases that place religion and secularity on the same level).
307. See Barclay, supra note 267, at 1714–16 (outlining the contentious history of the “political entanglement” argument).
308. See supra note 138 and accompanying text.
309. See Inazu, supra note 17, at 592.
ostracized or inhibiting the beliefs of others.\textsuperscript{310}

Outside of allowing people to hold their sincere beliefs without government or societal interference, Inazu further explores how confident pluralism aspires three important values for healthy communities: tolerance, humility, and patience.\textsuperscript{311} Tolerance is “a willingness to accept genuine difference, including profound moral disagreement” but “does not mean embracing all beliefs or viewpoints.”\textsuperscript{312} It allows people to respect others apart from their ideas without having to believe those ideas are even valid.\textsuperscript{313} Humility, which is not to be mistaken with relativism, allows people to acknowledge that their own ideals are not exclusively drawn from empirical sources.\textsuperscript{314} Patience allows people to recognize that moral issues are better discussed through “persuasion rather than through coercion.”\textsuperscript{315}

In \textit{Lemon}, the Court’s attempt to avoid division only created more of it because of the Court’s controversial variability in analyzing its subjective prongs, leading to discrimination toward religious beliefs,\textsuperscript{316} and national

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\textsuperscript{310} See id.; see also David French, \textit{Pluralism Has Life Left in It Yet}, THE ATLANTIC (Nov. 18, 2022), https://newsletters.theatlantic.com/the-third-rail/6377fb0dce44df0038de4c62/respect-for-marriage-same-sex-religious-freedom/ (“The magic of the American republic is that it can create space for people who possess deeply different world views to live together, work together, and thrive together, even as they stay true to their different religious faiths and moral convictions.”).

\textsuperscript{311} See Inazu, \textit{supra} note 17, at 596–99. Inazu brilliantly discusses pluralism while navigating controversial issues, including religious beliefs. See id. at 600–02.

\textsuperscript{312} Id. at 597–98.

\textsuperscript{313} Id. at 598; see also David Brooks, Opinion, \textit{Your Daily Dose of Optimism!}, N.Y. TIMES (June 20, 2019), https://www.nytimes.com/2019/06/20/opinion/america-radical-pluralism.html. While writing about the “radically” pluralistic nation the United States has become, David Brooks paraphrases the wisdom of Rabbi Jonathan Sacks:

\begin{quote}
[D]on’t be afraid to be a distinct, orthodox version of yourself within a larger society. Build a rich moral community. Just don’t try to universalize your faith or even become a dominant minority. Interact with the world around you, confident in your own particularity, but realize that every time you seek to dominate others, you will wind up dominated.
\end{quote}

See id.

\textsuperscript{314} Inazu, \textit{supra} note 17, at 599 (“Within a confident pluralism, humility leads both the Liberal Egalitarian and the Conservative Moralist to recognize that their own beliefs and intuitions depend upon tradition-dependent values that cannot be empirically proven or fully justified by forms of rationality external to particular traditions.”).

\textsuperscript{315} Id. at 599.

\textsuperscript{316} See Barclay, \textit{supra} note 267, at 1718 (“[I]n \textit{Wallace v. Jaffree}, the Court struck down a state law that accommodated school children who may wish to engage in a moment of prayer by instituting a daily moment of silence. Thus, the \textit{Lemon} test seemed to require courts to take a suspicious view of religious accommodations.”).
uncertainty in what was constitutionally permissible.\textsuperscript{317} In short, \textit{Lemon} incentivized less tolerance, humility, and patience.\textsuperscript{318} With the history and tradition test’s emphasis on equal treatment, the Court allows a potential path for confident pluralism and a more just society.\textsuperscript{319}

VI. CONCLUSION

By supplanting Lemon and rooting religious expression in history, the Kennedy Court laid the foundation for non-coercive religious expression to be treated on equal footing as non-religious expression.\textsuperscript{320} This neutrality lays the framework for a confident pluralism which operates when people tolerate one another regardless of their differences rather than treat them differently because of them.\textsuperscript{321} Although neutrality does not remove the division surrounding religion in the political sphere, it does create the potential for greater tolerance, humility, and patience.\textsuperscript{322}

\textsuperscript{317} See Shurtleff v. City of Boston, 596 U.S. 243, 281–82 (2022) (Gorsuch, J., concurring) (“\’[N]o provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment.\’ This approach fit, too, with this Court’s usual course in other areas. Often, we have looked to early and long-continued historical practices as evidence of the Constitution’s meaning at the time of its adoption. And, in the years following \textit{Everson}, the Court followed this same path when interpreting the Establishment Clause. Agree or disagree with the conclusions in these cases, there can be little doubt that the Court approached them in large part using history as its guide. \textit{Lemon} interrupted this long line of precedents. It offered no plausible reason for ignoring their teachings. And, as we have seen, the ahistoric alternative it offered quickly proved both unworkable in practice and unsound in its results.” (citation omitted) (quoting \textit{Everson v. Bd. of Educ.}, 330 U.S. 1, 33–49 (1947) (Rutledge, J., dissenting))).

\textsuperscript{318} See supra note 64 (noting the lack of evidence for \textit{Lemon}’s remarks about division and religion).

\textsuperscript{319} See supra note 146 (describing how Maine’s statute in \textit{Carson} is a false definition of neutrality); Inazu, supra note 17, at 596–99.

\textsuperscript{320} Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2432–33 (2022) (“Respect for religious expressions is indispensable to life in a free and diverse Republic—whether those expressions take place in a sanctuary or on a field, and whether they manifest through the spoken word or a bowed head.”).

\textsuperscript{321} See Inazu, supra note 17, at 592 (“A confident pluralism seeks to maximize the spaces where dialogue and persuasion can coexist alongside deep and intractable differences about beliefs, commitments, and ways of life. It suggests that we ought to resist coercive efforts aimed at getting people to ‘fall in line’ with the majority.”).

\textsuperscript{322} See \textit{id.} at 617 (“A confident pluralism recognizes that we can and must live with deep difference among our beliefs, values, identities, and groups. It points toward a tolerance for dissent, a skepticism of truth claims from government, a willingness to endure strange and offensive ways of life, and a recognition of our epistemic limits in judging the activities of others. These longstanding
Further, it is fruitless to attempt to lessen this division by excluding practices that consist of some peoples’ most sacred beliefs that have been celebrated throughout this country’s history. Rather, it is essential for people and the government to treat everyone equally despite their ideological differences; otherwise, we fall into the subjective favoritism established by Lemon, which muted non-coercive practices that many held sacred in the name of preventing political divisiveness.

Although the “ghoul” of Lemon may have been laid to rest, the need for greater tolerance, humility, and patience remains as important as ever. The history and tradition test provides a greater potential for these virtues because its bedrocks of history and neutrality are more stable than Lemon’s subjective foundations of endorsement and entanglement. But the law can only go so far. It is up to all, regardless of religious beliefs, to seize the potential for a

commitments challenge each of us to live out the aspirations of tolerance, humility, and patience in our politics and our society.”.

323. See id. at 598 (“The tolerance of a confident pluralism does not impose the fiction of assuming that all ideas are equally valid or morally benign. It does mean respecting people, aiming for fair discussion, and allowing for the right to differ about serious matters.”).

324. See Barclay, supra note 267, at 1726 (“As to political entanglement, other scholars have argued that there is no factual basis for the view that the Framers of the Constitution believed that ‘political division along religious lines was one of the principal evils against which the First Amendment was intended to protect.’ This iteration of entanglement is famously difficult to apply or predict. Indeed, sometimes courts have incorrectly found political divisiveness when it has been caused by a lawsuit rather than the religious activity itself.” (quoting Lemon v. Kurtzman, 403 U.S. 602, 622 (1971))).

325. See Inazu, supra note 17, at 596–99.

326. See Lemon, 403 U.S. at 612–13; see also McConnell, supra note 105, at 112–13 (“Some years ago, I presented a series of controversial fact patterns about religious conflict to a group of about 30 federal judges, along with about half a dozen possible ‘tests’ for what counts as an establishment of religion. I also asked the judges separately to state how they thought each of the fact patterns should be resolved, based on their personal beliefs rather than any legal tests. It turned out that, for every judge, the ‘endorsement test’ came out the same way as their personal beliefs—the only one of the ‘tests’ with that outcome.”).

327. See generally McConnell, supra note 105, at 97 (“[The Court’s decision in American Legion and thus, the history and tradition test] allows religiously expressive sleeping dogs to lie. But it does not green-light attempts by present and future officeholders to interject new religious symbols as a type of religious-identity politics. (The erection by Alabama Judge Roy Moore of a marble Ten Commandments monument in the rotunda of the state courthouse, and refusal to remove it on court order, is the obvious example.) Such efforts are offensive to religious believers because they politicize religion—or, as James Madison wrote, ‘employ Religion as an engine of Civil policy [which is] an unhallowed perversion of the means of salvation.’ And they deliberately seek to ostracize those whose religious conscience differs from majority sentiment.”). Professor McConnell’s distinction is important: historic religious expression and symbols are allowed by the history and tradition test for their genuine, anti-coercive value to religious adherents, not for politicizing religion and causing further division. See id. at 97–98.
pluralistic society offered by the history and tradition test. At the very least, this means engaging in thoughtful tolerance of different beliefs without making conclusory judgments because the religious or secular message differs from one’s own personal belief. As the Court starts a new era of Establishment Clause jurisprudence, we would all do well to remember Kennedy’s valuable maxim: “[L]earning how to tolerate diverse expressive activities has always been ‘part of learning how to live in a pluralistic society.’”

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328. See id. at 109 (“And no less disestablishmentarian a president as Jefferson allowed various denominations to use the Capitol and other federal buildings for weekly worship services—which he even attended.”). President Jefferson, often regarded as the Founding Father most concerned with a strict separation of church and state, did not go so far to try to dispel any notion of religion from the government. See id. But on the other hand, it is also up those who are religious to practice their beliefs with “statesmanship and civility” as President Washington exemplified in his non-coercive inclusion of religious language. See id.

329. See Inazu, supra note 17, at 597–98.


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