THE SUPREME COURT CORRECTS A SEVENTY-FIVE-YEAR DISTORTION IN ESTABLISHMENT CLAUSE JURISPRUDENCE

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In Kennedy v. Bremerton School District,[1] *the U.S. Supreme Court ruled that the Establishment Clause did not prohibit a high school football coach from offering a brief mid-field prayer at the conclusion of games. The Ninth Circuit had held that the coach's free exercise rights had to yield to the Establishment Clause's prohibition of conduct that might reflect a state endorsement of religion. In overturning the Ninth Circuit, the Supreme Court issued an historic and far-reaching ruling on the scope and nature of the Establishment Clause, providing the first truly clarifying decision in this area in the past seventy-five years. The Court held that the Establishment and Free Exercise Clauses were not in tension and that the Establishment Clause could not be used to limit the Free Exercise Clause. Even more profoundly, the Court rejected the use of tests that over time had become hostile to religious liberty. Finally, the Court stated that it would decide future Establishment Clause cases by consulting the historical meaning of the Clause. This Article analyzes the future impact that the* Kennedy *decision will exert on Establishment Clause jurisprudence.*

INTRODUCTION

In *Kennedy v. Bremerton School District,* the U.S. Supreme Court upheld a high school football coach's right to offer a quiet individual prayer on the field at the conclusion of a football game.[2] In its decision, the Court achieved perhaps the most monumental and far-reaching change in Establishment Clause jurisprudence since the 1947 decision in *Everson v. Board of Education*,[3] where the Court pronounced the historically inaccurate but profoundly influential "wall of separation" metaphor that would shape First Amendment law for the next seventy-five years.

Following *Everson* and attempting to incorporate the wall of separation metaphor in its Establishment Clause jurisprudence, the Court went on the create a chaotic and unpredictable patchwork of constitutional tests.[4] This patchwork sent the Establishment Clause into a confused muddle of contradictory mandates, with the result that the two religion clauses in the First Amendment—the Free Exercise Clause and the Establishment Clause—often conflicted with each other.[5]

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1. 142 S. Ct. 2407 (2022).
2. *Id*. at 2416 (2022).
3. 330 U.S. 1, 16 (1947).
4. *See* discussion *infra* Part I.
5. *Id*.

In this conflict, the Establishment Clause was used to limit freedoms protected by the Free Exercise Clause.[6] That was precisely the problem that came to the Court in *Kennedy,* with the school district censoring Coach Kennedy's prayers because of a fear that not doing so would cause an Establishment Clause violation.[7]

In deciding the validity of the school district's Establishment Clause concerns about Coach Kennedy's midfield prayer, the Court could have gone through its usual process of picking a particular test among the many Establishment Clause tests articulated and applied throughout the decades. Indeed, so many tests exist that the mere choosing of a particular test can itself determine the outcome of the case. Moreover, the different tests often produce different outcomes, even with the same fact scenario.

Instead of following this course, the Court in *Kennedy* effectively cast aside this test-centered jurisprudence and focused more generally on the historical meaning of establishment, thus producing a single approach that strives to fulfill the intended meaning of the First Amendment.[8] However, this approach required a correction of a mistaken path taken by the Court three-quarters of a century ago.

This Article outlines the unprecedented impact that *Kennedy* will exert on future Establishment Clause jurisprudence. Contrary to *Everson,* which started the Court down a path that contradicted history,[9] *Kennedy* promises to align future applications of the Establishment Clause with the historical meaning of that Clause. In doing so, the Court may finally bring the two religion clauses, the Free Exercise and Establishment Clauses, into the harmonious relationship envisioned by the Framers of the First Amendment. Although the Court in *Kennedy* also addressed free speech and free exercise of religion issues, this Article will focus only on the Court's Establishment Clause decision and analysis.

I. A CONFUSED JURISPRUDENCE

The only consistent area of agreement between scholars of the Establishment Clause has been that the jurisprudence in this area has long been in great disarray and confusion.[10] With its wide selection of different tests, the Court can reach conceivably any outcome on any given case.

Over the past several decades, the courts have applied an array of tests to determine whether particular governmental action rises to the level of an establishment of religion, with the earliest test being the one laid out in *Lemon v. Kurtzman*.[11] However, since its inception, the *Lemon* test has failed to provide a consistent means for interpreting and applying the Establishment Clause.[12] As one

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6. *See* discussion *infra* Section IV.A.4.

7. *Kennedy*, 142 S. Ct. at 2417-18.

8. *See id.* at 2428-29.

9. *See Everson*, 330 U.S. at 14-17.

10. *See* Russell L. Weaver, *Like a Ghoul in a Late Night Horror Movie*, 41 BRANDEIS L.J. 587, 587-88 (2003).

11. 403 U.S. 602, 612 (1971), *abrogated by Kennedy*, 142 S. Ct. 2407.

12. Weaver, *supra* note 10, at 590. As Justice William Rehnquist noted, the *Lemon* test "has

commentator states, each Establishment Clause case has presented "the very real possibility that the Court might totally abandon its previous efforts and start over."[13] This uncertainty led one court to label the Establishment Clause caselaw as suffering "from a sort of jurisprudential schizophrenia."[14]

Nowhere was this confusing and contradictory state of jurisprudence more evident than in the two companion cases in 2005, when the Court issued opposite rulings on the same day in cases involving public displays of the Ten Commandments.[15] In *McCreary County, Kentucky v. ACLU of Kentucky*, the Court found that a framed copy of the Ten Commandments hanging in a courthouse constituted an improper establishment of religion.[16] However, in *Van Orden v. Perry* the Court upheld a Ten Commandments monument standing on the grounds of the Texas state capitol.[17]

The Court based the different rulings in the two cases on separate constitutional tests. In *Van Orden*, the plurality opinion did not use the test most frequently used for public religious displays —the endorsement test.[18] Instead, the Court relied on the historical traditions test used in *Marsh v. Chambers.*[19] This test looks to whether there had been a longstanding tradition of public displays of the type of religious symbol at issue in the case—e.g., the Ten Commandments monument.[20] Moreover, the fifth vote in the Court's decision in *Van Orden*, supplied by Justice Breyer, appeared to rely on a new "legal judgment" test.[21]

In *McCreary*, on the other hand, the Court used a version of the *Lemon* test, focusing on whether the Ten Commandments display filled a predominantly secular purpose.[22] Although the Court struck down the display in *McCreary,*[23] the text of that display was less overtly religious than the text of the display in *Van Orden,* which contained the words "I AM the LORD thy God."[24] As one commentator noted, the opposing results in *Van Orden* and *McCreary* meant "that

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simply not provided adequate standards for deciding Establishment Clause cases." Wallace v. Jaffree, 472 U.S. 38, 110 (1985) (Rehnquist, J., dissenting).

13. William P. Marshall, *What is the Matter with Equality?: An Assessment of the Equal Treatment of Religion and Nonreligion in First Amendment Jurisprudence*, 75 IND. L.J. 193, 194 (2000).

14. Thomas v. Anchorage Equal Rts. Comm'n, 165 F.3d 692, 717 (9th Cir. 1999), *rev'd en banc*, 200 F.3d 1134 (9th Cir. 2000).

15. McCreary Cnty., Ky. v. ACLU of Ky., 545 U.S. 844 (2005); Van Orden v. Perry, 545 U.S. 677 (2005).

16. 545 U.S. 844, 881 (2005).

17. 545 U.S. 677, 691-92 (2005).

18. *Id.* at 686 (calling the *Lemon* test inappropriate for "passive" religious expressions).

19. *Id.* at 688 (citing *Marsh v. Chambers,* 463 U.S. 783, 792 (1983) (upholding the Nebraska legislature's practice of opening sessions with a prayer by a state-employed clergy)).

20. *Id.* at 683, 688.

21. *Id.* at 700 (Breyer, J., concurring).

22. McCreary Cnty., Ky. v. ACLU of Ky., 545 U.S. 844, 864 (2005).

23. *Id.* at 881.

24. *Van Orden*, 545 U.S. at 707 (Stevens, J., dissenting).

we will be litigating these cases one at a time for a very long time."[25]

The foundational Establishment Clause test, the first one articulated by the Court in *Lemon*, became confusing from the outset.[26] Arising out of a historically inaccurate perception that the Establishment Clause meant to create a wall of separation between church and state, the *Lemon* test incorporated a hostility toward religion, even though the first freedom in the First Amendment is religious liberty.[27] This hostility then produced an inconsistent legacy.[28] "It has had the profound effect of leading to results which cannot be reconciled with either history or tradition . . . ."[29] Though it allowed public funds to pay for textbooks in parochial schools,[30] the Court banned public funding of various instructional materials, such as maps and lab equipment in parochial schools.[31] Although the Court permitted public-funded bussing for students going to and from religious schools,[32] it forbade public funds for the bussing costs of school-sponsored field trips for those same students.[33] While the Court prohibited public money to pay for remedial instruction and guidance counseling for parochial school students,[34] it upheld public funding of speech and hearing services to such students.[35] Sometimes states could pay for religious schools to receive standardized tests and scoring services,[36] along with the costs of administering such exams,[37] while other times states could not fund the administration of state-required exams prepared by religious school teachers.[38]

Different members of the Court, at different times, have issued harsh criticisms of *Lemon*.[39] Their criticisms asserted that the secular purpose prong of

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25. Douglas Laycock, *How to Be Religiously Neutral,* LEGAL TIMES (July 4, 2005).

26. *See* Keith Werhan, *Navigating the New Neutrality: School Vouchers, the Pledge, and the Limits of a Purposive Establishment Clause*, 41 BRANDEIS L.J. 603, 610 (2003).

27. U.S. CONST. amend. I; *see infra* notes 39-40 and accompanying text.

28. Werhan, *supra* note 26, at 610. From 1971 to 1992, the Supreme Court applied the *Lemon* test in thirty of the thirty-one Establishment Clause cases it decided. *See* Lee v. Weisman*,* 505 U.S. 577, 603 n.4 (1992) (Blackmun, J., concurring).

29. Mark E. Chopko, *Religious Access to Public Programs and Governmental Funding*, 60 GEO. WASH. L. REV. 645, 654 (1992). "[E]ach of the three prongs of the test . . . invite distrust of one or the other of the actors in the church-state drama." *Id*. at 656.

30. Wolman v. Walter, 433 U.S. 229, 236-38 (1977), *overruled by* Mitchell v. Helms, 530 U.S. 793 (2000); Meek v. Pittenger, 421 U.S. 349, 361-62 (1975), *overruled by* Mitchell v. Helms, 530 U.S. 793 (2000).

31. *See Wolman*, 433 U.S. at 248-51; *Meek*, 421 U.S. at 362-66.

32. *See Meek*, 421 U.S. at 364.

33. *See Wolman,* 433 U.S. at 252-55.

34. *See Meek*, 421 U.S. at 370-72.

35. *See Wolman*, 433 U.S. at 241-44.

36. *See id*. at 238-41.

37. *See* Comm. for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 658-59 (1980).

38. *See* Levitt v. Comm. for Pub. Educ. & Religious Liberty, 413 U.S. 472, 481-82 (1973).

39. *See, e.g.*, Cnty. of Allegheny v. ACLU*,* Greater Pittsburgh Chapter, 492 U.S. 573, 655-56 (1989) (Kennedy, J., concurring in part and dissenting in part), *abrogated by* Town of Greece, v.

the *Lemon* test led to the automatic finding that any law inspired by the goal of accommodating religious practice amounted to an improper establishment.[40]

The creation of additional tests in the wake of *Lemon* did nothing to clarify the chaotic state of Establishment Clause jurisprudence. The more tests that evolved, the more confusion that reigned. Prayer at a city council meeting was allowed,[41] but not before a high school football game.[42] A crèche was allowed, if surrounded by sufficient reindeer and candy canes,[43] but not if standing alone.[44] Public school students could be released from school to attend religious classes at their place of worship, but religious ministers could not come into the public school to teach those same classes to students who voluntarily signed up for them.[45] A cross monument was allowed at the intersection of major highways,[46] but not on public land in the middle of an uninhabited desert.[47] And so on and so forth.

The Court in *Kennedy* did away with this confusing array of tests. It specifically swept away the *Lemon* and endorsement tests relied on in the court below.[48] Instead of choosing among the patchwork of tests, the Court simply focused on discovering the historical and constitutional meaning of the Establishment Clause.[49] The Court went to the core of the issue: it looked at the constitutional definition of establishment, rather than relying on tests that only tangentially tried to reflect the intended purpose of the Establishment Clause. This alone was transformational, and it stemmed from an even more

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Galloway, 572 U.S. 565 (2014); Edwards v. Aguillard, 482 U.S. 578, 636-40 (1987) (Scalia, J., dissenting); Aguilar v. Felton, 473 U.S. 402, 426-30 (1985) (O'Connor, J., dissenting), *overruled by* Agostini v. Felton, 521 U.S. 203 (1997); Wallace v. Jaffree, 472 U.S. 38, 108-12 (1985) (Rehnquist, J., dissenting); Roemer v. Bd. of Pub. Works of Md., 426 U.S. 736, 768-69 (1976) (White, J., concurring).

40. Michael Stokes Paulsen, *Lemon Is Dead*, 43 CASE W. RES. L. REV. 795, 801 (1993) ("The result was frequently a reading of the Establishment Clause that required functional hostility . . . to religion by treating the promotion of religious freedom—as distinguished from the promotion of religion—as an improper government motivation.").

41. *See* Town of Greece v. Galloway, 572 U.S. 565 (2014) (using the historical traditions test).

42. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (using the coercion test).

43. *See* Lynch v. Donnelly, 465 U.S. 668 (1984) (using the endorsement test).

44. *See Allegheny*, 492 U.S. 573 (1989) (using the endorsement test).

45. *See* Ill. *ex rel.* McCollum v. Bd. of Educ. of Sch. Dist. No. 71, 333 U.S. 203, 209-12 (1948).

46. *See* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067 (2019) (using the historical traditions test).

47. *See* Salazar v. Buono, 559 U.S. 700, 718-22 (2010) (using the endorsement test).

48. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427-28 (2022); *id.* at 2434 (Alito, J., concurring). The Court cited the "shortcomings" of the "ahistorical" *Lemon* and endorsement tests, which "invited chaos" in the courts and led to "'differing results' in materially identical cases." *Id.* at 2427.

49. According to *Kennedy*, "[i]n place of *Lemon* and the endorsement test . . . the Establishment Clause must be interpreted by 'reference to historical practices and understandings.'" *Id.* at 2428 (quoting Town of Greece v. Galloway, 572 U.S. 565, 576 (2014)).

transformational development: the correction of the jurisprudential wrong turn taken by the Court in 1947.

II. KENNEDY'S CORRECTION OF *EVERSON*

It is difficult to appreciate the magnitude of the Court's decision in *Kennedy* without knowing how far the Court's Establishment Clause jurisprudence had gone off course over the previous seventy-five years. That deviation in course had itself been occasioned by a repudiation of the previous two-hundred years of American history.

In 1947, in an attempt to define the meaning of the Establishment Clause, the Court articulated a historically inaccurate metaphor that would pervert First Amendment jurisprudence for the next seventy-five years.[50] This metaphor not only misstated the Framers' intentions, but it directly contradicted the American historical experience.

The infamous "wall of separation" metaphor, introduced to Establishment Clause jurisprudence in *Everson v. Board of Education* has formed the constitutional basis for much of the Establishment Clause caselaw.[51] As Justice Rehnquist argued, the greatest damage inflicted by the wall metaphor has occurred in its "mischievous diversion of judges from the actual intentions of the drafters of the Bill of Rights."[52] Although eighteenth-century Americans believed in separating church and state, their aim was not to insulate the state from religion but to protect religious institutions from being intruded upon by the state.[53]

The constitutional history of the First Amendment, as well as the American experience with the public presence of religion, counters the assertion that the Establishment Clause contains a hostility to the public presence of religion.[54] Not only does the wall of separation metaphor contradict the historical realities behind the meaning of the Establishment Clause, it does not even reflect the true beliefs

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50. *See* Everson v. Bd. of Educ., 330 U.S. 1 (1947).

51. For a discussion of the history of this metaphor, see Patrick M. Garry, *The Myth of Separation: America's Historical Experience with Church and State*, 33 HOFSTRA L. REV. 475 (2004) [hereinafter Garry, *The Myth of Separation*].

52. Wallace v. Jaffree, 472 U.S. 38, 107 (1985) (Rehnquist, J., dissenting).

53. Stephen L. Carter, *Reflections on the Separation of Church and State,* 44 ARIZ. L. REV. 293, 296 (2002); *see also* Garry, *The Myth of Separation, supra* note 51, at 476-77 (stating that the wall metaphor has no historical basis and is contradicted by the eighteenth-century relationship between government and religion). The close ties between religion and government persisted even after ratification of the First Amendment. *Id*. at 490. *See also* Patrick M. Garry, *Distorting the Establishment Clause into an Individual Dissenter's Right*, 7 CHARLESTON L. REV. 661, 670 (2013) [hereinafter Garry, *Distorting*] (stating that to Americans of the constitutional period, "religion was an indispensable ingredient to self-government").

54. *See generally* PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 481-84 (2004) (arguing that the strict separationist view has little historical and constitutional support and that this view owes more to political forces).

of its author.[55]

Everson's misreading of Jefferson's wall of separation metaphor was opposed by Justice Rehnquist in his dissent in *Wallace v. Jaffree*:

> It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly 40 years. Thomas Jefferson was of course in France at the time the constitutional Amendments known as the Bill of Rights were passed by Congress and ratified by the States. His letter to the Danbury Baptist Association was a short note of courtesy, written 14 years after the Amendments were passed by Congress. He would seem to any detached observer as a less than ideal source of contemporary history as to the meaning of the Religion Clauses of the First Amendment. . . . Whether due to its lack of historical support or its practical unworkability, the *Everson* "wall" has proved all but useless as a guide to sound constitutional adjudication.[56]

Early Americans rejected the kind of strict separation of church and state that twentieth century separationists would later espouse because, during the constitutional period, such separation would have been perceived to infringe on the free exercise of religion.[57] Indeed, the strict separationist view was rejected

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55. *See generally* DANIEL L. DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE (2002). Dreisbach argues that Jefferson's actions throughout his public career show that he believed state governments could accommodate religious exercises. *Id.* at 59-60. Dreisbach also argues that Jefferson's wall of separation differs both in "function and location" from the "'high and impregnable' barrier erected in 1947 by Justice Hugo Black . . . in *Everson v. Board of Education.*" *Id.* at 125. As Dreisbach explains, "[w]hereas Jefferson's 'wall' explicitly separated the institutions of church and state, Black's wall, more expansively, separates religion and all civil government." *Id.* For other works examining the historical origins of the wall of separation, see generally HAMBURGER, *supra* note 54; JOHN WITTE JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES (2000); STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM (1995); John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause,* 100 MICH. L. REV. 279 (2001); J. Clifford Wallace, *The Framers' Establishment Clause: How High the Wall?,* 2001 B.Y.U. L. REV. 755. The historical record demonstrates that, in the years leading up to adoption of the First Amendment, the colonies, states, and Continental Congress frequently enacted legislative accommodations to religions and religious practices; and "[t]here is no substantial evidence that anyone at the time of the Framing viewed such accommodations as illegitimate, in principle." Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics,* 60 GEO. WASH. L. REV. 685, 693 (1992).

56. 472 U.S. at 92, 107 (1985) (Rehnquist, J., dissenting).

57. *See* THOMAS CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 109 (1987). *See also* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 1863–1873, at 722-31 (1833). According to Story, the Establishment Clause merely helped to effectuate the inalienable right of free exercise by preventing

by "every justice on the Marshall and Taney courts."[58] According to Professor Hamburger, the idea of the Establishment Clause as creating a strict separation between church and state carries no historical support.[59] Such a separationist view has instead resulted from more recent political forces or agendas.[60]

Beginning with the *Everson* "wall of separation" and escalating during the *Lemon* progeny, the Court reflected a view of religion sharply contradictory to America's historical experience.[61] As the reach of the Establishment Clause broadened to curtail the public presence of religion, the case law seemed to reflect certain political attitudes toward religion more than it did historical precedence or constitutional principles. Inspired by the wall of separation metaphor, the Court in *Lemon v. Kurtzman*, where it struck down state statutes providing public money to parochial schools, articulated what would be known as the three-part *Lemon* test: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"[62] Using this test, later courts adopted a separationist view interpreting the Establishment Clause as confining religion to the private realm. Consequently, the "net effect of the decisions that came down from the Burger Court during the 1970s was to raise the wall of separation to a height never before reached."[63] These decisions saw the Establishment Clause as protecting a secular society and shielding people from the controversial and challenging views of religion.[64]

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any particular sect from being established at the national level. *Id.* John Locke's view of the separation of church and state was that it served to protect and facilitate religion's prominence in society, not hinder it. Steven D. Smith, *Separation and the 'Secular': Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955, 965-69 (1989). Since Locke and the framers lived in an inherently religious society, and hence supported church-state separation as a way of protecting religion, they obviously did not see separation as a path to secularization. *Id*.

58. JAMES MCCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION 134 (1971). On the other hand, the more separationist view espoused "by Jefferson was clearly not shared by a large majority of his contemporaries." *Id*. at 136.

59. HAMBURGER, *supra* note 54, at 191.

60. According to Kathleen Brady, the idea that religion is strictly a private matter arises from modern theology. Kathleen A. Brady, *Fostering Harmony Among the Justices: How Contemporary Debates in Theology Can Help to Reconcile the Divisions on the Court Regarding Religious Expression by the State*, 75 NOTRE DAME L. REV. 433, 485 (1999).

61. One year after *Everson*, the Court decided *Illinois ex rel. McCollum v. Board of Education. of School District No. 71*, striking down a public school program that provided for one hour of religious instruction per week by sectarian teachers in public school classrooms. 333 U.S. 203, 205 (1948). In its decision, the Court maintained that the "wall of separation" articulated in *Everson* "must be kept high and impregnable." *Id*. at 211-12.

62. 403 U.S. 602, 612-13 (1971), *abrogated by* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022) (citations omitted).

63. Joseph P. Viteritti, *Reading Zelman: The Triumph of Pluralism, and Its Effects on Liberty, Equality, and Choice*, 76 S. CAL. L. REV. 1105, 1116 (2003).

64. Several decades ago, when the Court was more firmly committed to a separationist stance,

By specifically refuting both the *Lemon* and endorsement tests, and by reviving the historical meaning behind the Establishment Clause, the *Kennedy* Court essentially refuted the wall of separation metaphor. By stating that the Establishment Clause could not be used to restrict religious liberty or religious speech, the Court indicated that the Establishment Clause would no longer be used as a secularist protection.[65]

III. THE FACTS AND HOLDING OF *KENNEDY*

Joseph Kennedy lost his job as a high school football coach because of his brief post-game prayers at midfield.[66] The Bremerton School District ("District") justified Kennedy's firing by arguing that the Establishment Clause required an end to Kennedy's public prayer practice.[67] The U.S. Supreme Court ruled on several issues, including Kennedy's speech and free exercise rights,[68] but the only ruling explored in this Article involved the question of whether the Establishment Clause required the District to do everything possible to stop Kennedy's prayers.[69] In the course of this ruling, the Court expanded on the meaning and scope of the Establishment Clause.[70]

Joseph Kennedy began working as a football coach at Bremerton High School in 2008.[71] During his tenure as coach, and similar to the practice of other teams and coaches around the country, Kennedy routinely said a short prayer on the field after each game had concluded.[72] This prayer was said in a kneeling position at midfield, with other players gradually joining him.[73] Later, Kennedy began incorporating short motivational speeches with his prayer when other players were present.[74] In addition, the Bremerton football team engaged in pregame or

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the separationist fear was over the threat of government capture by a religion or religions. *See* Calvin Massey, *The Political Marketplace of Religion,* 57 HASTINGS L.J. 1, 13 (2005). But later, as that threat seemed increasingly unlikely, the focus of the separationists turned more to a desire to protect society from the presumed social divisiveness caused by religious beliefs. *Id*. at 23.

65. The *Kennedy* Court stated 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.'" *Kennedy*, 142 S. Ct. at 2427 (quoting Good News Club v. Milford Cent. Sch., 533 U.S. 98, 119 (2001) (internal quotations omitted)). Furthermore, the Establishment Clause does not "'compel the government to purge from the public sphere' anything an objective observer could reasonably infer endorses" religion. *Id*. (quoting Van Orden v. Perry, 545 U.S. 677, 699 (2005) (Breyer, J., concurring in judgment)).

66. *Kennedy*, 142 S. Ct. at 2415.

67. *Id*. at 2416-19.

68. *Id*. at 2421-26.

69. *Id*. at 2426-33.

70. *Id*.

71. *Id*. at 2416.

72. *Id*.

73. *Id*.

74. *Id*.

postgame prayers in the locker room, but this was a tradition that predated Kennedy's tenure as coach.[75]

The District received no complaints about Kennedy's prayers for more than seven years.[76] The District superintendent first learned about the prayer ritual when an employee at another school commented positively on the ritual to the school's principal.[77] The superintendent then sent Kennedy a letter outlining "two problematic practices" in which Kennedy had engaged: the midfield motivational talks that included religious references; and Kennedy's leading of locker room tradition of prayers that predated Kennedy's tenure.[78] After receiving this letter, Kennedy ended the tradition of locker-room prayers, as well as his practice of incorporating religious references into his postgame motivational talks.[79] However, in a letter to the District, Kennedy stated that, "because of his 'sincerely-held religious beliefs,' he felt 'compelled'" to continue his practice of offering a "'post-game personal prayer' of thanks at midfield."[80] Kennedy also explained to the superintendent that he "'neither requests, encourages, nor discourages students from participating in' these prayers."[81]

After further correspondence, the superintendent issued an ultimatum forbidding Kennedy in his role as coach "from engaging in 'any overt actions' that could 'appea[r] to a reasonable observer to endorse . . . prayer.'"[82] The District argued that such a prohibition was required by the Establishment Clause.[83]

When Kennedy ignored this ultimatum and as media coverage of the controversy increased, the District made a very public response.[84] It "placed robocalls to parents to inform them that public access to the field [was] forbidden; it posted signs and made announcements at games" repeating that rule; "and it had the Bremerton Police secure the field in future games."[85] As the controversy continued, the District admitted that Kennedy's most recent postgame prayer was "fleeting" and that no students prayed with Kennedy.[86] Nonetheless, the District repeated its position that a reasonable observer could still think that Kennedy's prayers reflected the District's endorsement of religion.[87] It informed Kennedy that he could not pray on the field and had to find a private location behind closed

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75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.* at 2417.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.* at 2417-18.
84. *Id.* at 2418.
85. *Id.*
86. *Id.*
87. *Id.*

doors.[88] When Kennedy next offered a solitary prayer at midfield by briefly bowing his head, the District placed him on administrative leave and prohibited him from participating in any football program activities.[89] In a document later provided to the public, "the District admitted that it possessed 'no evidence that students [had] been directly coerced to pray with Kennedy.'"[90]

Although Kennedy had received consistently positive evaluations every other year of his coaching career, the District gave him a poor performance evaluation for his final season and advised against rehiring.[91] Subsequently, Kennedy sued, arguing a violation of his Free Speech and Free Exercise rights.[92] The District answered, in part, by asserting that their actions were compelled by the Establishment Clause.[93] The District Court agreed on this Establishment Clause argument,[94] and the Ninth Circuit affirmed.[95]

The Ninth Circuit stated that Kennedy's prayers violated the endorsement test and would lead an objective observer to conclude that the school district "endorsed Kennedy's religious activity by not stopping the practice."[96] Thus, the sole reason for Kennedy's suspension was the school's desire to avoid constitutional liability under the Establishment Clause.[97] As the Ninth Circuit stated: the school district "had a compelling state interest to avoid violating the Establishment Clause," and its suspension of Kennedy was narrowly tailored to vindicate that interest.[98]

In overruling the Ninth Circuit, the U.S. Supreme Court first addressed the issue of whether the Free Exercise and Establishment Clauses were in tension, since the lower court had held that the two clauses were in conflict and that Kennedy's Free Exercise rights had to yield to the school's Establishment Clause duties.[99] This theory of tension between the clauses had animated decades of Establishment Clause decisions.[100] However, the Court rejected this theory and stated that the two clauses were "complementary" and not conflicting, with both

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88. *Id.*

89. *Id.* at 2418-19.

90. *Id.* at 2419. On this point, however, the dissent disagreed with the Court, asserting that evidence of coercion did exist in the record. *Id.* at 2450-52 (Sotomayor, J., dissenting).

91. *Id.* at 2419.

92. *Id.*

93. *Id.*

94. Kennedy v. Bremerton Sch. Dist., 443 F. Supp. 3d 1223, 1237-40 (W.D. Wash. 2020), *aff'd* 991 F.3d 1004 (9th Cir. 2021), *rev'd*, 142 S. Ct. 2407 (2022) (stating that even if Kennedy's speech qualified as private speech, the school had properly suppressed it because if it had not done so an Establishment Clause violation would have occurred).

95. Kennedy v. Bremerton Sch. Dist., 991 F.3d 1004, 1023 (9th Cir. 2021), *rev'd*, 142 S. Ct. 2407 (2022).

96. *Id.* at 1018.

97. *Id.* at 1020-21.

98. *Id.*

99. *Kennedy*, 142 S. Ct. at 2426.

100. *Id.* at 2426-27.

serving to protect religious liberty.[101]

Next, the Court addressed the Ninth Circuit's application of the endorsement test to find an Establishment Clause violation in Coach Kennedy's mid-field prayer.[102] Arguing that the endorsement test arose out of the *Lemon* test and outlining the problems with the endorsement test, the Court officially rejected both tests as legitimate tools in Establishment Clause jurisprudence.[103] The Court stated that the shortcomings associated with the *Lemon's* ahistorical approach to the Establishment Clause had become so apparent that both that test and the endorsement test had to be abandoned.[104] The Court recognized that use of the endorsement test could result in an Establishment Clause violation even though the District never actually endorsed Kennedy's prayer, and even though a reasonable observer could mistakenly infer that by allowing the prayer the school was endorsing Kennedy's practice.[105] Moreover, the Court admitted that the endorsement test could constitute a "heckler's veto," which would amount to a violation of the Free Speech Clause.[106] As the Court stated: "[a]n Establishment Clause violation does not automatically follow whenever a public school or other government entity 'fail[s] to censor' private religious speech."[107]

In rejecting both the *Lemon* and endorsement tests, the Court stated that future Establishment Clause cases must be resolved according to the "historical practices and understandings" of the Framers.[108] In other words, the original meaning of the First Amendment was to be the controlling reference for Establishment Clause jurisprudence.[109]

IV. *KENNEDY*'S IMPACT ON FUTURE ESTABLISHMENT CLAUSE JURISPRUDENCE

A. Historical Meaning and Religious Liberty Control

1. Social Policy or Secularism Does Not Govern the Clause.—The Establishment Clause decisions that incorporated the wall of separation metaphor never relied on constitutional history.[110] Because the wall metaphor had no basis in history, the jurisprudence relying on that metaphor also had no historical foundations.[111] Instead, the separationism jurisprudence focused on social policy

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101. *Id.* at 2426.

102. *Id.* at 2427.

103. *Id.*

104. *Id.* at 2427-28 (noting the Court unanimously rejected, in another case during the same term, an attempt to censor religious speech based on *Lemon* and the endorsement test; citing Shurtleff v. City of Boston, 142 S. Ct. 1583, 1587-88 (2022)).

105. *Id.* at 2426-27.

106. *Id.* at 2427.

107. *Id.* (citing Bd. of Educ. v. Mergens, 496 U.S. 226, 250 (1990)).

108. *Id.* at 2428.

109. *Id.*

110. *See supra* notes 51-60 and accompanying text.

111. *Id.*

and cultural assumptions, concerns that the Court in *Kennedy* dismissed as constitutionally irrelevant. One of the primary concerns underlying the separationist jurisprudence was a fear of social divisiveness.[112]

Under this view, the Establishment Clause is not about constitutional intent or history, but about achieving certain social and cultural conditions. As such, the wall of separation metaphor has been used to try to shield a secular society, as well as opponents of religion, from certain controversies and conflicts that arise in a democracy, such as whenever a religion asserts itself or its beliefs in the public arena.[113] This view reflects a fear that the failure to keep the religious and political spheres separate will lead to social strife along religious lines and a fragmentation of the political community.[114]

Justices Stevens and Breyer, for instance, have argued that any public acknowledgement of religion would cause political discord and erode the social fabric of our democracy. Drawing on experiences from the Balkans, Northern Ireland, and the Middle East, Justice Stevens wrote: "Whenever we remove a brick from the wall that was designed to separate religion and government, we increase the risk of religious strife and weaken the foundation of our democracy."[115] Justice Breyer also stated that "the Establishment Clause concern for protecting the Nation's social fabric from religious conflict poses an overriding obstacle to the implementation of this well-intentioned school voucher program."[116] In *McCreary County v. ACLU,* Justice Souter, in his decision ruling against a Ten Commandments display, asserted that "nothing does a better job of roiling society" than does any perceived interaction between government and religion.[117]

According to Justice Breyer in *Van Orden v. Perry*, the Establishment Clause serves to avoid "divisiveness based upon religion that promotes social conflict, sapping the strength of government and religion alike."[118] This assertion reflected a longstanding argument. Chief Justice Warren Burger used it in his *Lemon* opinion, in which he wrote that "[o]rdinarily 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

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112. *See supra* note 64 and accompanying text.

113. *See* Mark D. Rosen, *Establishment, Expressivism, and Federalism,* 78 CHI.-KENT L. REV. 669, 675-76 (2003).

114. *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 718-29 (2002) (Breyer, J., dissenting). As one commentator has noted, "it is plausible to conclude that today's Establishment Clause doctrine communicates at least one thing very clearly: that the intermingling of political and religious authority is categorically bad." Rosen, *supra* note 113, at 685.

115. *Zelman*, 536 U.S. at 686 (Stevens, J., dissenting).

116. *Id*. at 717 (Breyer, J., dissenting).

117. 545 U.S. 844, 876 (2005). According to Justice Souter, America is "centuries away from the St. Bartholomew's Day massacre and the treatment of heretics in early Massachusetts, but the divisiveness of religion in current public life is inescapable." *Id*. at 881.

118. 545 U.S. 677, 698 (2005) (Breyer, J., concurring).

protect."[119] Echoing these sentiments, Justice Marshall in *Wolman v. Walter* likewise found that an Ohio program supplying public funds to schools, including religious ones, was an unconstitutional establishment because the aid risked "political 'divisiveness on religious lines.'"[120]

However, this divisiveness argument envisioning religion as a threat to society, contradicts the whole purpose behind the speech and free exercise clauses of the First Amendment. Moreover, the prevalence of this argument essentially censors certain viewpoints from the public dialogue and pushes religion out of the public square. The argument also goes against the entire direction of recent equal protection norms, insofar as it picks out particular viewpoints for differential treatment.[121]

This divisive view of religion assigns to the Court the role of eliminating any conflicts that might erupt from the religious practices of a diverse people.[122] It also goes against Madison's view that the only way to address social division was to foster an even greater pluralism.[123]

The separationist view of the Establishment Clause, incorporating the divisiveness theory, rests primarily on social and cultural factors—e.g., the type of modern culture and society that is desired. The separationist view then tries to use the Establishment Clause as a broadly empowered regulatory tool seeking to achieve that desired society.

By rejecting the *Lemon* and endorsement tests, which arose out of the wall metaphor, the *Kennedy* Court also rejected the wall of separation as a guiding principle in Establishment Clause jurisprudence.[124] Furthermore, by stating that history would henceforth serve as the guiding principle, the *Kennedy* Court directly denied the future viability of the wall of separation metaphor, since that metaphor not only ignored but contradicted history.[125] With constitutional history

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119. Lemon v. Kurtzman*,* 403 U.S. 602, 622 (1971), *abrogated by* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022). According to the Chief Justice, the "potential divisiveness of such conflict is a threat to the normal political process," since it "would tend to confuse and obscure other issues of great urgency." *Id.* at 622-23.

120. 433 U.S. 229, 259 (1977) (Marshall, J., concurring in part and dissenting in part) (quoting *Lemon*, 403 U.S. at 623), *overruled by* Mitchell v. Helms, 530 U.S. 793 (2000).

121. For an excellent discussion of the religion-as-politically-divisive view and how this view underlies the separationist position, see Richard W. Garnett, *Religion, Division, and the First Amendment,* 94 GEO. L.J. 1667 (2006).

122. *See* Stephen J. Stein, *Religion/Religions in the United States: Changing Perspectives and Prospects,* 75 IND. L. J. 37, 41 (2000) (stating that America is one of the most religiously diverse nations); *see also* ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 65-69 (2000). Despite America's religiosity, there is not the religious strife that exists in many other parts of the world; rather than undermining democracy, religious institutions have provided a strong foundation for civic life in the U.S. *Id.*

123. *See* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 35-36, 42-56 (1996).

124. Kennedy v. Bremerton Sch. Dist.*,* 142 S. Ct. 2407, 2431 (2022).

125. *See id*. at 2428-29.

as the jurisprudential guidepost, the use of the Establishment Clause as social regulator would also be discontinued. The focus will not be on the state of society but on the constitutional role and purpose of the Establishment Clause.[126]

2. The Elimination of Tests Evolving from the Wall of Separation.—The *Kennedy* Court specifically rejected two of the most prominent of the Establishment Clause tests: the *Lemon* test and the endorsement test.[127] More generally, the Court eliminated the whole patchwork of tests that have been created and applied over the decades.[128] Instead, only one test or focus will determine future Establishment Clause cases: the historical intent and meaning behind that Clause.[129]

Ever since *Lemon*, the Court's Establishment Clause jurisprudence has been littered with an array of tests. These tests were substitutes for the Court's definition or understanding of establishment. Never has the Court actually provided a clear definition of establishment. Instead, it has derived tests that, when applied, are supposed to tell the Court when an unconstitutional establishment has occurred.[130] But these tests, especially the *Lemon* test and its offshoot, the endorsement test, contain an inherent bias against the public presence of religion.[131]

A strain of hostility toward religion has endured throughout the *Lemon* legacy. Public school officials refused to allow a ninth-grade student to hand in a class paper on the life of Jesus Christ.[132] Elsewhere, school authorities demanded that a teacher remove religion-oriented books from a classroom library and to keep his personal Bible out of sight at all times.[133] Administrators of a public senior center forbade a film on the Christian faith from being shown.[134] New Jersey school officials removed a student's drawing of Jesus Christ from a display of student posters depicting things for which they were grateful.[135] On another occasion, that student was prohibited from reading his favorite story to the class because the story came from the Bible.[136] In Pennsylvania, a teacher's assistant was suspended for failing to take off a necklace containing a cross.[137] Elsewhere, a school district refused to permit the distribution of brochures advertising a summer Bible camp.[138] In another case, a school board forbade a

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126. *Id.* at 2428, 2431. The Court stated that in conferring "double protection for religious expression," the First Amendment did not give any preference to a secular activity. *Id.* at 2431.

127. *Id.* at 2427-28.

128. *Id.*

129. *Id.* at 2428.

130. *See id.* at 2427.

131. *Id.* at 2431; *see also supra* text accompanying notes 131-39.

132. Seattle v. Dickson Cnty. Sch. Bd., 53 F. 3d 152, 154 (6th Cir. 1995).

133. Roberts v. Madigan, 921 F. 2d 1047, 1049 (10th Cir. 1990).

134. Church of the Rock v. City of Albuquerque, 84 F.3d 1273, 1277 (10th Cir. 1996).

135. C.H. v. Oliva, 990 F. Supp. 341, 346 (D.N.J. 1997).

136. *Id.* at 346-47.

137. Nichol v. ARIN Intermediate Unit 28, 268 F. Supp. 2d 536, 541 (W.D. Pa. 2003).

138. Hills v. Scottsdale Unified Sch. Dist., 329 F.3d 1044, 1046-47 (9th Cir. 2003).

student from convening a Bible club during "noninstructional time."[139] In yet another, the American Civil Liberties Union claimed the Establishment Clause banned the Ten Commandments from being included in a public display of such documents as the Mayflower Compact, the Declaration of Independence, the Magna Carta, and the Bill of Rights.[140]

The Court in *Kennedy* recognized this chaotic legacy of *Lemon*,[141] as well as the hostility to religion it had produced.[142] The Court also recognized the faults of the endorsement test, which grew out of the *Lemon* test. The Ninth Circuit had used this test to uphold the school's actions against Coach Kennedy.[143] As the Ninth Circuit defined it, the endorsement test finds that a government-religion interaction is unconstitutional if, in the court's view, a reasonable observer would perceive in that interaction a government endorsement of religion.[144] This test had been used by the District Court in *Kennedy* to find Coach Kennedy's mid-field prayer to constitute an impermissible establishment.[145] According to the District Court, a reasonable observer might perceive that the prayer, even if that observer might not hear the words of the prayer, was specifically approved and endorsed by the government officials running the public school sponsoring the football game.[146] However, there existed no evidence on which to base such a conclusion, other than the fact that Coach Kennedy was a public employee.[147] But if that is enough to confer endorsement, then no public employee could ever express any religious sentiments or beliefs while being perceived to be on duty.[148] Essentially, as it has been applied, the endorsement test has become a kind of dissenter's veto, allowing anyone offended by or opposed to religious expressions to censor them.[149] And the Court in *Kennedy* explicitly prohibited such a use of the

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139. Donovan v. Punxsutawney Area Sch. Bd., 336 F.3d 211, 214 (3d Cir. 2003).

140. ACLU of Ky. v. Mercer Cnty., 240 F. Supp. 2d 623, 623-24 (E.D. Ky. 2003).

141. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427, 2431 (2022).

142. *Id.* at 2431 (stating that there is "no historically sound understanding of the Establishment Clause that begins to 'mak[e] it necessary for government to be hostile to religion'") (quoting Zorach v. Clauson, 343 U.S. 306, 314 (1952)).

143. Kennedy v. Bremerton Sch. Dist., 991 F.3d 1004, 1017 (9th Cir. 2021), *aff'g* 443 F. Supp. 3d 1223 (W.D. Wash. 2020), *rev'd*, 142 S. Ct. 2407 (2022).

144. *Id.*

145. Kennedy v. Bremerton Sch. Dist., 443 F. Supp. 3d 1223, 1237-38 (2020), *rev'd*, 991 F.3d 1004 (9th Cir. 2021).

146. *Id.* at 1238.

147. *Kennedy,* 142 S. Ct. at 2426-27 (stating that "the District never actually endorsed [the] prayer [and] no one complained that it had").

148. *See id.* at 2431.

149. *Id.* at 2427; *see* Patrick M. Garry, *Liberty from on High: The Growing Reliance on a Centralized Judiciary to Protect Individual Liberty,* 95 KY. L.J. 385, 397 (2007); Patrick M. Garry, *When Anti-Establishment Becomes Exclusion: The Supreme Court's Opinion in American Legion v. American Humanist Association and the Flip Side of the Endorsement Test,* 98 NEB. L. REV. 643, 652-53 (2020).

Establishment Clause.[150]

Among the problems with the endorsement test, as recognized by *Kennedy,* is that it allows too much subjectivity in a court's estimations of the impressions people might have of certain religious expressions. Because the test requires judges to speculate about the impressions that unknown people may have about various religious speech or symbols, its application is fraught with uncertainty.[151] According to one judge, the endorsement test requires "scrutiny more commonly associated with interior decorators than with the judiciary."[152] Justice Kennedy declared the endorsement test to be "flawed in its fundamentals and unworkable in practice."[153] He argued that the endorsement test results in a "jurisprudence of minutiae"[154] that requires courts to consider every detail surrounding the religious speech in order to see if an observer might interpret the speech to reflect a governmental endorsement.[155] Whether a religious symbol has become sufficiently diluted by surrounding secular symbols according to a court's estimations can then affect whether that symbol amounts to an endorsement of religion. In *Allegheny*, this jurisprudence of minutiae required the Court to examine "whether the city ha[d] included Santas, talking wishing wells, reindeer, or other secular symbols" so as to draw attention away from the religious symbol in the display and mute its religious message.[156] However, as Justice Kennedy argued in *Allegheny,* neither the crèche nor the menorah posed a "realistic risk" of establishing a religion.[157] Indeed, one year after the *Allegheny* decision, the Sixth Circuit held in *Doe v. City of Clawson* that the Establishment Clause was not violated by the display of a crèche in front of city hall.[158] According to the court, the presence of other secular holiday articles sufficiently diluted the religious message of the crèche.[159]

The endorsement test contains no concrete boundaries defining where establishment begins or ends. For instance, notices placed in student mailboxes, announcing church social activities, resulted in an unconstitutional establishment

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150. *See supra* note 65.

151. Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the 'No Endorsement' Test*, 86 MICH. L. REV. 266, 300-01 (1987).

152. Am. Jewish Cong. v. City of Chi., 827 F.2d 120, 129 (7th Cir. 1987) (Easterbrook, J., dissenting), *overruled by* Woodring v. Jackson Cnty., 986 F.3d 979 (7th Cir. 2021).

153. Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 669 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part), *overruled by* Town of Greece v. Galloway, 572 U.S. 565 (2014).

154. *Id.* at 674.

155. *Id.* at 674-75.

156. *Id.* at 674. The banning of the crèche, in Justice Kennedy's opinion, reflected "an unjustified hostility toward religion" and a "callous indifference toward religious faith that our cases and traditions do not require." *Id.* at 655, 664.

157. *Id.* at 662.

158. 915 F.2d 244, 249 (6th Cir. 1990).

159. *Id.*

of religion.[160] Even though other community groups such as Little League and the YMCA could distribute leaflets advertising their activities, religious groups could do so only after the principal ensured that their notices only advertised specific activities and did not engage in any proselytizing.[161] And even though the church leaflets were not distributed personally to the children, but were instead placed in student mailboxes, the court still held that the mere distribution of religious material to students could result in an endorsement of religion by the school.[162] Elsewhere, the performance of *The Lord's Prayer* by a high school choir violated the Establishment Clause.[163] According to the court, the choir's mere rehearsal of that song rose to the level of an impermissible establishment.[164] Reflecting a jurisprudence of minutiae, the court stated that a public school choir's performance of just one religious-oriented song has a principal effect of advancing the Christian religion.[165]

Because of the power given by the endorsement test to the so-called reasonable observer to object to public displays of religion, an individual dissenter's right has developed that enables just about anything, no matter how minute, to rise to the level of an establishment. Consequently, the endorsement test diverts courts from the core focus of the Establishment Clause—state interference in the institutional autonomy of religious organizations[166]—and turns judicial attention instead to a subjective analysis of all the possible feelings of discomfort of individual dissenters with religious expressions made on public property. As Justice Stevens described the endorsement test, emphasizing the perspective of the non-adherent: "A paramount purpose of the Establishment Clause is to protect such a person from being made to feel like an outsider in matters of faith, and a stranger in the political community."[167]

The *Kennedy* Court reacted against the subjectivity of the endorsement test, which in the past led it to be used in a way that was biased against religious expression in public. This subjectivity led courts to an exclusive focus on whatever objectionable impressions any person might have, whether or not government had done anything to foster those impressions.[168] Even if an observer

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160. Rusk v. Crestview Loc. Schs., 220 F. Supp. 2d 854, 855, 860-61 (N.D. Ohio 2002), *rev'd*, 379 F.3d 418 (6th Cir. 2004). The Sixth Circuit panel reversing the lower court's decision specifically noted that the "district court erred in finding an Establishment Clause violation based solely on the possibility that elementary school students might misperceive Crestview's practice of distributing flyers advertising religious (as well as nonreligious) activities as the school's endorsing religion." *Rusk*, 379 F.3d at 424.

161. *Rusk*, 220 F. Supp. 2d at 860-61.

162. *Id.* at 859.

163. Skarin v. Woodbine Cmty. Sch. Dist., 204 F. Supp. 2d 1195 (S.D. Iowa 2002).

164. *Id.* at 1198.

165. *Id.* at 1197.

166. *See supra* text accompanying note 53.

167. Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 799 (1995) (Stevens, J., dissenting).

168. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2426-27 (2022).

was mistaken in his or her impressions, the endorsement test could still find an unconstitutional establishment.[169] Thus, simply by not affirmatively stopping the prayer in *Kennedy*, the District under the endorsement test could be found to have established religion. However, by rejecting the endorsement test and focusing on the larger historical meaning of the Establishment Clause, the Court in *Kennedy* removed the anti-religion biases produced by the tests arising out of *Everson's* wall of separation's distortion of history.[170]

3. More Than an Interaction Is Needed for Establishment.—The judicial reliance on the *Lemon* and endorsement tests caused courts to shift attention away from establishment and focus it instead on interaction. Thus, the issue in Establishment Clause cases was not whether government had improperly established a religion, but whether an improper interaction between religion and government had occurred.

By the very definition of the word, establishment requires more than a transitory or isolated association between a government entity and an individual religious practice or expression.[171] For an establishment, there must be evidence of a long-term institutional association between the state and a religion.[172] For instance, if a Jewish group erects a menorah display over Hanukkah on public property, such an act can hardly be said to constitute an establishment, since it is transitory and reflects no permanent relationship between the state and the Jewish religion. Indeed, it should be the burden of the challengers to prove that any transitory government-religion interactions do in fact rise to the level of an intentional, longstanding, discriminatory alignment between the state and a particular religious sect.[173]

If establishment is defined as a long-standing associational involvement between the government and a religion, any particular government-religion interaction should not be viewed in isolation or as single-handedly defining the nature of the state's overall policy and intent with regard to that religion.[174]

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169. *Id*. at 2427 (stating that the school felt it had to censor Kennedy's prayer "[b]ecause a reasonable observer could (mistakenly) infer that by allowing the prayer the District endorsed Mr. Kennedy's message").

170. *Id*. at 2428 (asserting that "'[t]he line' that courts and governments 'must draw between the permissible and the impermissible' has to 'accor[d] with history and faithfully reflec[t] the understanding of the Founding Fathers.'" (quoting Town of Greece v. Galloway, 572 U.S. 565, 577 (2014))).

171. *See* Patrick M. Garry, *Establishment Clause Jurisprudence Still Groping for Clarity: Articulating a New Constitutional Model*, 12 NE. U. L. REV. 660, 696-98 (2020) [hereinafter Garry, *Articulating*].

172. *See id*. at 664, 697.

173. *See Kennedy*, 142 S. Ct. at 2421-22.

174. An establishment of religion cannot be determined simply by looking at one instance of government-religion interaction in isolation. If one Hindu group, for example, is providing social welfare services at one prison in a state, unless the state has improperly preferred that group to any other group, the one-time service at that prison should not by itself be sufficient to show an establishment.

However, under the endorsement test, a reasonable observer could conclude, after one viewing of a Christmas crèche display on public grounds, for instance, that in fact the government had established the Christian religion. But how reasonable could that person be if just one momentary experience would lead to such a conclusion? Would it not be reasonable for a person to have the duty of at least looking around to see if other indications of this suspected establishment exist? Conversely, should not a reasonable person have the responsibility of observing the obvious existence of other factors that might negate any conclusion of establishment?

4. A Reconciliation of the Clauses.—In the course of its decision, the *Kennedy* Court addressed a claim that had over time allowed the Establishment Clause to limit the freedoms protected by the Free Exercise clause. This claim held that the two clauses are in tension: that while the Free Exercise Clause protects religious liberty, the Establishment Clause limits it.[175] This argument enabled the school in *Kennedy* to use its Establishment Clause concern to restrict the coach's religious freedom.[176]

In the wake of *Lemon,* courts had often seen the Exercise and Establishment Clauses as being in opposition to each other.[177] Operating under the assumption that the two clauses served contradictory purposes, the conclusion was drawn "that the Free Exercise Clause confers benefits on religion, while the Establishment Clause imposes burdens on religion."[178] But this distinction is constitutionally illogical because the Free Exercise Clause is then being nullified by the Establishment Clause.[179] Instead, under the umbrella of the First Amendment, "the two clauses protect a single central liberty—religious freedom— from two different angles."[180] According to Professor Paulsen, "[t]he

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175. *Id.* at 2421, 2426-27.

176. *See id.* at 2426.

177. *See* Carter, *supra* note 53, at 311 ("Despite what courts and commentators say, the First Amendment contains only one religion clause, not two, and the text will not admit of an interpretation that tries to assign two different meanings to the word *religion*, which appears only once.") (emphasis added).

178. George W. Dent, Jr., *Of God and Caesar: The Free Exercise Rights of Public School Students,* 43 CASE W. RES. L. REV. 707, 720 (1993).

179. *See* Richard John Neuhaus, *A New Order of Religious Freedom*, 60 GEO. WASH. L. REV. 620, 630 (1992); *see also* Dent, Jr., *supra* note 178, at 723 (arguing that the government's goal should be "to maximize religious freedom" while remaining "as neutral as possible about religion"); Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 541 (1991) (arguing that "[i]f the two religion provisions are read together in the light of an overarching purpose to protect freedom of religion, most of the tension between them disappears").

180. Paulsen, *supra* note at 40, at 798. Paulsen then goes on to argue that "[i]f nonestablishment and free exercise are understood as correlative rather than contradictory principles, it is logical to read the clauses as mirror-image prohibitions on government prescription and proscription, respectively, of the same thing—religious *exercise*." *Id.* at 808 (emphasis added). For other commentary arguing that the two clauses are not at odds, *see* Carl H. Esbeck, *A Constitutional Case for Governmental Cooperation with Faith-Based Social Service Providers*, 46 EMORY L.J. 1, 25-26 (1997).

Establishment Clause prohibits the use of the coercive power of the state to *prescribe* religious exercise; the Free Exercise Clause prohibits the use of government compulsion to *proscribe* religious exercise."[181]

Taken together, as two components of a singular First Amendment, the two clauses address two separate threats to religious freedom: On one hand, governmental restriction of the religious exercise of individuals; and on the other, governmental interference or intrusion into religious institutions. The Establishment Clause prevents government from giving preference to any religion, while the Free Exercise Clause prevents government restriction of the religious exercise of any individual.[182]

Textually, the Constitution gives more protection to religious activity than to any secular-related activities.[183] Consequently, to apply the Establishment Clause such that it that limits religious liberty runs counter to the constitutional scheme. In particular, it seems completely unjustified that nonreligious speech should have greater protection than religious speech. Instead, "it makes more sense to see the two Religion Clauses as complementary and symmetrical propositions, protecting the autonomy of religious life against government inhibition as well as inducement."[184]

The Court in *Kennedy* finally cleared up this contrived inconsistency between the religion clauses and held that contrary to the disjointed case law of the past, the Exercise Clause is not constrained or negated by the Establishment Clause.[185] The Ninth Circuit below had held that, because Coach Kennedy's Free Exercise rights clashed with the demands of the Establishment Clause, the former had to yield to the latter.[186] Consequently, the school's interest in avoiding an

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181. Paulsen, *supra* note 179, at 798 (emphasis added).

182. *See* McConnell, *supra* note 55, at 718-19. ("Anti-accommodationists object to 'singling out' religion for special protection under the Free Exercise Clause, but they typically have no qualms about 'singling' out religion for special prohibitions under the Establishment Clause. . . . The anti-accommodationists seemingly take the position that the government must never 'advance' religion, but may inhibit, penalize, and punish it.") Although the anti-accommodationists view their position as neutral, it is neutral only "for those who believe that full religious practice can occur in the 'private' realm." Rosen, *supra* note 113, at 676. But there are many who believe that a full religious life is possible only if one's religious beliefs infuse every aspect of one's life, both private and public. *See* Lee v. Weisman, 505 U.S. 577, 645 (1992) (Scalia, J., dissenting) (discussing such integrationist perspective).

183. *See* Michael W. McConnell, *The Problem of Singling Out Religion,* 50 DEPAUL L. REV. 1 (2000). The Free Speech Clause protects religious expression; the Free Exercise Clause protects religious practice, conduct, and beliefs; and freedom of association, as well as the Establishment Clause, protect the integrity and autonomy of religious groups and organizations. *See also* Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000) (proposing that the right of expressive association is impaired if the government "affects in a significant way the group's ability to advocate public or private viewpoints" (citing N.Y. State Club Ass'n, Inc. v. City of New York, 487 U.S. 1, 13 (1988))).

184. McConnell, *supra* note 55, at 730-31.

185. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2426 (2022).

186. Kennedy v. Bremerton Sch. Dist., 991 F.3d 1004, 1020-21 (9th Cir. 2021), *rev'd*, 142 S.

Establishment Clause violation superseded Kennedy's speech and religious exercise rights.[187] The U.S. Supreme Court resolved this apparent conflict by holding that the Clauses were "complementary" and not in conflict with each other.[188] Indeed, as the Court recognized, the school'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 Clause in the First Amendment should 'trum[p]' the other two."[189]

V. A RETURN TO PRINCIPLES OF LIMITED GOVERNMENT AND JUDICIAL RESTRAINT

The *Kennedy* abandonment of the judicially intrusive Establishment Clause tests achieves one of the wide-ranging and far-reaching goals underlying the Constitution—that of limited government and judicial restraint. Through the facts of Mr. Kennedy's longstanding conflict with his school district over something as isolated and singular as a quiet prayer after a football game, as well as the lengths to which the school went to oversee and regulate Kennedy's prayer, one can see how Establishment Clause jurisprudence had come to authorize and perhaps even mandate highly intrusive government action into private behavior. This is the kind of behavior that was commonplace and pervasive in eighteenth-century America; and yet through the *Lemon* and endorsement tests, government entities have become roving inquisitors into private religious exercise. Such a role clearly transcends the bounds of what the Framers thought appropriate for government authority and activity. But in a post-*Lemon* world, the Establishment Clause had become a means by which government used its regulatory power to broadly monitor private speech.

By returning Establishment Clause jurisprudence to its proper historical foundations, *Kennedy* helps to transform the Clause from an instrument of activist government intervention to a constitutional liberty provision in harmony with limited government principles.[190]

Ct. 2407 (2022).

187. *Id.*

188. *Kennedy*, 142 S. Ct. at 2426.

189. *Id.* at 2432 (quoting *Kennedy*, 991 F.3d at 1017).

190. For a discussion on a related topic concerning limited government and the Establishment Clause, see Garry, *Articulating*, *supra* note 171, at 702, which discusses how the Establishment Clause seeks to protect a vibrant and autonomous religious sphere of society as a social institution capable of checking the power of government. Under this theory, religion during the constitutional era was a prominent social mediating institution capable of checking government. *Id.* at 703. Therefore, given the need to check and limit government, government accommodation of religion becomes all the more important, especially in an increasingly government-dominated world. *Id.* at 704.

VI. CONCLUSION: WHERE DO WE GO FROM HERE

Having finally returned to historical meaning, after a seventy-five-year departure occasioned by the wall metaphor, the Court in its Establishment Clause jurisprudence will now have to look closely at the eighteenth-century understanding of "establishment." Under the wall of separation model, any interaction between government and religion, however momentary, could result in an unconstitutional establishment. But such a result clearly contradicts the widespread eighteenth-century beliefs about the public value and presence of religion.[191] What may not be so clear is what specifically the Framers meant by the term "establishment" within the First Amendment.

Given, as the Court ruled in *Kennedy,* that the Free Exercise and Establishment Clauses are not in tension but are instead complementary, then both Clauses must serve the same larger purpose of protecting religious liberty. Yet because the two clauses are separate, they probably address different aspects of, or threats to, religious liberty. While the Free Exercise Clause deals with protecting individual religious liberty, the Establishment Clause deals with the preservation of institutional religious freedom and autonomy.

Perhaps the greatest threat to religious liberty known to the Framers was that posed by the established Church of England.[192] Through that establishment, the British government not only discriminated against all other religious institutions, it also directly intruded into the religious autonomy and workings of the Anglican Church.[193] Thus, the freedom most threatened by this arrangement was the state of institutional religious freedom in England.

In determining a historical meaning of the Establishment Clause, the Court will have to examine the scope and nature of this institutional liberty.[194] Some traits of this liberty become apparent through a historical analysis.[195] First, any improper government interference must be on an institutional level.[196] Second, the interference must be somewhat permanent and not of a fleeting nature.[197] And third, that government interference will probably be discriminatory in intent or effect—in other words, it will result in a differential treatment between religious institutions.[198]

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191. For a discussion of eighteenth-century practices of and beliefs toward religion, see Patrick M. Garry, *Religious Freedom Deserves More Than Neutrality: The Constitutional Argument for Nonpreferential Favoritism of Religion*, 57 FLA. L. REV. 1, 15-24 (2005). *See also* Patrick M. Garry, *The Institutional Side of Religious Liberty: A New Model of the Establishment Clause*, 2004 UTAH L. REV. 1155, 1160-63 [hereinafter Garry, *A New Model*].

192. *See* Garry, *Articulating*, *supra* note 171, at 697-98.

193. *See* Garry, *A New Model*, *supra* note 191, at 1162.

194. For a discussion on this institutional aspect of the Establishment Clause, *see* Garry, *Articulating*, *supra* note 171, at 694.

195. *See id*.

196. *See id*. at 692-96.

197. *See id*. at 698.

198. *See id*. at 695, 698-700.

In defining the historical meaning of the Establishment Clause, the Court will also have to distinguish situations in which the Free Exercise Clause will be more appropriate.[199] During the past, the Court has sometimes used the Establishment Clause as a kind of reverse Free Exercise Clause, operating to the benefit of those individuals who are offended by religious expression and wish to be governmentally protected from exposure to such expression.[200] In such settings, the Establishment Clause has been used as a type of individual secularist right. However, when matters of individual conduct or freedom are at issue, the Free Exercise Clause applies. When institutional autonomy or liberty is at issue, the Establishment Clause applies.

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199. For a discussion on when the Establishment Clause has wrongly been applied instead of the Free Exercise Clause, see Patrick M. Garry, *The Democratic Aspect of the Establishment Clause: A Refutation of the Argument That the Clause Serves to Protect Religious or Nonreligious Minorities*, 59 MERCER L. REV. 595, 601, 620-22 (2008).

200. For a more expansive discussion of this notion of reverse Free Exercise Clause, see Garry, *Distorting*, *supra* note 53, at 685. In this vein, the Establishment Clause has also been used as a kind of macro-Free Exercise Clause, presuming the existence of coercion whenever religious expression enters the public sphere, relieving objectors of the need to prove actual coercion being asserted against specific individuals. However, in *Kennedy,* the Court rejects the District's argument that "*any* visible religious conduct by a teacher or coach should be deemed—without more and as a matter of law—impermissibly coercive on students." Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2431 (2022) (emphasis in original).