IMPACT OF THE SUPREME COURT'S INTERPRETATION OF THE RELIGIOUS CLAUSES ON THE K-12 EDUCATION LANDSCAPE

by

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The First Amendment of the United States Constitution directs Congress to "make no law respecting an establishment of religion, or prohibiting the free exercise thereof." This text, the religious clauses of the Constitution, was written to act as tandem religious liberty protections. However, the inherent tension between the Establishment and Free Exercise clauses of the First Amendment has been demonstrated by the Supreme Court's recent jurisprudence in cases related to public education.

To resolve that tension, the Roberts Court chose to jettison the *Lemon v. Kurtzman* (1971) precedent, which was established after the Court's more progressive Warren-era. The *Lemon* holding sought to create a universally applicable test to ensure a strong separation between church and state, along with general government neutrality towards religion. The Supreme Court that decided *Lemon* was especially friendly toward challenges under the Establishment Clause in the context of public education policy. However, the Court's changed compostion also ushered in a new approach. When the modern Court considers similar challenges under the Establishment Clause, it almost always seeks to protect the Free Exercise interest at stake, often neglecting to consider the Establishment Clause altogether. In recent cases It has replaced the Lemon test with

a more originalist, history and tradition standard; however, than new standard has yet to be fully fleshed-out. Having recently changed its interpretation of the religious clauses, Supreme Court's future holdings will likely consider the limits of free exercise protections for public school employees and the details of the new establishment standard.

This thesis explores the dynamics of the modern Supreme Court's shift in jurisprudence, how it occurred, and how future rulings might further impact American public education.

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Introduction

The jurisprudence of the United States Supreme Court has fallen under increased scrutiny in recent decades, as the Supreme Court has been tasked with resolving some of the most hot-button questions in American politics. The modern Supreme Court, under Chief Justice Roberts established the right of same-sex couples to marry in *Obergefell v. Hodges* (2015), expanded federal protections for gun owners under the Second Amendment in *New York State Rifle & Pistol Association v. Bruen* (2022), reversed a decades-old precedent protecting the right to an abortion in *Dobbs v. Jackson Women's Health Organization* (2022), and prevented the state of Colorado from removing former President Trump from the ballot in *Trump v. Anderson* (2024).. Supreme Court's willingness to overturn historical precedents and embrace novel interpretations of constitutional law has been criticized by political commentators and the religious clauses of the First Amendment have experienced an especially significant and rapid shift in interpretation.[1]

The two provisions of the First Amendment that deal with religion, the Establishment Clause and the Free Exercise Clause, prevent the government from establishing a state religion, and ensure that the individual right to practice one's religious beliefs is protected. At first glance, the two clauses go hand-in-hand; the first prevents the government from forcing a set of religious tenets upon the citizenry, while the second secures the right of the citizens to practice whatever religion they see fit. However, there are certain instances in which the two clauses come into tension with one another, particularly in the environment of public schools. For example, when a Kindergarten teacher expresses their religious beliefs in the classroom through the clothing or accessories they wear, is that merely an individual exercising their First Amendment right to

[1] Sanders, Sam, and Mark Joseph Stern. "The Real Justices of Scotus." NPR, May 25, 2021. https://www.npr.org/transcripts/999078292.

express their religious beliefs? Or is that a state official violating the Establishment Clause by outwardly displaying symbols of their religiosity before an especially malleable audience? What if instead of merely wearing clothing or accessories associated with their religion, they tell their students a personal narrative of how their religious faith plays a role in their personal life?

These are the sorts of tensions the Supreme Court must resolve between the religious clauses of the First Amendment. This thesis will examine how the Court has gone about striking a balance between those two competing clauses, and how the modern Roberts Court has found a different balance than the Warren Court. To accomplish this, the thesis will compare several Supreme Court holdings from the Warren Court and the Roberts Court.

In the mid-20th Century, under Chief Justice Earl Warren, the Supreme Court found a balance between the two clauses which tended to favor the Establishment Clause over the Free Exercise Clause. *Engel v. Vitale* (1962) directly takes up the issue of whether public schools can facilitate time for students to pray, without violating the Establishment Clause. The holding in *Engel* is indicative of the Warren Court's expansive view of the Establishment Clause. Less than decade later, the Court decided *Lemon v. Kurtzman* (1971). The holding in *Lemon* would become representative of the Warren Court's approach to interpreting the First Amendment and controlling precedent for Establishment Clause cases for decades to come. Moreover, *Lemon*'s factual background is like those of recent Supreme Court cases about public funding for private religious institutions; however, under the Roberts Court those cases have had a much different outcome.

Under, Chief Justice John Roberts, the Supreme Court has struck a different balance between the two clauses, instead favoring the Free Exercise Clause over the Establishment Clause. In *Town of Greece v. Galloway* (2013), the Court's holding demonstrates its shift in

interpreting the Establishment Clause in cases regarding public prayer. While the Warren Court was cautious to ensure that public classrooms did not become places of religious worship in *Engel*, the Roberts Court had a narrower view of the scope of the Establishment Clause, determining in *Town of Greece* that the First Amendment did not restrict prayer in public spaces. Moreover, in *American Legion v. American Humanist Association* (2017) the Roberts Court demonstrates its interest in departing from the *Lemon* holding established by their predecessors. Further, the Supreme Court's holding in *Kennedy v. Bremerton School District* (2022) demonstrates the Roberts Court's expansive view of the Free Exercise Clause, which they understand to prevent public school districts from placing various restrictions on the religious worship of their employees, even if, in the view of school district, that religious worship might impact that employee's effectiveness in their job. Finally, *Carson v. Makin* (2022) not only demonstrates a further shift in the Supreme Court's First Amendment jurisprudence, but also best highlights how the modern Court's rulings will impact education funding in the years to come.

First Amendment Clauses

Religion has long been a critical issue in American public life. Even before the founding, the American colonies were characterized as a land where religious minorities could live free of persecution by the state. Various religious denominations including Quakers, Baptists, and Puritans found refuge in the American colonies, in large part due to the lack of an established church.[2] In England, these groups were restricted by the established Church of England, which prevented them from congregating, and in some instances engaged in outright persecution.[3] Accordingly, the founders sought to preserve that environment of religious liberty when drafting

[2] Gjelten, Tom. "To Understand How Religion Shapes America, Look to Its Early Days." NPR, June 28, 2017. https://www.npr.org/2017/06/28/534765046/smithsonian-exhibit-explores-religious-diversitys-role-in-u-s-history.
[3]Ibid.

the Constitution. The First Amendment begins by immediately preventing the federal government from establishing a state religion or abridging an individual's right to practice their religious faith:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[4]

The prioritization of these two religious clauses, referred to as the Establishment Clause and the Free Exercise, respectively, demonstrate the premium the founders placed on protecting the religious liberty of the various denominations. While the founders agreed in principle that religion generally was not a matter in which the government should intervene, there were disagreements between the founders on the degree to which that prohibition restricted government action. Representing the maximalist view, Thomas Jefferson famously argued in an 1802 letter to a group of Baptists in Connecticut that the Establishment Clause required a '"wall of separation"' between church and state.[5] Jefferson believed it was vitally important that the operations of the state remained as secular as possible, and while individuals should have right to openly express their religious beliefs, religious leaders must be prevented from having any outsized influence on the operations of the government. However, other literature on the Establishment Clause indicates that some founders had a much narrower view of the provisions. One interpretation of the clause indicates that the founders only intended for the Establishment Clause to prevent the federal government from establishing a religion and sought to allow each state government to establish a religious faith, should they so choose.[6] These vastly different

[4] U.S. Constitution, amend. 1

[5] Kryzanek, Michael. "The Doctrine of Separation of Church and State." Bridgewater State University. Accessed March 26, 2024. https://www.bridgew.edu/stories/2023/doctrine-separation-church-and-state.

[6] Amar, Akhil Reed. "Some Notes on the Establishment Clause." *Roger Williams University Law Review*, vol. 2, no. 1, 1996,

interpretations of the Establishment Clause indicate the high degree of ambiguities in the text of the First Amendment.

The Changing Judicial Philosophies of the Warren and Roberts Court

Supreme Court is tasked with resolving disputes arising from the ambiguities within the Constitution, and as the court of last resort, federal and state courts nationwide are required to abide by the Supreme Court's precedents. The composition of the nine-member court changes every few years, and each new justice brings their own unique ideological philosophy onto the bench. Chief Justice Earl Warren was President Eisenhower's first Supreme Court appointee in 1953. When Warren joined the bench, he joined a Court comprised of justices appointed during the progressive administrations of Franklin Roosevelt and Harry Truman. There were ideological differences between the members of the Court, in terms of whether the judiciary should favor restraint, deferring to the judgment of Congress and the White House, or take a more intervention-heavy approach[7]. However, each of the justices had been educated and appointed during an time when the judicial philosophy of living constitutionalism was becoming popular. The idea of the living constitution represented a shift, away from the notion that the Constitution was a document with a fixed meaning, instead living constitutionalists posit that the Constitution "evolves according to changing values and circumstances" and, moreover, that the judiciary helps to facilitate that process.[8] Put another way, the Constitution must be malleable for it to apply to modern questions, and it's the responsibility of the Supreme Court determine how it should evolve.

[7] Morton J. Horwitz, The Warren Court And The Pursuit Of Justice, 50 Wash. & Lee L. Rev. 5 (1993).
[8] Ibid.

The jurisprudence of William Douglas, a Roosevelt appointee who remained on the Court until 1975, arguably best exemplifies this judicial philosophy. Justice Douglas' decisions fell under scrutiny for their lack of reference to precedent or history; instead, Douglas referenced doctrines aligned with the Constitution, like natural law, as the basis for making his decisions.[9] According to the doctrine of the living constitution, while the founders may not have included a particular protection in the Bill of Rights for a given civil liberty, their general support for natural individual rights indicates that the modern constitution should be construed as protecting the civil liberty in question. The adoption of this philosophy, generally, by members of the Supreme Court led to some of the Court's most significant landmark decisions expanding individual rights, including the constitutional right to marry in *Obergefell.*[10]

The Supreme Court's use of the doctrine of the living constitution under Chief Justice Warren was criticized by certain legal scholars who believed that the Court's approach gave its members too much power to "create" new constitutional rights.[11] These scholars argued that the Supreme Court's expansive approach to individual rights posed a threat to democratic principles.[12] According to their reasoning, the each time the Supreme Court establishes a new individual right not explicitly protected in the text of the constitution, that inherently prevents Congress and the various state legislatures from passing laws in that field; accordingly, as the Courts establish more rights they necessarily remove more issues from the purview of

[9]Garrow, David J. "The Tragedy of William O. Douglas." The Nation, June 29, 2015. https://web.archive.org/web/20160327023214/http://www.thenation.com/article/tragedy-william-o-douglas/.
[10] Amar, A. R. (2012). *America's Unwritten Constitution: The Precedents and Principles We Live By*. Basic Books.
[11] Bork, Robert H. (1971) "Neutral Principles and Some First Amendment Problems," Indiana Law Journal: Vol. 47: Iss. 1, Article 1
[12] Ibid.

democratically-elected institutions.[13] In response to the perceived excesses of the Warren Court, a new generation of jurists presented a new philosophy, called originalism.

The doctrine of originalism directs justices to avoid making any sort of personal value judgement, and even avoid concerning themselves with the practical outcomes of their holdings; instead justices are merely instructed to make decisions "looking solely at how the Constitution was understood at the time it was written."[14] This method, also known as "original public meaning" was originally propagated by Justice Antonin Scalia, among others, who was appointed to the Supreme Court by President Reagan in 1986. In the decades that followed, the number of originalists on the federal bench increased. By the time Scalia died in 2016 three of his fellow justices could be considered originalists, and eight years later, six of the nine members of the Supreme Court are arguably originalists.[15] Critics of originalism argue that the seemingly straightforward doctrine, when applied, can have serious consequences, especially when originalism directly encourages jurists to avoid becoming concerned with the practical outcomes of their decisions. Nevertheless, the popularity of original public meaning under the Roberts Court has forced many advocates to make their legal appeals tailored to the originalist majority on the Court. Perhaps the most notable example of this was when Elena Kagan, the then-Solicitor General was nominated to the bench and said during her confirmation hearing "we're all originalists now."[16] Through Kagan would later become the Supreme Court's leading liberal justice, her acknowledgment that all members of the Court maintain some fealty to the original

[13] Ibid
[14] Green, Emma. "How the Federalist Society Won." The New Yorker, July 24, 2022. https://www.newyorker.com/news/annals-of-education/how-the-federalist-society-won.
[15] Ibid.
[16] U.S. Congress, Senate, Committee on the Judiciary, Elena Kagan Confirmation Hearing, Day 2, 111th Cong., 2nd sess., 2010.

public meaning philosophy speaks to how influential originalism has become amongst the justices.

The Supreme Court's composition and approach to interpreting constitutional law is always subject to change. The Court's broad ideological shifts since the mid-20th Century cannot be decoupled from the change in interpretation of the Establishment Clause and the Free Exercise clause. Through the case studies of Supreme Court precedents from the mid-20th Century and the modern Court, this thesis will unpack the details behind the shift in jurisprudence, and the reasoning members of the Court relied on for each holding.

Case Studies

Engel v. Vitale (1962)

Background and Procedural History

In the 1950s New York state passed legislation allowing the State Board of Regents (which has broad power to oversee New York public schools) to develop a prayer to be recited in the classroom the outset of each school day.[17] The Board called for all teachers to lead s certain prayer at the outset of each school day.

Following the direction of the Board, the Union Free School District in New Hyde Park, New York began having classes recite the brief prayer at the beginning of each school day, after the pledge of allegiance.[18] Shortly after the instruction of the prayer, five families filed suit, arguing that the prayer ran afoul of their religious beliefs or practice. They challenged the district and the state's recommendation that the prayer be said under the Establishment Clause. Steven Engel and the other parents argued that prayer was written by the government with the expressed purpose of advancing religious beliefs among children in public schools.[19] In response, representatives from the school district conceded the religious nature of the prayer, but argued that, nevertheless, the prayer did not violate the Establishment Clause.[20] The respondents asserted that since the prayer was non-denominational and students were not being compelled to join in the prayer, the Establishment Clause had not been violated.[21] The trial court, along with the New York Court of Appeals agreed with the school district. In the trial court's opinion, the

[17] *Engel* v. *Vitale,* 370 U. S. 421 (1962).
[18] *Engel* v. *Vitale,* 370 U. S. 421 (1962).
[19] *Engel* v. *Vitale,* 370 U. S. 421 (1962).
[20] *Engel* v. *Vitale,* 370 U. S. 421 (1962).
[21] *Engel* v. *Vitale,* 370 U. S. 421 (1962).

judge emphasized that the school district could not compel the students to participate in the prayer, and moreover, that teachers were prohibited from commenting on a student's decision to not participate in the prayer.[22] However, since no compulsion was found to have occurred in the classroom, the prayer did not violate the Establishment Clause according to the trial and appellate courts.[23] Engel and the parents continued to appeal to the Supreme Court, which held oral arguments on April 3rd, 1962.

Opinion of the Court

In a 6-1 majority opinion, the Court found in favor of the parents.[24] The majority opinion, written by Justice Black detailed the history of the Establishment Clause, and the reasoning behind the inclusion of the provision in the Bill of Rights.[25] Justice Black explained how England's established church had been a source of disputes in the 17th Century, as various religious clerics sought to influence the monarchy, in hopes the government would recognize what they believed to be proper worship practices.[26] When discussing the history of established religions in the United States, Justice Black expressed regret that during the colonial era many colonies established their own religions, following in the footsteps of the monarchy in England.[27] However, Justice Black pointed to the Virginia Bill for Religious Liberty as a turning point, in which Thomas Jefferson and James Madison achieved a landmark victory in preventing the state from establishing a religion. According to Justice Black, that achievement paved the way for the adoption of the Establishment Clause in the Bill of Rights.[28] The majority opinion describes how

[22] *Engel* v. *Vitale,* 370 U. S. 421 (1962).
[23] *Engel* v. *Vitale,* 370 U. S. 421 (1962).
[24] *Engel* v. *Vitale,* 370 U. S. 421 (1962).
[25] *Engel* v. *Vitale,* 370 U. S. 421 (1962).
[26] *Engel* v. *Vitale,* 370 U. S. 421 (1962).
[27] *Engel* v. *Vitale,* 370 U. S. 421 (1962).
[28] *Engel* v. *Vitale,* 370 U. S. 421 (1962).

the founders' sought to use the Establishment Clause to prevent the persecution that occurred in England from being allowed in the United States, because it would negatively impact both church and the state.[29] In the words of Justice Black: "Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion."[30] Accordingly, the majority opinion decided that the state of New York was seeking to establish the sort of religious program that Establishment Clause was intended to prevent.[31]

The school district argued that the voluntary nature of the prayer meant that the government was not involved in coercing the students to engage in a religious practice.[32] But the Court's majority opinion explained that the government need not directly coerce individuals for their actions to violate the Establishment Clause.[33] Nevertheless, Justice Black explained that the nature of the prescribed prayer might indirectly create a sense of coercion for members of minority religious groups.[34]. Before siding with the Engel and his fellow parents, the majority stated that their ruling should not be construed as having restricted public schools from encouraging students to recite the pledge of allegiance or other patriotic documents which reference a god.[35] They clarified that recitation of these sorts of documents are not religious exercises like the prayer in question.[36]

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[29] *Engel* v. *Vitale,* 370 U. S. 421 (1962).
[30] *Engel* v. *Vitale,* 370 U. S. 421 (1962).
[31] *Engel* v. *Vitale,* 370 U. S. 421 (1962).
[32] *Engel* v. *Vitale,* 370 U. S. 421 (1962).
[33] *Engel* v. *Vitale,* 370 U. S. 421 (1962).
[34] *Engel* v. *Vitale,* 370 U. S. 421 (1962).
[35] *Engel* v. *Vitale,* 370 U. S. 421 (1962).
[36] *Engel* v. *Vitale,* 370 U. S. 421 (1962).

Relevant Concurrences and Dissents

In a concurring opinion, Justice Douglas explained that he seemingly disagreed with the majority opinion's argument that there had been some sort of implicit coercion when the government recommended public school classrooms start the day reciting a prayer[37]. In fact, Justice Douglas concedes in his concurrence that he does not believe the prayer in question would be considered the government establishing a religion under the historical meaning of the term "establishment."[38] In Justice Douglas' mind, the question at issue in the case was whether the state could fund a religious exercise without violating the Establishment Clause. Justice Douglas explained that he believed any state funding of a religious exercise violated the Establishment Clause.[39] However, he conceded that there was a plethora of ways in which local, state, and federal funds had helped finance some sort of religious practice, document, or display.[40] Beyond the admitted impracticality of Justice Douglas' interpretation of the Establishment Clause, he also admitted that the Supreme Court's precedent in *Everson v. Board of Education* (1947) proved problematic for his argument.[41] In *Everson* the Supreme Court had to determine whether another school board's decision to fund transportation to private schools, most of which were Catholic schools, violated the Establishment Clause.[42] The Court held that the funding scheme did not violate the Constitution.[43] In this concurrence, Justice Douglas quoted from the dissent of Justice Rutledge at length; however, Justice Douglas sided with the majority in *Everson.*[44]

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[37] *Engel* v. *Vitale,* 370 U. S. 421 (1962).
[38] *Engel* v. *Vitale,* 370 U. S. 421 (1962).
[39] *Engel* v. *Vitale,* 370 U. S. 421 (1962).
[40] *Engel* v. *Vitale,* 370 U. S. 421 (1962).
[41] *Engel* v. *Vitale,* 370 U. S. 421 (1962).
[42] *Everson* v. *Board of Ed. of Ewing,* 330 U. S. 1 (1947).
[43] *Everson* v. *Board of Ed. of Ewing,* 330 U. S. 1 (1947).
[44] *Engel* v. *Vitale,* 370 U. S. 421 (1962).

The only member of the Court to dissent was Justice Potter Stewart. He argued that the majority had misapplied the Establishment Clause, articulating a narrower view of the provision. Justice Stewart characterized the New York government's action as merely "permitting school children to say this simple prayer," which falls well short of establishing an official religion.[45] Justice Stewart was critical of the notion of a "wall of separation between church and state" expressed by the majority, Justice Stewart noted that the phrase appears nowhere in the Constitution.[46]

In Justice Stewart's view, the prayer was comparable to other references to God, like the text of the Pledge of Allegiance, or the phrase "'In God We Trust'".[47] Moreover, Justice Stewart asserted the prayer was merely reflective of "the deeply entrenched and highly cherished spiritual traditions of our Nation" and in no way an attempt to establish a religion.[48]

Impact and Further Precedent

While *Engel* is now considered a standard component of federal Establishment Clause caselaw, at the time the ruling, it was remarkably controversial. The members of Court did not seem to consider the case to be especially difficult, the justices did not spend a long amount of time discussing the case in conference; it seemed they were unprepared for the public backlash.[49] *Engel* drew criticism from members of Congress and plenty in the public who deemed the holding anti-religious; a poll conducted after the holding found that seventy-nine percent of Americans disagreed with the decision.[50] In response to the ruling, the Supreme Court received a

[45] *Engel* v. *Vitale,* 370 U. S. 421 (1962).
[46] *Engel* v. *Vitale,* 370 U. S. 421 (1962).
[47] *Engel* v. *Vitale,* 370 U. S. 421 (1962).
[48] *Engel* v. *Vitale,* 370 U. S. 421 (1962).
[49] Lain, Corinna. "Reconstructing Engel." Stanford Law Review, March 2015. https://www.stanfordlawreview.org/wp-content/uploads/sites/3/2015/03/67_Stan_L_Rev_479_Lain.pdf.
[50] Ibid.

record amount of negative mail, and President Kennedy was prompted to defend the Court, asking Americans to support the decision, even if they disagreed with it.[51]

Despite the turmoil, Supreme Court had an opportunity to reverse course after they agreed to hear another public school-related Establishment Clause case the following term. The case, *Abington School District v. Schempp* (1963) had a very similar fact pattern to *Engel*: public school students were being required to read the Bible each day.[52] The Court could have simply overturned *Engel*, or quietly backed away from the precedent by deciding to cabin the ruling to the specific prayer in question; however, the members of the Court stood by the precedent they created a year earlier, in another near-unanimous decision preventing the state from promoting religious worship in schools.[53] Once again, Justice Stewart was the only member of the Court to dissent, and all members from the *Engel* majority remained in the majority in *Abington*.[54]

Decades later, after the controversy around *Engel* had died down, the Supreme Court had the opportunity to expand its holdings in *Engel* and *Abington* to the occasion of a high school graduation ceremony. In *Lee v. Weisman* (1992) the Court was tasked with deciding whether it violated the Establishment Clause for a school district to allow clergy to provide a non-denominational invocation during the graduation ceremony.[55] While there were no members of the Court in 1992 who took part in the *Engel* decision, the Supreme Court still cited the precedents in in *Engel* and *Schempp*, even using a similar rationale to prevent the school district from having the prayer. Like the majority in *Engel*, the opinion of the Court in *Lee*, written by

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[51] "President Urges Court Be Backed on Prayer Issue; Calls Decision a Stimulus to Private Practice of Faith Criticism Continues President Urges Court Be Backed." The New York Times, June 28, 1962. https://www.nytimes.com/1962/06/28/archives/president-urges-court-be-backed-on-prayer-issue-calls-decision-a.html.

[52] *School Dist. of Abington Township* v. *Schempp,* 374 U. S. 203 (1963)

[53] *School Dist. of Abington Township* v. *Schempp,* 374 U. S. 203 (1963)

[54] *School Dist. of Abington Township* v. *Schempp,* 374 U. S. 203 (1963)

[55] *Lee* v. *Weisman,* 505 U. S. 577 (1992)

Justice Kennedy, argued that there was a sort of soft, indirect coercion at play when the government supports even a non-denominational prayer.[56] However, unlike in *Engel* and *Schempp,* this decision was much narrower, with four members of the Court dissenting. The dissent, authored by Justice Scalia, criticized how the Court's holding prevented the state from offering the sort of invocation that had been historically common at similar government celebrations.[57] Moreover, the dissent cited Justice Stewart's opinion in *Engel*, disputing the majority's argument that the government supporting such a prayer necessarily involved some element of coercion.[58] While *Lee v. Weisman* expanded the scope of the holding from *Engel,* the strength of the dissent was indicative of the Supreme Court's coming shift.

Lemon v. Kurtzman (1971)

Background and Procedural History

Proceeding the Supreme Court's decision to take *Lemon* the Court had dealt with an increasing number of Establishment Clause challenges. While the Court tended to resolve these by siding with those challenging the government's action under the Establishment Clause, it never established and overarching policy, or test, for how it would go about interpreting such challenges, as it had with other provisions of the First Amendment.[59] The Supreme Court would use *Lemon* as a vehicle for creating a similar test for the Establishment Clause.

In the late 1960s both the Connecticut and Pennsylvania state legislatures passed laws attempting to fund private schools in the state.[60] Rhode Island's legislation, the 1969 Salary

[56] *Lee* v. *Weisman,* 505 U. S. 577 (1992)
[57] *Lee* v. *Weisman,* 505 U. S. 577 (1992)
[58] *Lee* v. *Weisman,* 505 U. S. 577 (1992)
[59] *Brandenburg* v. *Ohio,* 395 U. S. 444 (1969) *(per curiam)*
[60] *Lemon* v. *Kurtzman,* 403 U. S. 602 (1971)

Supplement Act, as the name suggested, increased the salaries of certain private school teachers.[61] For a private school teacher to receive the salary supplementation they had to teach a subject which was also taught in public schools, and moreover they had to agree to not teach any subjects related to religion.[62] In Rhode Island, twenty-five percent of students attended private schools, and ninety-five percent of those private schools were Catholic.[63] While the Act was clearly written in an attempt to prevent state dollars from being used on religion, a group of Rhode Island taxpayers filed suit, claiming the law violated the Establishment Clause and Free Exercise Clause.[64]

At the District Court hearing, the judge found evidence that Catholic schools were, in fact, quite concerned with the propagation of religious values among their students.[65] Specifically, the Court found that most of these religious private schools had plenty of Catholic symbols like crucifixes and paintings of the Holy Family, and many of the teachers who would receive the funding were nuns.[66] Moreover, the District Court determined that a crucial component of the Catholic Church's mission involved their educational curriculum.[67] The District Court was concerned that the teachers being funded by the program, as employees of the Catholic Church, might seek to incorporate religious teachings into the secular curriculum.[68] Accordingly, the District Court was weary that the Salary Supplement Act had fostered the state

[61] *Lemon* v. *Kurtzman,* 403 U. S. 602 (1971).
[62] *Lemon* v. *Kurtzman,* 403 U. S. 602 (1971).
[63] *Lemon* v. *Kurtzman,* 403 U. S. 602 (1971).
[64] *Lemon* v. *Kurtzman,* 403 U. S. 602 (1971).
[65] *DiCenso v. Robinson,* 316 F. Supp. 112 (District Court of Rhode Island) (1970).
[66] *DiCenso* v. *Robinson*, 316 F. Supp. 112 (District Court of Rhode Island) (1970).
[67] *DiCenso* v. *Robinson*, 316 F. Supp. 112 (District Court of Rhode Island) (1970).
[68] *DiCenso* v. *Robinson*, 316 F. Supp. 112 (District Court of Rhode Island) (1970).

of Rhode Island being excessively entangled with a religious institution, holding that the law violated the Establishment Clause.[69]

Similarly, the state of Pennsylvania passed legislation that reimbursed private schools for the costs of textbooks and the salaries of teachers.[70] The private schools seeking this reimbursement needed to demonstrate that the funds would be used for a secular educational curriculum, which was to be kept entirely separate from any religious instruction.[71] Moreover, the legislation delineated specific secular subjects for which the funding would be available; each reimbursement through this funding scheme required the approval of the Pennsylvania Superintendent of Public Instruction.[72] In the two years after the legislation was enacted, the state issued five million dollars in reimbursements to private schools.[73] Like in Rhode Island, the vast majority of students in Pennsylvania private schools attended schools with a Catholic affiliation.[74] A Pennsylvania parent, named Alton Lemon, who's children were in public school, sued the state for violating the Establishment Clause and Free Exercise Clause. In this case, the federal court that heard the case declared that there had not been violation of the Constitution.

Considering the similarities between the two statues, the Supreme Court combined the cases, holding oral arguments on March 3rd, 1971.

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[69] *DiCenso* v. *Robinson*, 316 F. Supp. 112 (District Court of Rhode Island) (1970).
[70] *Lemon* v. *Kurtzman,* 403 U. S. 602 (1971).
[71] *Lemon* v. *Kurtzman,* 403 U. S. 602 (1971).
[72] *Lemon* v. *Kurtzman,* 403 U. S. 602 (1971).
[73] *Lemon* v. *Kurtzman,* 403 U. S. 602 (1971).
[74] *Lemon* v. *Kurtzman,* 403 U. S. 602 (1971).

Opinion of the Court

The Supreme Court struck down both state's statues under the Establishment Clause. The Court agreed unanimously that the Pennsylvania statute was unconstitutional, and only Justice Byron White dissented from the Court's decision to strike down Rhode Island's Act.[75]

The majority opinion begun by acknowledging the ambiguity within the Establishment Clause, before explaining that the provision reached further than merely preventing the government from establishing a specific religion.[76] Rather, according to the Chief Justice Burger, who penned the majority opinion, the use of the phrase "Congress shall make no law *respecting* an establishment of religion" (emphasis added), meant that the Constitution prevented the state from taking an sort of action which might be considered a step toward establishing a religion.[77] Moreover, the Court explained, citing precedent, that the Establishment Clause prevents the government from sponsoring religion, offering financial support for religion, or actively involving members of the state in religious practices.[78]

When analyzing the funding schemes created by both legislatures, Chief Justice Burger concedes that the legislative history of each law, along with the text of both laws, indicate that they were intended to avoid violating the Establishment Clause.[79] The majority points specifically to the legislature's attempt to only fund secular components of private education, when it was decoupled from any religious instruction.[80] The majority even acknowledged that a true wall of separation between church and state was impossible to achieve, and it was instead

[75] *Lemon* v. *Kurtzman,* 403 U. S. 602 (1971).
[76] *Lemon* v. *Kurtzman,* 403 U. S. 602 (1971).
[77] *Lemon* v. *Kurtzman,* 403 U. S. 602 (1971).
[78] *Lemon* v. *Kurtzman,* 403 U. S. 602 (1971).
[79] *Lemon* v. *Kurtzman,* 403 U. S. 602 (1971).
[80] *Lemon* v. *Kurtzman,* 403 U. S. 602 (1971).

the purpose of the Establishment Clause to limit government interaction with religious institutions as much as possible.[81] After evaluating previous Establishment Clause caselaw, the majority created a three part test for determining whether a given government action had violated the Establishment Clause:

> 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 statue must not foster an "excessive government entanglement with religion."[82]

The Court analyzed the case under these three prongs, which would come to be to be known as the *Lemon test.* If the state action failed any of the three prongs of the test, its action was unconstitutional under the Establishment Clause.

While the Supreme Court's majority opinion did not consider either statute to have a religious purpose, Chief Justice Burger appeared especially concerned with ability of the teachers receiving funding in Rhode Island to keep their secular teachings separate from their religious convictions.[83] Chief Justice Burger cited the District Court's finding that religious authorities supervise all of the teachers in the Catholic parochial school system, with Catholic Church leaders even seeking to maintain a one-to-one ratio of nuns to layman teachers in the schools.[84] The majority opinion also focused on a handbook given to the teachers, which, among other things, advised teachers: '"Religious formation is not confined to formal courses; nor is it restricted to a single subject area."'[85] This evidence led the Court to determine that it would be challenging for private school teachers to separate their curriculum from Catholic doctrine and

[81] *Lemon* v. *Kurtzman,* 403 U. S. 602 (1971).
[82] *Lemon* v. *Kurtzman,* 403 U. S. 602 (1971).
[83] *Lemon* v. *Kurtzman,* 403 U. S. 602 (1971).
[84] *DiCenso* v. *Robinson*, 316 F. Supp. 112 (District Court of Rhode Island) (1970).
[85] *DiCenso* v. *Robinson*, 316 F. Supp. 112 (District Court of Rhode Island) (1970).

other actions that might support the Catholic Church.[86] Accordingly, the Court found that the Rhode Island Salary Supplementation Act fostered an excessive entanglement with religion.

The Supreme Court found that the Pennsylvania funding scheme also fostered an excessive government entanglement with religion, in a different manner. While the Pennsylvania law didn't incorporate paying school officials directly, it did involve the state directly paying religious institutions. The Court was also concerned about how the law forced the state government to look over the accounting documents of the religious institutions to approve purchases for secular curriculum for reimbursement.[87] The majority believed this relationship was an excessive government entanglement.

Finally, the Court articulated a concern that these two funding schemes would expand, if left untouched, and would become questions of political consequence in both respective states.[88] According to Chief Justice Burger, future debates regarding the issue of using public funds for private religious schools might lead to political debates, which would essentially be divided based on one's religious affiliation.[89] The majority opinion deemed this a further potential consequence of what they believed to be an excessive government entanglement.[90] While the majority did not believe Rhode Island or Pennsylvania to be establishing a state religion, they were concerned that these funding schemes, if allowed to stand, might progress toward a deeper relationship between the two states and the Catholic Church. [91]

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[86] *Lemon* v. *Kurtzman,* 403 U. S. 602 (1971).
[87] *Lemon* v. *Kurtzman,* 403 U. S. 602 (1971).
[88] *Lemon* v. *Kurtzman,* 403 U. S. 602 (1971).
[89] *Lemon* v. *Kurtzman,* 403 U. S. 602 (1971).
[90] *Lemon* v. *Kurtzman,* 403 U. S. 602 (1971).
[91] *Lemon* v. *Kurtzman,* 403 U. S. 602 (1971).

Relevant Concurrences and Dissents

In a concurring opinion Justice Brennan detailed why he believed the Court's holding in *Lemon* was distinct from previous decisions in which the Supreme Court had decided other government actions did not violate the Establishment Clause. For example, Justice Brennan mentioned *Board of Education v. Allen* (1968), in *which* the Supreme Court decided that a school board's decision to loan private and parochial students textbooks did not violate the Establishment Clause.[92] As Justice Brennan explained, in *Allen* the government was not funding religious schools, but instead allowed their students to borrow books; hardly the level of entanglement that was involved in the case at issue.[93] Accordingly, Justice Brennan argued that the Supreme Court could side with Lemon without contradicting their decision in *Allen.*[94]

In his partial concurrence and partial dissent, Justice White acknowledges that the government funding given to private religious schools in Rhode Island and Pennsylvania might indirectly benefit the Catholic faith; however, he asserts that it does not necessarily mean the funding schemes are unconstitutional.[95] Justice White calls the majority's reasoning "curious and mystifying," noting that the District Court in the Rhode Island case never found evidence that the private school teachers in question had been including religious teachings in their curriculum.[96] Moreover, Justice White is critical of the majority's concern with the number of nuns and other religious clerics with influence in Catholic parochial schools, although, in his words: "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."[97] In his dissent, while

[92] *Board of Ed. of Central School Dist. No. 1* v. *Allen,* 392 U. S. 236 (1968).
[93] *Lemon* v. *Kurtzman,* 403 U. S. 602 (1971).
[94] *Lemon* v. *Kurtzman,* 403 U. S. 602 (1971).
[95] *Lemon* v. *Kurtzman,* 403 U. S. 602 (1971).
[96] *Lemon* v. *Kurtzman,* 403 U. S. 602 (1971).
[97] *Lemon* v. *Kurtzman,* 403 U. S. 602 (1971).

Justice White never explicitly criticizes the Lemon test itself, he certainly takes issue with how the Court went about applying the entanglement prong, indicating disagreement with the third prong of the test itself.[98]

Impact and Further Precedent

While *Lemon* was not technically decided by the Warren Court (Chief Justice Earl Warren had retired two years prior), the decision was the culmination of two decades of Establishment Clause jurisprudence. During this period the Court had an expansive view of the powers of the Establishment Clause, asserting that even when a government action fell short of directly establishing a religion, it still might run afoul of the First Amendment. The Warren Court's broad view of the power of the Establishment Clause relative to the Free Exercise Clause is in part demonstrated by the Court's rulings. While the Warren Court took a generally expansionist view of the Clause in *Engel* and *Schempp*, it decided those cases without a consistent methodological approach to interpreting the Establishment Clause. In *Lemon*, the Court established the three-prong test which would be used for decades to come. The third prong of the test, the entanglement prong, perhaps was most indicative of the Supreme Court's belief that the Establishment Clause should be construed broadly. By allowing judges to strike down any government action that they believed to create an "excessive government entanglement with religion" the Court created an environment where challenges to government actions under the Establishment Clause could prevail, even if the government action had a secular purpose.[99]

In the decades that followed, the Lemon test would have a considerable influence on Establishment Clause caselaw. Two years later, the Supreme Court used the Lemon test to strike

[98] *Lemon* v. *Kurtzman,* 403 U. S. 602 (1971).
[99] *Lemon* v. *Kurtzman,* 403 U. S. 602 (1971).

down a New York law that created, among other programs, a maintenance and repair grant for private schools; like in *Lemon,* the grants would mostly go to Catholic parochial schools.[100] Using the Lemon test, the Court found that although the New York programs had a secular purpose, they would have the effect of advancing the Catholic faith, striking down the legislation under the second prong of the Lemon test.[101] However, in this case, Chief Justice Burger joined Justice White in dissent, along with the Court's newest member, Justice William Rehnquist.[102]

The Lemon test reached the peak of its influence in a 1985decision called *Aguilar v. Felton*. In *Aguilar*, the City of New York used federal funds designed to support educational opportunities for disadvantaged communities to pay for public employees to teach secular course material in private, often religious schools.[103] Unlike the legislation involved in the *Lemon* ruling, in *Aguilar*, the funding went directly to state employees, who could be supervised by government officials to ensure no religious instruction crept into their otherwise secular coursework and that their teachings did not advance a religious cause.[104] Accordingly, the Supreme Court found that the New York City funding scheme passed both the first and second progs of the Lemon test.[105] However, in a 5-4 decision, the Court struck down the program under the entanglement prong of the test, asserting that the administrative interaction between the state and religious institutions required to facilitate that supervision was itself an excessive entanglement.[106] While the holding in *Aguilar* might have represented the high water mark for

[100] *Committee for Public Ed. & Religious Liberty* v. *Nyquist,* 413 U. S. 756 (1973).
[101] *Committee for Public Ed. & Religious Liberty* v. *Nyquist,* 413 U. S. 756 (1973).
[102] *Committee for Public Ed. & Religious Liberty* v. *Nyquist,* 413 U. S. 756 (1973).
[103] *Aguilar* v. *Felton,* 473 U. S. 402 (1985)
[104] *Aguilar* v. *Felton,* 473 U. S. 402 (1985)
[105] *Aguilar* v. *Felton,* 473 U. S. 402 (1985)
[106] *Aguilar* v. *Felton,* 473 U. S. 402 (1985)

the Lemon test, the reasoning used to strike down New York City's education program demonstrated the flaws in the three-pronged test.

In his dissent, Justice Rehnquist argued that the Court had essentially decided that, the very act of supervising the employees receiving funding to prevent them from inadvertently supporting a religion, was itself a violation of the Establishment Clause, calling it a "'Catch-22' paradox of its (the Supreme Court's) own creation."[107] While Justice Rehnquist did not explicitly call for the Lemon test to be abandoned, he critiqued how the Court's Establishment Clause jurisprudence had: "traveled far afield from the concerns which prompted the adoption of the First Amendment when we rely on gossamer abstractions to invalidate a law which obviously meets an entirely secular need."[108] The dissent disapproved of how the entanglement prong of the Lemon test, which was not particularly connected to the text or history of the Establishment Clause, had been used to strike down a program which had a secular purpose and took various precautions to avoid benefiting a religion.

After *Aguilar* and the various dissents, the Supreme Court began relying less on the Lemon test. When religious monuments were challenged under the Establishment Clause after *Aguilar*, the Court stopped using the Lemon test.[109] In one 2005 majority opinion the Chief Justice explicitly stated: "Many of our recent cases simply have not applied the Lemon test… Others have applied it only after concluding that the challenged practice was invalid under a different Establishment Clause test."[110] The Supreme Court's slow abandonment of the Lemon

[107] *Aguilar* v. *Felton,* 473 U. S. 402 (1985)
[108] *Aguilar* v. *Felton,* 473 U. S. 402 (1985)
[109] *Van Orden* v. *Perry,* 545 U. S. 677 (2005)
[110] *Van Orden* v. *Perry,* 545 U. S. 677 (2005)

test, after originally relying on it heavily, was indicative of the Court also gradually limiting the scope of government actions prohibited under the Establishment Clause, just as the Court's view of the protections under the Free Exercise Clause started to expand.

Town of Greece v. Galloway (2013)

Background and Procedural History

Preceding the Supreme Court's decision to hear Town of *Greece v. Galloway* (2013), the Supreme Court had gradually decreased its reliance on the use of the Lemon test. While this change in approach cannot be attributed to a single cause, the new composition of the Court was likely a contributing factor. By 2013, there were multiple members of the Court who were sympathetic to the doctrine of originalism. While originalists thinkers might share concerns about the difficulty in applying the Lemon test, they are also more likely to be sympathetic to the more fundamental issues Chief Justice Rehnquist raised in his *Aguilar* dissent, about how the test had moved the Supreme Court's jurisprudence away from the original intent the founders had for including the clause.[111] Judge Robert Bork, an influential originalist thinker, articulated this belief in a 1995 article: "it is a fair conclusion that the test itself contradicts the original understanding of the establishment clause and is destroying laws and practices that were not meant to be invalidated."[112] This charge, that the Lemon test is not just an ineffective method for resolving certain Establishment Clause questions, but that it distorts the original meaning of the Constitution, presented a significant challenge to the Court's method of interpreting the religious clauses. Accordingly, the Court avoided applying the Lemon test altogether in *Van Orden v.*

[111] *Aguilar* v. *Felton,* 473 U. S. 402 (1985)
[112] Robert H. Bork, "What to Do about the First Amendment," Commentary Magazine, February 13, 1995, https://www.commentary.org/articles/robert-bork/what-to-do-about-the-first-amendment/.

Perry (2005), which dealt with a public monument to Ten Commandments. Nevertheless, the Lemon test remained controlling precedent for Establishment Clause challenges in the federal judiciary, but *Town of Greece v. Galloway* would signal its new approach.

Greece, New York is governed by a five-member town board, which holds monthly public meetings, chaired by the town supervisor. In 1999 Greece elected John Auberger as supervisor, who, upon taking office instituted a new practice of inviting a local chaplain to deliver an invocation at the beginning of the public meetings.[113] The town was systematic about ensuring various denominations were included, going as far to call local congregations asking for clergy to participate.[114] The town did not exclude anyone from leading the in the monthly invocation, and claimed they would welcome any religious leader.[115] At no point did the town attempt to exercise any editorial control over the contents of the invocation. However, in the first eight years of the practice, only Christian ministers delivered the invocation, a reflection of the vast majority of religious congregations in Greece being Christian.[116]

Susan Galloway and Linda Stephens were residents who attended the monthly public and found the Christian nature of the invocations offensive.[117] They filed suit, alleging the practice violated the Establishment Clause. In their complaint, Galloway and Stephens did not seek to have the prayer eliminated altogether, they merely argued that the sectarian nature of the prayers using verbiage like "In Jesus' name" violated the Clause.[118] Prayers referencing a "generic god,"

[113] *Town of Greece* v. *Galloway,* 572 U. S. 565 (2014)
[114] *Town of Greece* v. *Galloway,* 572 U. S. 565 (2014)
[115] *Galloway v. Town of Greece*, 681 F.3d 20 (2d Cir. 2012).
[116] *Galloway v. Town of Greece*, 681 F.3d 20 (2d Cir. 2012).
[117] *Galloway v. Town of Greece*, 681 F.3d 20 (2d Cir. 2012).
[118] *Galloway v. Town of Greece*, 681 F.3d 20 (2d Cir. 2012).

were permissible, they reasoned. After being given notice of the lawsuit, the Town began inviting Jewish, Bahá'í, and Wiccan clergy to deliver the prayer.[119]

The District Court granted summary judgment, siding with the Town, and upholding the practice. The Court found that the Town had sought to include various theological perspectives, and therefore had not affiliated themselves with a specific religious faith. However, on appeal, the Second Circuit found in favor of Galloway. The Court reasoned that the consistent of Christian prayer at the board meetings inherently created an impression the Town of Greece was essentially affiliated with the Christian faith.[120] The Second Circuit panel also pointed to the terminology used by the clergy when offering the prayers, '"let us pray,"' for example, encouraging members of the audience to stand and bow their heads to participate.[121] The Appeals Court argued that this sort of invitation put non-Christians in the audience in an awkward position.[122] The Town of Greece appealed the Appeals Court's decision and the Supreme Court granted certiorari in 2013.

Opinion of the Court

In a 5-4 decision, the Supreme Court found in favor of the Town of Greece. In the majority opinion, the Court did not cite the Lemon test, but instead relied on a different precedent, *Marsh v. Chambers* (1983).[123] In *Marsh*, the Court upheld the Nebraska Legislature's decision to hire a chaplain to offer a daily prayer at the opening of each day of the legislative session.[124] While *Marsh* had been seen by some as a carve-out for a specific practice that had a

[119] *Town of Greece* v. *Galloway,* 572 U. S. 565 (2014)
[120] *Galloway v. Town of Greece*, 681 F.3d 20 (2d Cir. 2012).
[121] *Galloway v. Town of Greece*, 681 F.3d 20 (2d Cir. 2012).
[122] *Galloway v. Town of Greece*, 681 F.3d 20 (2d Cir. 2012).
[123] *Town of Greece* v. *Galloway,* 572 U. S. 565 (2014)
[124] *Marsh* v. *Chambers,* 463 U. S. 783 (1983)

history dating back to the founding, Justice Kennedy explained that the precedent was more than just one-time exception; rather, the Court was open to protecting public religious practices with a history of being considered permissible.[125]

The Court's majority opinion highlights the similarities between Nebraska and the Town of Greece's practice. In both cases the prayer is offered at the begging of the meeting: before elected representatives begin their work, and intended to create a reflective atmosphere amongst the public servants in attendance.[126] Since both the prayers offered by the Nebraska legislature's chaplain had a similar purpose as to those offered by the various clergy invited to the Greece board meeting; and crucially, since the prayers had no coercive value, the majority reasoned that the town of Greece's prayer was covered by the Court's holding in *Marsh*.[127]

Throughout the Court's majority option, instead of applying the Lemon test, or any specific judge-made rule, Justice Kennedy referenced the importance of not overturning a historical practice.[128] The opinion specifically expressed concern over the potentially divisive nature of striking down the Town's practice: "A test that would sweep away what has so long been settled would create new controversy and begin anew the very divisions along religious lines that the Establishment Clause seeks to prevent."[129] While Justice Kennedy does not explicitly criticize the Lemon test, this excerpt hints at the modern Court's concern about the backlash caused by decisions that strike down a longstanding practice in favor of a restrictive test[130]. Instead, to bolster the majority's decision, Kennedy cites a similar prayer used by the

[125] *Town of Greece* v. *Galloway,* 572 U. S. 565 (2014)
[126] *Town of Greece* v. *Galloway,* 572 U. S. 565 (2014)
[127] *Town of Greece* v. *Galloway,* 572 U. S. 565 (2014)
[128] *Town of Greece* v. *Galloway,* 572 U. S. 565 (2014)
[129] *Town of Greece* v. *Galloway,* 572 U. S. 565 (2014)
[130] *Town of Greece* v. *Galloway,* 572 U. S. 565 (2014)

Continental Congress in 1774, demonstrating the historical basis for the Town of Greece's invocation practice. Further, the citing a prayer said before the Continental Congress also provides support of the majority's argument that the Establishment Clause was not intended to prevent the innovation in question; after all, it was the Continental Congress that drafted the First Amendment.

Justice Kennedy's opinion also took up Galloway's argument that the invocations would have passed constitutional muster had they been non-sectarian. In response, the Court argued that such a restriction would force the government into the sorts of religious debates that the First Amendment was created to prevent. Justice Kennedy explains that, should the prayers need to be non-sectarian, there would inevitably be disputes amongst members of the public, and potentially the clergy themselves, over whether certain terminology alluded to a specific religious faith. Having the government become the arbiter of such disputes would eventually, according to Justice Kennedy, effectively restrict the speech of the clergy. Instead, he explains, "Once it invites prayer into the public sphere, government must permit a prayer giver to address his or her own God or gods as conscience dictates, unfettered by what an administrator or judge considers to be nonsectarian."[131]

Finally, the majority opinion responds to Galloway's concern that the clergy's prayer had a coercive nature for members of the public attending the monthly board meetings. Galloway claimed that, by asking the public audience to join them in prayer, the clergy were essentially coercing members of the public to participate in the prayer, on behalf of the government.[132] While the Second Circuit found this argument persuasive, the Supreme Court did not. Justice

[131] *Town of Greece* v. *Galloway,* 572 U. S. 565 (2014)
[132] *Town of Greece* v. *Galloway,* 572 U. S. 565 (2014)

Kennedy explained that while the clergy used phrases like '"would you join me in a moment of prayer"' they were likely "accustomed to directing their congregations" by using such language and accordingly, only sought to include voluntary participants instead of coerce the audience.[133] Had the invocation been used by clergy predominantly to "threaten damnation, or preach conversion," the majority acknowledged, it would not have been constitutionally permissible; however, the majority found no such evidence.[134] Having responded to each of Galloway's arguments, the majority reversed the Second Circuit's holding, and found in favor of Greece, allowing the practice to continue.[135]

Relevant Concurrences and Dissents

The principal dissent was penned by Justice Kagan and joined by Justices Ginsburg, Breyer, Sotomayor. Justice Kagan's opinion did not seek to question the majority's reliance on the Court's precedent *Marsh* but instead argued that the invocation in Greece was materially distinct from the prayer in Lincoln. Instead of being akin to prayer before a legislative session, Justice Kagan believes the monthly invocation violated the norm of religious equality, which, according to Justice Kagan is a crucial component of the First Amendment's religious clauses.[136] Justice Kagan focuses her dissent on demonstrating how the differences between the facts of *Marsh* and the case before the Court created an atmosphere in which residents of Greece might feel a sense of discrimination, as though their religious faith—or lack thereof—might be held against them.[137]

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[133] *Town of Greece* v. *Galloway,* 572 U. S. 565 (2014)
[134] *Town of Greece* v. *Galloway,* 572 U. S. 565 (2014)
[135] *Town of Greece* v. *Galloway,* 572 U. S. 565 (2014)
[136] *Town of Greece* v. *Galloway,* 572 U. S. 565 (2014)
[137] *Town of Greece* v. *Galloway,* 572 U. S. 565 (2014)

Justice Kagan explains that the prayer offered by the Nebraska Legislature's chaplain was non-sectarian and, though he originally referenced Jesus, those reference were removed after a single senator complained. A crucial component of Justice Kagan's argument contrasts the type of proceeding the respective bodies held; the daily meetings of the Legislature did not include members of the public as participants, they were confined to a view gallery, meanwhile the board meetings in Greece sought to include members of the public who made requests to their elected officials.[138] Moreover, Kagan argued that the guest clergy in Greece faced the members of the public while delivering their invocation, in contrast with the chaplain in Lincoln who faced members of the Legislature.[139] These differences, according to Justice Kagan, might reasonably create a sense of imposition on meetings attendees who aren't Christian, indicating an atmosphere of soft coercion not present in *Marsh*[140]. Justice Kagan is concerned that non-Christians might believe that members of the board are interpreting their responsiveness to the invocation, and further, that their responsiveness might have some bearing on how their requests to the board are handled. This impression puts non-Christians on unequal footing before the elected officials in Greece, therefore violating the First Amendment's guarantee of religious equality.

In a brief concurrence, Justice Thomas articulates his view that the Establishment Clause was originally intended to only constrain the actions of the federal government, allowing states to establish their own religious practices should they so choose.[141] This textualist interpretation of the First Amendment represents a relatively peripheral view amongst Constitutional scholars,

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[138] *Town of Greece* v. *Galloway,* 572 U. S. 565 (2014)
[139] *Town of Greece* v. *Galloway,* 572 U. S. 565 (2014)
[140] *Town of Greece* v. *Galloway,* 572 U. S. 565 (2014)
[141] *Town of Greece* v. *Galloway,* 572 U. S. 565 (2014)

though it does align with some scholars' reading of the clause.[142] While Justice Scalia signed on to another component of the Thomas' dissent, no members of the Court expressed agreement with Thomas' view.[143] The reasoning used in Justice Thomas' concurrence provides an instructive contrast with the Kagan dissent. The former fixates on the wording of the text of the clause, while the latter focuses on protecting a norm not mentioned in the original document.

Impact and Further Precedent

Retrospectively, the Court's holding in *Town of Greece* was an early indicator of the Court's shift in attitude toward the religious clauses. Under Chief Justice Roberts, the Supreme Court became increasingly skeptical of claims brought under the Establishment Clause. *Town of Greece* was the first of many prominent decisions the Roberts Court would make regarding the religious clauses. The ideological dynamic between the members of the Court in *Town of Greece* would continue to play itself out in future cases, where members of the originalist majority highlight the importance of maintaining historical practice. Moreover, Justice Kagan's dissent in *Town of Greece* is emblematic of how her jurisprudence would continue to develop in cases involving the religious clauses; her attempts to build consensus and encourage the majority, usually led by the Chief Justice, to moderate their opinions would sometimes prove effective, occasionally putting her in the majority.[144]

The reasoning of the majority opinion itself also reflects a change in the Court's thinking toward the Establishment Clause. Instead of applying the Lemon test, the Court focuses on the precedent in *Marsh*, and even Kagan's dissent did not argue that the Test should be applied to the

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[142] Amar, Akhil Reed. "Some Notes on the Establishment Clause." *Roger Williams University Law Review*, vol. 2, no. 1, 1996,

[143] *Town of Greece* v. *Galloway,* 572 U. S. 565 (2014)

[144] Shaw, Kate. "Why Did Liberals Join the Majority in the Masterpiece Case?" The New York Times, June 5, 2018. https://www.nytimes.com/2018/06/05/opinion/liberal-justices-concurrence-masterpiece.html.

facts of *Town of Greece*. It's easy to attribute the majority's reasoning for not applying the Lemon test to ideology. The originalist school of thought tends to be at odds with judge-made tests, especially the one established *Lemon*, which did not draw its verbiage from the original text or understanding of the Constitution.[145] However, Kagan's lack of interest in the using Lemon test suggests a boarder recognition, from the Court's more left-of-center members, of the difficulty in applying the Lemon test. While Kagan and the members who joined her dissent might be more ideologically open to the Lemon test, all members of the Court know that their currency is credibility and are understandably hesitant to apply a test which has often produced controversial results.

American Legion v. American Humanist Association (2019)

Background and Procedural History

In the years after *Town of Greece*, the Court's composition continued to shift. The new members of the Court, Justices Gorsuch and Kavanaugh, maintained the Court's commitment to the originalist school of thought. The Court had already allowed longstanding religious monuments to remain standing under modern Establishment Clause challenges.[146] However, the Court had yet to clearly articulate their standard for interpreting the Establishment Clause under Chief Justice Roberts, in 2019 the Court had that opportunity.

The Bladensburg Cross is a 40-foot concrete and granite World War I memorial erected in 1925 in Prince George's County, just outside of Washington D.C. The cross was established with the purpose of recognizing the servicemen from the area who had lost their lives in the war

[145] Robert H. Bork, "What to Do about the First Amendment," Commentary Magazine, February 13, 1995, https://www.commentary.org/articles/robert-bork/what-to-do-about-the-first-amendment/.
[146] *Van Orden* v. *Perry,* 545 U. S. 677 (2005)

effort, with some family members of the fallen troops describing the memorial as having sentimental value equivalent to a gravestone.[147] The property ownership for the land was transferred to the state government in 1961, and in the succeeding years the state made a total investment of nearly a quarter-million dollars in maintaining the memorial.[148] The site was continuously used by the American Legion for services recognizing departed servicemembers.[149] In 2012, members of the American Humanist Association filed a complaint with the state of Maryland, alleging that the cross violated the Establishment Clause; accordingly, they asked for the cross to either be removed or structurally altered.[150]

The District Court referenced the ambiguous nature of the cross symbol, having been historically used to memorialize loss of life, to symbolize aid, and to represent the Christian faith. The District Court applied the Lemon test to evaluate the Establishment Clause challenge. The judge found that the cross passed all three prongs of the test, having a secular purpose, did not have the primary effect of advancing religion, and did not foster an excessive government entanglement with religion.[151] The District Court agreed with the American Legion's argument that the cross was indented to serve a secular purpose of memorializing the sacrifices of servicemen in World War I.[152] The Court also believed that passersby who understood the

[147] *American Humanist Association v. Maryland-National Capital Park and Planning Commission, 147 F. Supp. 3d 373 (D. Md. 2015)*
[148] *American Humanist Association v. Maryland-National Capital Park and Planning Commission, 147 F. Supp. 3d 373 (D. Md. 2015)*
[149] *K American Humanist Association v. Maryland-National Capital Park and Planning Commission, 147 F. Supp. 3d 373 (D. Md. 2015)*
[150] *American Humanist Association v. Maryland-National Capital Park and Planning Commission, 147 F. Supp. 3d 373 (D. Md. 2015)*
[151] *American Humanist Association v. Maryland-National Capital Park and Planning Commission, 147 F. Supp. 3d 373 (D. Md. 2015)*
[152] *American Humanist Association v. Maryland-National Capital Park and Planning Commission, 147 F. Supp. 3d 373 (D. Md. 2015)*

history of the cross wouldn't get the impression that the government was endorsing a religion, nor did the cross force the government to become repeatedly involved with religion.

On appeal, the Fourth Circuit found the cross to be in violation of the Establishment Clause, deeming that it had failed to fulfil the second and third prongs of the test.[153] The Fourth Circuit panel determined that the cross would leave an impression that the state was endorsing Christianity.[154] Moreover, the Court believed the imposing size of the cross overshadowed its secular elements, and the state's maintenance spending contributed to an excessive government entanglement.[155] The Supreme Court then granted certiorari.

Opinion of the Court

The Supreme Court decided 7-2 that the Bladensburg Cross did not violate the Establishment Clause. The plurality opinion, written by Justice Samuel Alito, detailed the Court's new approach to resolving Establishment Clause challenges to a historical monument or practice.[156]

At the outset of his opinion, Justice Alito recognizes the Court's history of controversially striking down long-held religious practices under the Establishment Clause, citing *Engel* specifically.[157] While it becomes clear that Justice Alito and the Court's majority are seeking to avoid such controversial rulings in the future, he points to *Engel* in part to explain why the Court established the Lemon test; to ensure that the federal judiciary would have consistent and predicable rulings in response to Establishment Clause challenges.[158] While it

[153] American Legion v. American Humanist Assn., 588 U. S. ___ (2019)
[154] American Legion v. American Humanist Assn., 588 U. S. ___ (2019)
[155] American Legion v. American Humanist Assn., 588 U. S. ___ (2019)
[156] American Legion v. American Humanist Assn., 588 U. S. ___ (2019)
[157] American Legion v. American Humanist Assn., 588 U. S. ___ (2019)
[158] American Legion v. American Humanist Assn., 588 U. S. ___ (2019)

seems Justice Alito is sympathetic to that cause, he also emphasizes that the 1971 Supreme Court was ambitious to believe that a single test could resolve that issue, concluding that the test have proved a failure.[159] In a passage indicative of the Court's frustration with the clause, Alito explains: "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."[160] For the first time, the Supreme Court majority explicitly acknowledged the ineffective nature of the Lemon test and sought to limit the scope of cases to which its applied.[161]

The Alito opinion explains that the Lemon test is particularly ineffective in cases involving long-standing practices or monuments, instead of the Lemon tests, the Supreme Court declares that such Establishment Clause questions should be given a presumption of constitutionality.[162] Justice Alito proceeds to explain why "in cases…that involve the use, for ceremonial, celebratory, or commemorative purposes, of words or symbols with religious associations" the Lemon test is so difficult to apply.[163] According to Alito, its often difficult to evaluate the purpose of long-established words and symbols with a religious connotation; in the case of the Bladensburg Cross, there isn't a well-developed historical record indicating whether the individuals who erected the cross did so for an explicitly religious purpose. Even if there was a clear record, Justice Alito argues that the purpose and message of such monuments change over time.[164] The opinion points to the example of the Statute of Liberty, which was originally meant

[159] American Legion v. American Humanist Assn., 588 U. S. ___ (2019)
[160] American Legion v. American Humanist Assn., 588 U. S. ___ (2019)\
[161] American Legion v. American Humanist Assn., 588 U. S. ___ (2019)
[162] American Legion v. American Humanist Assn., 588 U. S. ___ (2019)
[163] American Legion v. American Humanist Assn., 588 U. S. ___ (2019)
[164] American Legion v. American Humanist Assn., 588 U. S. ___ (2019)

to represent the alliance between the United States but is now seen as a symbol of the country's attitude toward immigrants.[165] Justice Alito also mentions the religious names of various American cities (Providence, Las Cruces), which have taken on more neutral meanings through familiarity.[166]

Perhaps most crucially, Alito's opinion considers the consequences of the justiciary ordering the removal of these symbols. In Alito's view, the very act of removing a monument like the Bladensburg Cross would indicate a hostility to religion, undermining the state's ability to be perceived as neutral toward religion.[167] Alito speculates that a finding in favor of the American Humanist Association would cause undue controversy amongst the residents of Prince George's County.[168]

After detailing the new standard, the presumption of constitutionality, for long-stranding religious monuments and symbols under Establishment Clause challenges, the Court found that the Bladensburg Cross did not violate the First Amendment. The Court cited *Town of Greece* and *Marsh*, pointing to the importance of interpreting the Establishment Clause through historical practices.[169] While the cross does represent Christianity, the Alito believed it had substantive non-sectarian value for members of the community, especially having been established for almost a century. [170]

Beyond development of new standard for this category of Establishment Clause challenges, the concerns raised by Justice Alito's opinion are telling. This concern expressed by

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[165] American Legion v. American Humanist Assn., 588 U. S. ___ (2019)
[166] American Legion v. American Humanist Assn., 588 U. S. ___ (2019)
[167] American Legion v. American Humanist Assn., 588 U. S. ___ (2019)

[168] American Legion v. American Humanist Assn., 588 U. S. ___ (2019)
[169] American Legion v. American Humanist Assn., 588 U. S. ___ (2019)
[170] American Legion v. American Humanist Assn., 588 U. S. ___ (2019)

the Court regarding the potential public backlash to their holdings would be foreign to the Warren Court.[171] Moreover, for the first time, the opinion of the Court expresses concerns that an Establishment Clause holding would appear hostile to religion; a remarkable shift from their predecessors' willingness to ruffle feathers. The members of the Court, while hearing a case about improper state establishment of religion, did not just evaluate that claim, but also weighed arguably the opposite concern. The Court's consideration of the risk of being too hostile to religion represents a major turning point in the treatment of the Establishment Clause. Nowhere in *Engel* did members of the Warren Court worry about the public's response to their holding, and they certainly did not worry about the state appearing hostile to religion by preventing prayer in public schools.[172]

Relevant Concurrences and Dissents

Considering the majority's focus on the history and tradition of behind the cross, Justices Kagan and Breyer wrote separate concurring opinions explaining, while they agreed with Justice Alito's focus on the history of the Bladensburg Cross, they didn't believe the Court should adopt a history and tradition test for all Establishment Clause cases moving forward.[173] Justice Kagan specified that the Lemon test can be applied in other Establishment Clause cases.[174]

In his concurring opinion Justice Gorsuch offers a more direct critique of the Lemon test. The American Humanist Association claimed their members were offended when driving past the cross, giving them grounds to sue.[175] However, Justice Gorsuch argues that this "offended

[171] American Legion v. American Humanist Assn., 588 U. S. ___ (2019)
[172] *Engel* v. *Vitale,* 370 U. S. 421 (1962).
[173] American Legion v. American Humanist Assn., 588 U. S. ___ (2019)
[174] American Legion v. American Humanist Assn., 588 U. S. ___ (2019)
[175] American Legion v. American Humanist Assn., 588 U. S. ___ (2019)

observer" standard invites too many lawsuits under the Establishment Clause.[176] However, Justice Gorsuch blames the Lemon test for this confusion regarding standing: "if (under the Lemon Test's advancement prong) the Establishment Clause forbids anything a reasonable observer would view as an endorsement of religion, then such an observer must be able to sue."[177] Gorsuch's concurrence argues that the nature of the Lemon test, from which the observer standard stems, was especially inviting of Establishment Clause litigation, encouraging any offended party to file suit.[178]

The only dissent in the case was written by Justice Ruth Bader Ginsburg and joined by Justice Sonia Sotomayor. In her dissent, Justice Ginsburg rejects the notion that the Bladensburg Cross was meant to represent secular sentiment of reflection as opposed to a religious one.[179] Justice Ginsburg argues that the size of the monument distinguishes it from the crosses that mark the graves of fallen servicemen in military cemeteries[180]. In the case of the Bladensburg Cross, according to Justice Ginsburg, the monument confers an endorsement of Christianity to the public.[181]

Impact and Further Precedent

While the Court did not agree to abandon the Lemon test in *American Legion*, a majority of its members agreed that the test should not be applied to longstanding monuments and practices with a religious connotation. Justice Alito's opinion seeks to establish a new framework, which focus on history and tradition, to determine whether a given government

[176] American Legion v. American Humanist Assn., 588 U. S. ___ (2019)
[177] American Legion v. American Humanist Assn., 588 U. S. ___ (2019)
[178] American Legion v. American Humanist Assn., 588 U. S. ___ (2019)
[179] American Legion v. American Humanist Assn., 588 U. S. ___ (2019)
[180] American Legion v. American Humanist Assn., 588 U. S. ___ (2019)
[181] American Legion v. American Humanist Assn., 588 U. S. ___ (2019)

action violates the Clause. Most members of the Court articulated—through either a concurrence or dissent— their own approach to deciding future Establishment Clause cases, with the implicit acknowledgement that the Lemon test had failed.

The reasoning used in Justice Alito's opinion, combined with Justice Gorsuch's explicit frustration with the amount of litigation under the Clause, indicates a hesitation—on the Court's right flank— to make any finding of in favor of an Establishment Clause challenge. In future cases, the Court's preference towards protecting public religious exercise would make itself increasingly clear.

Kennedy v. Bremerton School District (2022)

Background and Procedural History

The Court's holding in the Bladensburg Cross case established a pattern of neglecting the Lemon test, arguably in an effort by the Court's Republican-appointed majority to cabin that precedent without explicitly overruling it. However, since the Court did not have the votes or the will to overturn Lemon in *American Legion*, some lower Courts continued to use the Lemon test to evaluate Establishment Clause challenges.[182] By 2022, the federal judiciary had been using a mix of the Lemon test and the history and tradition method established by the Court in *Town of Greece* and *American Legion* for several years, when the Court was presented with another opportunity to clarify their Establishment Clause jurisprudence. However*, Kennedy v. Bremerton School District* (commonly referred to as the Coach Kennedy case) added a new wrinkle. The petitioner, high school football coach Joseph Kennedy, was not bringing an Establishment Clause challenge before the Court, instead he was arguing that his government employer (the

[182] *Kennedy v. Bremerton Sch. Dist., 991 F.3d 1004 (9th Cir. 2021)*

school district) had terminated his employment in violation of his right to freely express his religious beliefs.[183] The district would argue that they were merely fulfilling their constitutional obligations under the Establishment Clause.[184] When the Supreme Court decided to grant certiorari in the Coach Kennedy case, they would need to resolve the inherent tension between the Establishment Clause and the Free Exercise Clause.

Joseph Kennedy was hired in 2008 to coach the Bremerton High School football team. In his first seven seasons with the team, he said a brief prayer on the fifty-yard line at the end of each game.[185] Additionally, Kennedy invoked religious terminology and concepts in motivational speeches to the team.[186] While he never asked his players to join him in prayer, most of the team did so voluntary after each game.[187] No student or staff member at Bremerton complained about the practice; however, the district superintendent became aware of the practice in 2015 when a colleague complimented the manner in which Kennedy used his faith in his role as a coach.[188] After being made aware of Kennedy's practice the superintendent advised him that any religious activity needed to be '"nondemonstrative (i.e., not outwardly discernible as religious activity)" if "students are also engaged in religious conduct" in order to "avoid the perception of endorsement."'[189] The superintendent acknowledged there was some tension between protecting Kennedy's individual rights and the district's interest in complying with the Establishment Clause but resolved that tension in favor of the latter.[190] Originally Kennedy complied with the superintendent's requests, ceasing to make references to his faith or say the

[183] K*ennedy v. Bremerton* Sch. Dist., 991 F.3d 1004 (9th Cir. 2021)
[184] K*ennedy v. Bremerton* Sch. Dist., 991 F.3d 1004 (9th Cir. 2021)
[185] *Kennedy* v. *Bremerton School Dist.,* 597 U. S. ___ (2022)
[186] *Kennedy* v. *Bremerton School Dist.,* 597 U. S. ___ (2022)
[187] *Kennedy* v. *Bremerton School Dist.,* 597 U. S. ___ (2022)
[188] *Kennedy* v. *Bremerton School Dist.,* 597 U. S. ___ (2022)
[189] *Kennedy* v. *Bremerton School Dist.,* 597 U. S. ___ (2022)
[190] *Kennedy* v. *Bremerton School Dist.,* 597 U. S. ___ (2022)

postgame prayer; however, he eventually felt compelled to continue the silent prayer. Kennedy expressed to the district that he was willing to avoid praying while students were around, to avoid the perception of a government endorsement of religion.[191] Regardless of those concessions, the district still believed the nature of the prayer violated the Establishment Clause, and asked Kennedy to find a way to pray in private.[192] Kennedy disobeyed this request and was put on admirative leave after the season. His contract was not renewed the following season. Kennedy filed suit, alleging the district violated his right to free expression.

During the discovery process the school district conceded that Kennedy was fired solely for his noncompliance with their Establishment Clause guidance.[193] The District Court found that there was compelling interest in restricting Kennedy from praying because the school district was seeking to comply with their constitutional obligation.[194] On appeal, the Ninth Circuit agreed with the finding in favor of Bremerton, their ruling rested in large part on the Lemon test, specifically the notion, which had emerged from *Lemon,* that Kennedy's conduct would give a reasonable observer the impression that the government had endorsed religion.[195]

Opinion of the Court

In a 6-3 opinion, written by Justice Gorsuch and decided along ideological lines, the Court sided with Coach Kennedy, determining that Bremerton had erred in preventing him from saying his postgame prayer.[196] Based on the facts detailed by the District Court's discovery process, the majority opinion argued that the restriction on Kennedy's prayer required Bremerton

[191] *Kennedy* v. *Bremerton School Dist.,* 597 U. S. ___ (2022)
[192] *Kennedy* v. *Bremerton School Dist.,* 597 U. S. ___ (2022)
[193] K*ennedy v. Bremerton* Sch. Dist., 991 F.3d 1004 (9th Cir. 2021)
[194] K*ennedy v. Bremerton* Sch. Dist., 991 F.3d 1004 (9th Cir. 2021)
[195] K*ennedy v. Bremerton* Sch. Dist., 991 F.3d 1004 (9th Cir. 2021)
[196] *Kennedy* v. *Bremerton School Dist.,* 597 U. S. ___ (2022)

to pass the strict scrutiny test, since they had not terminated his contract for any other reason than his noncompliance with their request.[197] Therefore, the school district would have to demonstrate that their restrictions on Kennedy were content-neutral and narrowly tailored in furtherance of a compelling government interest, in accordance with the Court's test.[198] Justice Gorsuch determined that the school district's' restriction was not content-neutral since they had prevented Kennedy from engaging in the conduct in question specifically because that conduct was religious.[199]

Bremerton argued that Coach Kennedy's position was inherently influential amongst students, therefore heightening the importance of ensuring that Kennedy's religious expression wasn't interpreted as a state endorsement of his faith.[200] While the majority opinion granted Kennedy had an influential position, the Court did not believe that allowed the district to further restrict his private exercise of faith.[201] Gorsuch's opinion even argued that such reasoning would allow public schools to prevent teachers from wearing hijabs or saying a silent prayer before eating a meal.[202]

Central to the school district's argument was the notion that Kennedy's prayer raised an inherent tension between Bremerton's obligation to comply with the Establishment Clause and Kennedy's individual rights. Bremerton argued that the tension should be resolved in favor of the Establishment Clause. While the Ninth Circuit panel agreed with their reasoning, the Supreme Court did not. In Justice Gorsuch's own words:

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[197] *Kennedy* v. *Bremerton School Dist.,* 597 U. S. ___ (2022)
[198] *Kennedy* v. *Bremerton School Dist.,* 597 U. S. ___ (2022)
[199] *Kennedy* v. *Bremerton School Dist.,* 597 U. S. ___ (2022)
[200] *Kennedy* v. *Bremerton School Dist.,* 597 U. S. ___ (2022)
[201] *Kennedy* v. *Bremerton School Dist.,* 597 U. S. ___ (2022)
[202] *Kennedy* v. *Bremerton School Dist.,* 597 U. S. ___ (2022)

> "The Ninth Circuit pursued this same line of thinking, insisting that the District's interest in avoiding an Establishment Clause violation "'trump[ed]'" Mr. Kennedy's rights to religious exercise and free speech…
>
> But how could that be? 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 abridging the freedom of speech." Amdt. 1. A natural reading of that sentence would seem to suggest the Clauses have "complementary" purposes, not warring ones where one Clause is always sure to prevail over the others."[203]

Justice Gorsuch and the Court rejected the notion that there is any tension between these two clauses, instead arguing that the Establishment Clause and the Free Exercise Clause were intended to work together to protect individual rights.[204] Gorsuch believes that the supposed tension between the clauses is caused by the school district's misunderstanding of the Lemon test.[205] According to Gorsuch, the misunderstanding is rooted in the use of the reasonable observer standard, which Gorsuch criticized in his *American Legion* concurrence.[206] The standard directs state actors to consider whether a reasonable observer would interpret a given practice to be a government endorsement of religion, if so, the practice would have the effect of advancing a religion, and fail a prong of the Lemon test, therefore violating the Establishment Clause.[207] Gorsuch explains that this understanding allows any theoretically offended observer to have the equivalent of a heckler's veto over a public expression of faith, rejecting the idea that the Establishment Clause would be violated if Kennedy were allowed to continue praying.[208] Moreover, Gorsuch also indicates his belief that the lower courts should have recognized the Supreme Court's lack of reliance on the Lemon test in recent years, charactering the Court's

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[203] *Kennedy* v. *Bremerton School Dist.,* 597 U. S. ___ (2022)
[204] *Kennedy* v. *Bremerton School Dist.,* 597 U. S. ___ (2022)
[205] *Kennedy* v. *Bremerton School Dist.,* 597 U. S. ___ (2022)
[206] *American Legion v. American Humanist Assn.,* 588 U. S. ___ (2019)
[207] *Kennedy* v. *Bremerton School Dist.,* 597 U. S. ___ (2022)
[208] *Kennedy* v. *Bremerton School Dist.,* 597 U. S. ___ (2022)

decision in *Town of Greece* as a rejection of the test as universally applicable to Establishment Clause disputes.[209]

As Gorsuch's opinion concluded, he criticized Bremerton for essentially asking for the Court to create a new rule which would require public schools to prevent their faculty from engaging in any sort of public religious activity.[210] Again, in Justice Gorsuch's own words:

> "Such a rule would be a sure sign that our Establishment Clause jurisprudence had gone off the rails. In the name of protecting religious liberty, the District would have us suppress it."[211]

The majority opinion concludes by emphasizing the importance of religious tolerance in a diverse republic, characterizing Bremerton School District's actions as attempt to "ferret out and suppress" individual expression, and reversing the Ninth Circuit's decision.[212]

Relevant Concurrences and Dissents

Justice Thomas wrote a brief concurring opinion noting that the Court had not decided what the state's burden is for restricting their faculty's religious beliefs; in other words, the circumstances in which a school administrator could restrict a teacher's religious expression.[213]

The principal dissent, written by Justice Sotomayor and joined by Justices Kagan and Breyer, starts by articulating a different view of the facts of the case. Sotomayor highlights that before the fall of 2015, Kennedy regularly led the entire team in prayers, in one case after an administrator had asked him to cease the practice.[214] Sotomayor highlights the media firestorm created by coach Kennedy, which included various pregame press appearances flaunting his

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[209] *Kennedy* v. *Bremerton School Dist.,* 597 U. S. ___ (2022)
[210] *Kennedy* v. *Bremerton School Dist.,* 597 U. S. ___ (2022)
[211] *Kennedy* v. *Bremerton School Dist.,* 597 U. S. ___ (2022)
[212] *Kennedy* v. *Bremerton School Dist.,* 597 U. S. ___ (2022)
[213] *Kennedy* v. *Bremerton School Dist.,* 597 U. S. ___ (2022)
[214] *Kennedy* v. *Bremerton School Dist.,* 597 U. S. ___ (2022)

disregard for the superintendent's directives[215]. While Kennedy's advocacy through the media might not have any bearing on a jurist's analysis of his individual rights, it supports the district's argument that there may have been a coercive effect on students, if Kennedy was evaluating his players' degree of support for him during his legal fight.[216] Moreover, Sotomayor highlights that some parents eventually informed the district that their sons had only join Kennedy's prayers because they wanted to avoid being separate from the team.[217]

Justice Sotomayor knocks the majority opinion for applying a "toothless version of coercion analysis" that did not consider the soft coercion that students may have felt considering the degree of power and influence Coach Kennedy had over his players.[218] Specifically, Sotomayor mentions that, beyond Kennedy having inherent influence over the children he coached, players might have been concerned about receiving more playing time or obtaining letters of recommendation from Kennedy, which could have presumably been altered by Kennedy's impression of a given player's agreement or disagreement with his prayer.[219]

Regarding the competing interest of the school district's compliance with the law and Coach Kennedy's individual right to exercise his religious beliefs Justice Sotomayor asserts that the majority is wrong to dismiss the notion of a tension between the two clauses:

> "The proper response where tension arises between the two Clauses is not to ignore it, which effectively silently elevates one party's right above others. The proper response is to identify the tension and balance the interests."[220]

Instead of arguing that there is not tension between the religious clauses, Sotomayor argues that a balancing test must be applied. While Sotomayor does not fully adopt Bremerton's argument that

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[215] *Kennedy* v. *Bremerton School Dist.,* 597 U. S. ___ (2022)
[216] *Kennedy* v. *Bremerton School Dist.,* 597 U. S. ___ (2022)
[217] *Kennedy* v. *Bremerton School Dist.,* 597 U. S. ___ (2022)
[218] *Kennedy* v. *Bremerton School Dist.,* 597 U. S. ___ (2022)
[219] *Kennedy* v. *Bremerton School Dist.,* 597 U. S. ___ (2022)
[220] *Kennedy* v. *Bremerton School Dist.,* 597 U. S. ___ (2022)

the Establishment Clause trumps the Free Exercise Clause, she agrees that the district's interests in preventing their employee from engaging in an act of coercion should have priority.[221] Sotomayor emphasizes that, while Kennedy did have some right to pray, he did voluntarily enter an employment contract with the school district, while the students had less agency over attending school.[222]

Finally, Sotomayor's dissent criticizes the Court's decision to overrule *Lemon.* Citing Justice Kagan's concurrence in the Bladensburg Cross case, Sotomayor agrees that the Lemon test is not universally applicable to cases involving the Establishment Clause, however she objects to the decision to effectively overturn the precedent[223]. In turn, Sotomayor takes Gorsuch's opinion to task for the vague history and tradition test he offers in its stead. According to Sotomayor, the majority asserts that the test should be applied to all Establishment Clause issues without properly fleshing out the test.[224] Beyond not giving the lower courts details on the new test they're expected to apply, the Court also gives no direction to school administrators who are tasked with abiding by the Establishment Clause.[225]

Impact and Further Precedent

The factual dispute between the majority opinion and the dissent *Kennedy* indicates that the Supreme Court's holding in the case might not easily be applicable to other questions regarding religious expression in public schools.[226] Since Gorsuch's majority opinion hardly acknowledged Kennedy's previous, more expansive, religious activities with his team, the

[221] *Kennedy* v. *Bremerton School Dist.,* 597 U. S. ___ (2022)
[222] *Kennedy* v. *Bremerton School Dist.,* 597 U. S. ___ (2022)
[223] *Kennedy* v. *Bremerton School Dist.,* 597 U. S. ___ (2022)
[224] *Kennedy* v. *Bremerton School Dist.,* 597 U. S. ___ (2022)
[225] *Kennedy* v. *Bremerton School Dist.,* 597 U. S. ___ (2022)
[226] *Kennedy* v. *Bremerton School Dist.,* 597 U. S. ___ (2022)

Court's ruling might be difficult to apply to different facts in future cases[227]. However, the case does explicitly indicate that the federal judiciary should no longer apply the Lemon test, essentially overturning the precedent. Gorsuch's majority opinion, in a critical tone, admonishes the Ninth Circuit for mistakenly applying the Lemon test. However, the Court had never explicitly said that the test was no longer applicable until 2022, and his admonishment was critiqued by some legal scholars in the wake of the decision.[228]

The *Kennedy* case is the first instance in which the Supreme Court took on a question that involved competing claims between the two religious clauses. The narrow nature of their decision indicates that the Court may have to answer further questions in similar cases where a government employees' religious expression might cause an Establishment Clause violation, as indicated by Justice Sotomayor's dissent. Justice Sotomayor's dissent also effectively represents how a Justice from the Warren Court era might respond to the modern Roberts Court's jurisprudence. The dissent offers an explicit and material defense of the Lemon test, in contrast with the history and tradition alternative presented by the Court's Republican-appointed majority. Sotomayor's reasoning also creates a juxtaposition with the originalist majority's decision-making process; instead of focusing on how the founders intended the religious clauses to operate when they were written, Sotomayor focuses on the practical problems with erasing past precedent, and illudes to the Establishment Clause creating a separation between church and state, a term that does not appear in the Constitution but was referenced frequently by Warren-era progressive jurists.

[227]Sarah Isgur and David French. "Praying Football Coach Wins At Supreme Court." June 2022. In The Dispatch. Podcast. https://open.spotify.com/episode/3eT6nawpVueIADGmt7aRl1?si=a08fa9be1a9948d2.
[228] Sarah Isgur, and David French. "Praying Football Coach Wins At Supreme Court." June 2022. In The Dispatch. Podcast. https://open.spotify.com/episode/3eT6nawpVueIADGmt7aRl1?si=a08fa9be1a9948d2.

The dissent is also especially instructive regarding the delta of opinion and approach between the Republican-appointed and Democrat-appointed justices. Sotomayor and Gorsuch could not even agree on whether the *Kennedy* case presented a tension between the Establishment and Free Exercise clauses, much less which clause or test should be applied to the facts of the case. That vast difference of opinion, while somewhat specific to the facts of *Kennedy* would be visible in another case from that same term.

Carson v. Makin (2022)

Background and Procedural History

In the same term as the Supreme Court's Coach Kennedy decision, it also considered *Carson v. Makin* a case with a similar fact pattern to several precedential decisions. In two proceeding cases *Trinity Lutheran v. Comer* (2017) *and Espinoza v. Montana Department of Revenue* (2020), the Supreme Court dealt with challenges to various state grant schemes which prevented their funds from being used on sectarian schools. In the case of *Trinity Lutheran,* a Church applied to a grant program in the state of Missouri which funds would be used on its preschool playground.[229] The state denied the grant on the basis that an article in the Missouri Constitution prohibited the use of state funds being used for religious organizations.[230] In *Espinoza* the state of Montana prevented religious schools from receiving money thorough a scholarship program based on a similar amendment to the Montana Constitution.[231] While the latter case dealt with funds being used directly for a pedagogical purpose, in both cases the Court decided that the given state constitutional provision, as interpreted, was in violation of the

[229] Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U. S. 449 (2017)
[230] Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U. S. 449 (2017)
[231] Espinoza v. Montana Dept. of Revenue, 591 U. S. ___ (2020)

superseding federal Free Exercise Clause, since both funding schemes discriminated against certain institutions solely because of their sectarian nature.[232] While both the states of Missouri and Montana expressed concerns about both religious clauses, the Supreme Court majority only cited the Free Exercise Clause

With that context, *Carson v. Makin* presented a similar challenge under the Free Exercise clause. The funding scheme in question was used by the state of Maine to ensure its rural residents have access to secondary education.[233] The remote nature of the state of Maine prevents some local School Administrative Units (SAUs), essentially school districts, from operating secondary schools for their residents.[234] Accordingly, some of these SAUs, instead of operating a secondary school have a contract with a local private school for their residents to attend[235]. However, for SAUs without any predesignated secondary school option, the state of Maine allows the parents of the student to choose a public or private school and sends payments directly to the school to compensate for the student's cost of attendance.[236] Private religious schools were excluded from this program. However, that was not always the case, prior to 1981 the state of Maine allowed the funds from the program to be used on religious school.[237] The Maine Attorney General, reflecting his understanding that the funding scheme violated the Establishment Clause, prohibited funds from being used on religious schools. [238]

The petitioners in this case, the Carson family reside in the small town of Glenburn and sent their child to a Christian School in nearby Bangor because the school aligned with their

[232] Espinoza v. Montana Dept. of Revenue, 591 U. S. ___ (2020)
[233] Carson v. Makin, No. 19-1746 (1st Cir. Oct. 29, 2020)
[234] Carson v. Makin, No. 19-1746 (1st Cir. Oct. 29, 2020)
[235]Carson v. Makin, No. 19-1746 (1st Cir. Oct. 29, 2020)

[236] Carson v. Makin, No. 19-1746 (1st Cir. Oct. 29, 2020)
[237] Carson v. Makin, No. 19-1746 (1st Cir. Oct. 29, 2020)
[238] Carson v. Makin, No. 19-1746 (1st Cir. Oct. 29, 2020)

Baptist beliefs.[239] The school had its proper accreditations and Maine validated Carson's attendance for the purposes of fulfilling the state's compulsory education requirement.[240] The family eventually filed suit, since their child's tuition would have been covered by the state had they allowed finds from the tuition program to be spent on sectarian schools, and accordingly argued that the program was in violation of the Free Exercise Clause.[241] The District Court found in favor of the Commissioner of the Maine Department of Education (Makin), so Carson appealed to the First Circuit.[242] Crucially, before the case was heard before the First Circuit, the Supreme Court decided *Espinoza,* with its similar set of facts.[243] However, the Circuit Court's opinion still sided with Makin, arguing the facts in this case were different from the Supreme Court's recent precedent, since the case at hand was on pedagogical values instead of religious identity.[244] The Supreme Court then granted certiorari.

Opinion of the Court

The Supreme Court reversed the First Circuit Court of Appeal's ruling and sided with the Carson family in a 6-3 ruling. In a relatively brief majority opinion, Chief Justice Roberts explained how the state of Maine had violated the Free Exercise Clause.[245] Court precedent explains that Free Exercise does not just prevent direct suppression of individual religious expression, but also prevents the state from issuing indirect penalties for religious expression. If the state provides a generally applicable benefit program, parties cannot be excluded from that

[239] Carson v. Makin, No. 19-1746 (1st Cir. Oct. 29, 2020)
[240] Carson v. Makin, No. 19-1746 (1st Cir. Oct. 29, 2020)
[241] Carson v. Makin, No. 19-1746 (1st Cir. Oct. 29, 2020)
[242] Carson v. Makin, No. 19-1746 (1st Cir. Oct. 29, 2020)
[243] Carson v. Makin, 596 U. S. ___ (2022)
[244] Carson v. Makin, No. 19-1746 (1st Cir. Oct. 29, 2020)
[245] Carson v. Makin, 596 U. S. ___ (2022)

program because of their religion alone.[246] According to the Chief Justice, Maine's tuition program does just that. In the Chief's words:

> The State pays tuition for certain students at private schools— so long as the schools are not religious. That is discrimination against religion.[247]

Moreover, Roberts explains that, while the state of Maine might have only changed the policy in 1981 to further separate church and state, they did so far beyond what is required by the federal constitution.[248] According to the Court, the state cannot enact a policy to create a separation of church and state beyond what's required by the Establishment Clause if that involves neglecting their obligation to abide by the Free Exercise Clause.[249] Roberts' opinion goes on to explain why Maine's tuition policy falls under the *Espinoza* precedent, rejecting the First Circuit's argument and reversing their decision.[250]

Relevant Concurrences and Dissents

Justice Breyer penned the primary dissent, which began by detailing what he believed to be the purpose of the two religious clauses, to create an obligation government neutrality toward religion, which would allow the United States to have a spirit of pluralism and tolerance on issues of religion, avoiding the conflict that plagued Europe. [251]Accordingly, Breyer argues that Maine intended to embrace that neutrality by preventing any state education funds to be spend on sectarian schools; emphasizing that Maine never sought to elevate one faith over another.[252] Justice Breyer's dissent highlighted the notion that the tension between the two religious clauses

[246] Carson v. Makin, 596 U. S. ___ (2022)
[247] Carson v. Makin, 596 U. S. ___ (2022)
[248] Carson v. Makin, 596 U. S. ___ (2022)
[249] Carson v. Makin, 596 U. S. ___ (2022)
[250] Carson v. Makin, 596 U. S. ___ (2022)
[251] Carson v. Makin, 596 U. S. ___ (2022)
[252] Carson v. Makin, 596 U. S. ___ (2022)

could be resolved by acknowledging there was some flexibility in how the judiciary interprets the clauses, suggesting that the Court should give Maine some "leeway" for their approach to resolving the tension:

> This doctrine reflects the fact that it may be difficult to determine in any particular case whether the Free Exercise Clause requires a State to fund the activities of a religious institution, or whether the Establishment Clause prohibits the State from doing so …. we have made clear that States enjoy a degree of freedom to navigate the Clauses' competing prohibitions.[253]

Justice Breyer further explains that, because of the Court's ruling, Maine will essentially be forced to compel their taxpayers to sponsor religion, presuming there are always some families, to whom the tuition program applies, that wish to see their children educated at a religious school.[254] The dissent takes great issue with this outcome, arguing that it could lead to the sort of religious conflict that the founders sought to prevent by crafting the Establishment Clause.

Impact and Further Precedent

Unlike in *Kennedy,* the Supreme Court's holding in *Carson* does not overturn any previous precedent, and merely ratifies the Court's new approach to the religious clauses. However, in *Carson* the Court again demonstrates the degree to which its members are split on how to approach the religious clauses when they are in conflict. As was the case in *Kennedy* it appears of though the justices who are in dissent believes the Court's holding not only forces the state to recognize a religious free exercise right that doesn't exist given the facts, but it forces the state to violate the Establishment Clause.[255] Justice Breyer offers a new approach, suggesting that the judiciary should offer flexibility and even leniency to states struggle to navigate the

[253] Carson v. Makin, 596 U. S. ___ (2022)
[254] Carson v. Makin, 596 U. S. ___ (2022)
[255] Carson v. Makin, 596 U. S. ___ (2022)

difficult questions raised by the religious clauses.[256] Yet he is at odds with a majority that seems inclined to resolve such questions in favor of the side claiming a Free Exercise violation, even if they might avoid acknowledging the existence of the tension in the first place. On the other hand, it seems unlikely that the six justices in the *Carson* majority could ever get their colleagues to agree that the state preventing all religiously affiliated parties from accessing otherwise available funds is more an indicator of religious discrimination than it is neutrality.

Finally, through this case doesn't mention Lemon test explicitly, it's worth noting that the funding scheme the Roberts Court forces state of Maine to adopt in this case is remarkably similar to the one the Court struck down in *Lemon.* There is no better illustrator of the Supreme Court's evolution on the religious clauses than its holding in favor of the Free Exercise Clause in Makin creating the same outcome it deemed unconstitutional under the Establishment Clause in 1971.

[256] Carson v. Makin, 596 U. S. ___ (2022)

Conclusions

During the late-20th Century the Supreme Court had an expansive view of the Establishment Clause, demonstrated both by their willingness to make controversial rulings in *Engel* and create broad tests for lower courts like in *Lemon.* The more progressive Warren Court was no stranger to controversy in *Engel* and *Lemon*. The test applied by the Court in *Lemon*, striking down state funding schemes that were facially neutral towards religion, helped establish a firm wall of separation between church and state, which would become a hallmark of the Court's jurisprudence in the 20th Century. Each prong of the test created an obstacle to any public display of religion or any government engagement with a religious organization. The second prong, preventing the state from advancing religion, soon morphed into the endorsement test. The endorsement test combined with the entanglement prong encouraged an increase in Establishment Clause litigation.

Within a couple decades, the Court began to shift away from the Lemon test, realizing the excessive results it might produce in cases like *Aguilar*. However, under Justice Roberts, the Court has shifted away from enforcing the Establishment Clause altogether, only finding in favor a challenge under the clause once since 2005.[257] Naturally, the Roberts Court's empowerment of the Free Exercise Clause in lieu of a strong Establishment Clause has been met with a mixed reaction from legal scholars.[258] It represents the modern Court's willingness to make a substantial shift in its jurisprudence for the sake of better conformity to the doctrine of originalism. It also is worth noting that the Supreme Court, in an age of record institutional

[257] DeGirolami, M. O. (2015). Constitutional contraction: religion and the Roberts court. *Stanford Law & Policy Review*, *26*(2), 385

[258] Richard Garnett. "Symposium: Religious Freedom and the Roberts Court's Doctrinal Clean-Up." SCOTUSblog, August 7, 2020. https://www.scotusblog.com/2020/08/symposium-religious-freedom-and-the-roberts-courts-doctrinal-clean-up/.

distrust among the American public, is now explicitly concerned with the reaction to their rulings, as the majority opinion and the various concurrences in *American Legion* made apparent.[259] The judge-made test in *Lemon* was limited by the Roberts Court in *American Legion*; but the decision to overturn it altogether in *Kennedy*, demonstrates the Roberts Court's focus on narrowing the federal judiciary's understanding of the breath of the Establishment Clause.

While this shift in religious clause jurisprudence can be understood as an originalist court correcting what it believes to be the mistakes of its progressive predecessors, there are other explanations worth mentioning. Beyond just the ideological shift for members on of the Supreme Court, since *Engel* and *Lemon,* the United States has also experienced a theological shift, as fewer Americans than ever before consider themselves religious.[260] While Christians remain the majority in the United States, as of 2020, only 47 percent of Americans say they attended a church, synagogue, or mosque regularly; when the Court decided *Lemon v. Kurtzman*, that number was stable at above 70 percent.[261] Moreover, the number of Americans who describe themselves as religiously unaffiliated has increased from 16 percent when polling started in 2007, to 28 percent in 2023.[262] One could argue that the Supreme Court, intentionally or not, is serving as a sort of counterweight to trends in individual American's self-described religiosity. When the vast majority of Americans are religious, the Court is hypervigilant in upholding the Establishment Clause. However, when American religiosity is declining, the Court focuses on

[259] Pew Research Center, June 2022, "Americans' Views of Government: Decades of Distrust, Enduring Support for Its Role"
[260] Pew Research Center, January, 2024, "Religious 'Nones' in America: Who They Are and What They Believe
[261] Jones, Jeffrey M. "U.S. Church Membership Falls below Majority for First Time." Gallup.com, February 7, 2024. https://news.gallup.com/poll/341963/church-membership-falls-below-majority-first-time.aspx.
[262] Jason DeRose. "Religious 'Nones' are now the largest single group in the U.S." NPR, January 24, 2024. https://www.npr.org/2024/01/24/1226371734/religious-nones-are-now-the-largest-single-group-in-the-u-s.

the Free Exercise Clause, even applying it to protect against discrimination towards religion generally, as it did in *Carson*.

Some legal scholars, critical of the Roberts Court's shift on the Establishment Clause, point out that members of the Court have expressed concerns about rising antireligious sentiment in the United States, and might be using their rulings to combat that sentiment. Professor Justin Driver uses the term "Christian aggrievement" to characterize what he believes to be an increasingly popular feeling amongst elite conservatives.[263] Driver argues that this aggrievement has contributed to the Supreme Court reversing a "longstanding commitment to ensuring that the common schoolhouse is not transformed into a house of worship."[264] While Driver's theory might overstate the argument that the Court is corrupted by such personal bias, he raises the noteworthy point that all members of the Roberts Court are religious, with a majority being Catholic. While the Court responding to perceived changes in American religiosity as a counter-majoritarian, or even reactionary, force is a tenable explanation for the shift in jurisprudence, that rationale has not been mentioned by any member of the Court. Instead, the rationale explicitly stated by the justices throughout recent caselaw is adherence to originalism, a more convincing causal explanation.

Regardless of the Roberts Court's motivation, their recent decisions need additional clarification. These decisions by the Court have arguably sent K-12 schools through a sort of whiplash. All within the a few decades, the Court created of the Lemon Test, then refused to apply it, then replaced it with a vague history and tradition test. This sense of whiplash is demonstrated by the records of fact in *Kennedy* and *Carson*. In the former case, a school

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[263] Driver, Justin. "THREE HAIL MARYS: CARSON, KENNEDY, AND THE FRACTURED DETENTE OVER RELIGION AND EDUCATION." *Harvard Law Review* 136, no. 1 (2022): 208+. *Gale General OneFile* (accessed May 23, 2024).
[264] Ibid.

superintendent is chided by the court for restricting the expression of their employee because it ran afoul of the Lemon test. In the latter case, a state policy clearly aimed at conforming with *Lemon*, is struck down because the Supreme Court now gives the Free Exercise Clause primacy. While these changes might be easy for a member of the federal bench to follow, the same cannot be said of every public schoolteacher.

The Supreme Court's ruling in *Kennedy* did not clearly define what types of religious behaviors from public school teachers can be characterized as coercive. While the Court's previous jurisprudence indicated that government employees had limited free expression rights on the job, the Kennedy ruling indicated that there are some instances when public employees are on the job, but not acting in an official capacity, when they can engage in personal speech.[265] In one attorney's guidance to school administrators, she mentions that public school teachers might now have a right to wear political merchandise on school grounds: "it remains to be seen where such boundaries lie, but *Kennedy* counsels districts proceed with caution on similar issues until we have more clarity."[266] The federal Department of Education similarly issued a new guidance for public schools, in the wake of the Kennedy ruling.[267] These new guidance indicates how the ruling in *Kennedy* could be a source of confusion for K-12 administrators as they navigate their employees' constitutional rights.

As the Court clarifies it's Kennedy ruling in subsequent cases, one of the questions it will have to answer is how public-school teachers' First Amendment rights compare to those of their

[265] Kirsten White, "Clear as Mud: Navigating In-School Employee Expression in the Wake of Kennedy v. Bremerton School District," Fox Rothschild LLP, July 15, 2022, https://www.jdsupra.com/legalnews/clear-as-mud-navigating-in-school-9307734/.
[266] Ibid
[267] Franczek P.C. "Department of Ed Releases Post-Kennedy Guidance on Religious Expression in Public Schools." Franczek, May 17, 2024. https://www.franczek.com/blog/department-of-ed-releases-post-kennedy-guidance-on-religious-expression-in-public-schools/.

students. The Supreme Court has been consistent in recognizing relatively broad free expression rights for students since their landmark rulings in *Tinker v. Des Moines* (1969) and *Morse v. Frederick* (2007), the latter of which established that students could only have their free expression curtailed if it: "materially disrupts classwork or involves substantial disorder or invasion of the rights of others."[268] If the Supreme Court were to apply their holdings in *Tinker* and *Morse*, as religious liberty advocates recommend doing, to teachers, expression of faith like Coach Kennedy's could be commonplace in public K-12 schools.[269] While the Court might not extend First Amendment protections that far for teachers, a creating a teacher-specific standard for expression, as they did for students in *Morse*, would help clarify their jurisprudence.

The issue of how the Establishment Clause applies to public schools is still a separate question. Writing in the University of Chicago Law Review, Tyler Ashman mentions multiple ways the Supreme Court could clarify their Establishment Clause jurisprudence while ensuring fealty to the original meaning of the Constitution. Ashman suggests that the Supreme Court could refine their standard of what constitutes religious coercion, since the majority in *Kennedy* gave little credence to Bremerton's soft coercion argument.[270] Moreover, Ashman points out that it would help if the Supreme Court identified, as a component of their new historical practices and understandings standard, what sorts of practices would be considered by the founders to be an Establishment of religion that an originalist jurist would strike down. Finally, Ashman recognizes that the *Kennedy* opinion's "sweeping language about the return to history does not

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[268] *Morse* v. *Frederick,* 551 U. S. 393 (2007).

[269] Sarah Isgur, and David French. "Praying Football Coach Wins At Supreme Court." June 2022. In The Dispatch. Podcast. https://open.spotify.com/episode/3eT6nawpVueIADGmt7aRl1?si=a08fa9be1a9948d2.

[270] Tyler Ashman. "The Establishment of Originalism in Kennedy v. Bremerton School District." *The Establishment of Originalism in Kennedy v. Bremerton School District. The University of Chicago Law Review*, 2023, lawreview.uchicago.edu/online-archive/establishment-originalism-kennedy-v-bremerton-school-district.

suggest a limiting principle."[271] According to Ashman, the Roberts Court's commitment to history could be indicative of future rulings that go even farther in returning to the founders' understanding of the Establishment Clause, continuing to tear down the wall of separation built by the Warren Court.

Although the Supreme Court's holding in *Carson* did not produce as many unanswered questions as the Coach Kennedy case, legal scholars still point to some gray areas in the Court's rulings. Primarily, as Professor Joshua Dunn notes, from *Trinity Lutheran* through *Espinoza* to *Carson*, the Supreme Court has struck down laws blocking state funds from going to religious institutions.[272] These laws, known as Blaine Amendments, were passed throughout the 20th Century by various states, when creating a wall of separation between church and state was in vague.[273] While none of these rulings have declared Blaine Amendments generally unconstitutional under the Free Exercise Clause, the Supreme Court has yet to articulate a standard through which a Blaire Amendment could pass constitutional muster, so it's not unreasonable to anticipate further legislation on the issue.[274]

While the facts of the *Carson* case provide an instructive juxtaposition between the Court's ruling in *Lemon* and the rulings of the originalist majority under Roberts, the Court has left more unanswered questions in its *Kennedy* ruling than in *Carson*. The Coach Kennedy case best demonstrates how much further work the Court must do to clarify its shift in jurisprudence.

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[271] Ibid.

[272] Dunn, Joshua. "In Carson v. Makin, Justices Prolong Death of Blaine Amendments, but Don't quite Finish the Job." *Education Next* 23, no. 1 (Winter 2023, 2023///Winter). https://uoregon.idm.oclc.org/login?url=https://www.proquest.com/scholarly-journals/carson-v-makin-justices-prolong-death-blaine/docview/2758544572/se-2.

[273] Ibid.

[274] Ibid.

While shifting the federal courts' interpretation of the religious clauses towards a more originalist understanding may be a noble goal, as various legal scholars have identified, lower court judges and public-school administrators still need clarity from the nation's highest court.

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