

The New and Confusing Establishment Clause

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Introduction

In years hence, in some future case or series of cases, the Supreme Court may land upon clear boundaries for the Establishment Clause. But contrary to repeated claims by both political actors and some academics, it has not done so yet. This essay argues that the many claims percolating among academics and lawmakers that the Supreme Court in recent years has established a clear “history and tradition” test for the Establishment Clause are premature. Rather, what the Court has done is far more confusing; it has unsettled the waters without clearly indicating what form of historical methodology lower courts and lawmakers should use. And using the recent Ten Commandments laws as test cases, the essay concludes by showing that originalism—whatever form the Court eventually adopts—need not necessarily result in a gutting of the Establishment Clause.

The claims regarding a new “history and tradition” test come from strange bedfellows. Among academics, Caroline Mala Corbin,¹ Richard Schragger, Micah Schwartzman, Nelson

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1. Caroline Mala Corbin, *New Judicial Federalism and the Establishment Clause: Classroom Ten Commandments as a Case Study in State Constitutional Protection*, 104 TEXAS L. REV. 1, *passim* (2025).

Tebbe,² Richard Katskee,³ Dov Fox, and Mary Ziegler⁴ have all written on the issue. The consistent theme among these writers appears to be that, in recent decisions, the Court has offered a “history and tradition” test for determining whether government action violates the Establishment Clause.⁵ Some argue it has weakened the concept of “coercion” to the point that no plaintiff could ever prove government coercion,⁶ and that the Court’s new test will never result in protecting religious minorities against a Christian established church—all of this as part of an effort by Supreme Court Justices to reinject Christianity into America’s public schools.⁷

Among lawmakers on the political right, the argument is similar, though with a different gloss. They similarly contend that the Establishment Clause is weakened and the Court has flung open the gates to allow a flood of religion into public schools.⁸ But they celebrate the perceived change, citing it as their impetus for passing laws that mandate the placement of the Ten Commandments in public school classrooms.

Despite these claims’ popularity in both camps, I am not yet convinced they accurately reflect the text of Supreme Court

2. Richard Schragger, Micah Schwartzman & Nelson Tebbe, *Reestablishing Religion*, 92 U. CHI. L. REV. 199, 221–22 (2025); Micah Schwartzman, Richard Schragger & Nelson Tebbe, *The Structure of Religious Preference*, 139 HARV. L. REV. 211, 235, 242 (2025).

3. Richard B. Katskee, *Taking Liberties: The Supreme Court’s New Hierarchy of Rights and Its Victims*, 127 W. VA. L. REV. 173, 193–94 (2024).

4. Dov Fox & Mary Ziegler, *The Lost History of “History and Tradition”*, 98 S. CAL. L. REV. 1, 5 (2024).

5. Corbin, *supra* note 1, *passim*; Schragger et al., *supra* note 2, at 222; Fox & Ziegler, *supra* note 4, at 5; Katskee, *supra* note 3, at 189.

6. *See* Corbin, *supra* note 1, at 10–11.

7. Corbin, *supra* note 1, *passim*; Schragger et al., *supra* note 2, at 223 (arguing religion receives more favorable treatment than secular counterparts); Fox & Ziegler, *supra* note 4, *passim*; Katskee, *supra* note 3, at 199.

8. *See, e.g., infra* notes 35–36 and accompanying text.

holdings or that they can withstand scholarly scrutiny. After briefly recounting the recurring argument that a clear “history and tradition” test now governs the Establishment Clause and that prior law has gone the way of the dodo, this essay will offer an alternative reading of what the Supreme Court has done by analyzing the text of its recent Establishment Clause opinions, specifically *Kennedy v. Bremerton School District*.⁹ In my estimation, the situation is not as well-defined as academics and lawmakers claim, but it may be more confusing. The Court has not, as Professor Corbin claims, “paved . . . roads for courts eager to let Christianity dominate public schools, regardless of the cost to non-Christians.”¹⁰ Instead, it has likely left most lower courts confused. It has not “scaled back”¹¹ coercion in any meaningful way, but neither has it provided a clearer test than existed before for identifying it. And a careful analysis of the historical roots of the Establishment Clause need not result, as some academics fear and some lawmakers hope, in allowing schools to become places of religious indoctrination. On the contrary, several scholarly accounts of that history convincingly suggest otherwise and conclude that laws like those related to the Ten Commandments will not pass constitutional muster.¹²

The irony in all the various interpretations of the Court’s Establishment Clause jurisprudence is that two groups on the opposite end of the ideological spectrum have inadvertently joined forces. In their criticisms of the Court, many academics have

9. 142 S. Ct. 2407 (2022).

10. Corbin, *supra* note 1, at 5.

11. *Id.* at 10.

12. See, e.g., Mark Storslee & Michael Helfand, *Government Religious Speech and the Establishment Clause*, 79 VAND. L. REV. (forthcoming 2026) (manuscript at 166–71) (available at <https://ssrn.com/abstract=5847562> [<https://perma.cc/7ZBT-6MLK>]); Mark Storslee, *History and the School Prayer Cases*, 110 VA. L. REV. 1619, 1694–96 (2024); NATHAN S. CHAPMAN & MICHAEL W. MCCONNELL, *AGREEING TO DISAGREE* 145–47 (2023).

ended up agreeing with their ideological opposites, the very people they seem to fear the most. For what drives some lawmakers to believe they can now “reintroduce Christianity into public schools”¹³ is the very conclusion those academics push so hard: that the Supreme Court has taken a bulldozer to the Establishment Clause.¹⁴ Reality is more complex.

I. The Premature Argument for the Establishment Clause’s Demise

A. *The Argument from Academics*

At its most basic level, the academics arguing that the Establishment Clause is nothing but a shadow of its former glory follow a few logical steps. They claim the Supreme Court has obliterated the Establishment Clause’s protections by (1) negating well-settled caselaw and replacing it with a new “history and tradition” test,¹⁵ and (2) intentionally engaging in techniques to avoid having to apply the Establishment Clause at all.¹⁶ Not all academics explicitly accuse the Court of acting in bad faith. Some do.¹⁷ For others, it is an undercurrent.¹⁸

Take Professor Corbin, for example. The bulk of her article explores the various ways the Court, at times, has concluded the

13. Corbin, *supra* note 1, at 3.

14. *See, e.g., infra* notes 35–36 and accompanying text.

15. Corbin, *supra* note 1, *passim*; Schragger et al., *supra* note 2, at 201–02, 222; Katskee, *supra* note 3, at 189–91; Peter J. Smith & Robert W. Tuttle, *Establishment Clause Mythology*, 75 CASE W. RESV. L. REV. 573, 575–76 (2024); Fox & Ziegler, *supra* note 4, at 3–4.

16. Corbin, *supra* note 1, at 14–19; Schragger et al., *supra* note 2, at 222; Katskee, *supra* note 3, at 189–91; Smith & Tuttle, *supra* note 15, at 638–39; Fox & Ziegler, *supra* note 4, at 63.

17. Corbin, *supra* note 1, at 14; Katskee, *supra* note 3, at 174.

18. Schragger et al., *supra* note 2 at 222; Fox & Ziegler, *supra* note 4, at 62–63 (“Understanding the Court’s contemporary uses of history and tradition as the byproduct of social movement conflict reveals the other normative commitments that reliance on history and tradition disguises.”).

Establishment Clause does not apply. She refers to these as “artful dodges.”¹⁹ She puts that term in the heading of the longest section of her article²⁰ and keeps returning to the theme it implies: that the Court is not acting in any principled way but is disingenuously trying to wipe away the Establishment Clause altogether²¹ by assessing issues like plaintiff’s standing,²² determining whether a symbol is religious,²³ deciding whether coercion actually exists,²⁴ and drawing the line between government and private speech.²⁵

Professor Katskee makes similar arguments. He claims the Court “has doggedly refused to look to history and tradition” when applying the Free Exercise Clause²⁶ but has embraced it wholeheartedly for only the Establishment Clause.²⁷ And he pulls no punches, declaring: “Our Constitution’s plan for ordered liberty is threatened by a Supreme Court that is undermining not just its own authority but the rule of law itself.”²⁸ Professors Schragger, Schwartzman, and Tebbe are softer and more nuanced, but the theme is inescapable. “Evidently by design,” they contend, “the Court’s turn toward history and tradition allows significant leeway for government religious expression.”²⁹ Once again, this implies the Court is not acting according to principle but is instead intentionally pushing an anti-Establishment Clause agenda.

19. Corbin, *supra* note 1, at 14.

20. *Id.* at 2.

21. *See id.* at 9, 14, 37.

22. *Id.* at 24–27.

23. *Id.* at 16–19.

24. *Id.* at 22–23.

25. *Id.* at 14–16.

26. Katskee, *supra* note 3, at 190–91.

27. *Id.* at 188–89.

28. *Id.* at 174.

29. Schragger et al., *supra* note 2, at 222.

Professors Fox and Ziegler are similar. “All told,” they say, “the Court’s appeal to history and tradition has upended decades of settled law across the constitutional landscape, with a raft of new occasions on the horizon.”³⁰ They also note their view that the Court’s story of the origins of the “history and tradition” test is “not true” and “disguises” other normative goals.³¹ This echoes a similar sentiment from Professors Smith and Tuttle, who contend the Court is definitely relying on “tradition” as the new method for interpreting the Establishment Clause, and that this “offers purchase in government for the Christian-nationalist agenda.”³²

The boundaries of the Establishment Clause have never been obvious.³³ These academics make compelling points that the Court may not have applied some of its stated principles in the most plausible way. For just one example, scholars have long discussed the inherent tension in putting religious displays on government land: that it tempts religionists and courts to argue that sacred religious symbols are serving nothing more than a secular purpose.³⁴ So Corbin is walking on familiar ground when she lists

30. Fox & Ziegler, *supra* note 4, at 5.

31. *Id.* at 62–63.

32. Smith & Tuttle, *supra* note 15, at 576.

33. See *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (“Candor compels acknowledgment, moreover, that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law.”).

34. See, e.g., William D. Blake, *Pyrrhic Victories: How the Secularization Doctrine Undermines the Sanctity of Religion*, 55 J. CHURCH AND STATE 1, 1 (2013) (arguing that it harms religion to justify the placement of religious symbols on public property by claiming the symbols are actually secular); Frederick Mark Gedicks, Lynch and the Lunacy of Secularized Religion, 12 NEV. L.J. 640, 643 (2012) (criticizing the “appropriation” of religious symbols into ostensibly secular government displays); Douglas Laycock, *Government-Sponsored Religious Displays: Transparent Rationalizations and Expedient Post-Modernism*, 61 CASE W. RESV. L. REV. 1211, 1237–44 (2011) (arguing against the notion that

this as one of her “artful dodges.” But assessing a plaintiff’s standing, determining whether a symbol is religious, deciding whether coercion actually exists, and drawing the line between government and private speech are more than mere attempts to avoid the Establishment Clause. They are critical parts of constitutional analysis. More importantly, as I will show, these authors’ claims that the Court has made a dramatic shift that has somehow demolished the Establishment Clause are premature.

B. *The Argument from Lawmakers*

The academics I describe above are not alone. Strange partners have joined them. In the buildup to the passage of laws trying to place the Ten Commandments in public schools, lawmakers made similar claims that the Supreme Court had diminished the Establishment Clause to a constitutional memory. Of course, their claims came more with jubilation than dread.

In March 2025, Texas State Senator Phil King remarked:

[I]n 2022, the law took a turn in the right direction. In 2022, the Coach Kennedy case, *Kennedy v. Bremerton ISD*, in that case where Coach Kennedy knelt to pray on the football field, in that case, as it got up to the Supreme Court, the Supreme Court struck the *Lemon* test, removed it from precedent, removed it from authority. And so because of that, we can today put the Ten Commandments back in our public school classrooms in Texas. And that’s simply what SB 10 does.³⁵

In Louisiana, State Representative Dodie Horton made a similar claim: “The landscape has changed,” she said. “In *Kennedy v. [Bremerton] School District*, the Supreme Court overturned the *Lemon* test, eliminating the *Lemon* test and instead

a freestanding Christian cross can be anything other than a “religious symbol”).

35. TEXAS SENATE, *Senate Session March 18, 2025*, at 3:09:38 (Mar. 18, 2025), <https://senate.texas.gov/videoplayer.php?vid=21349> [<https://perma.cc/9LEF-S2X4>] (statement of Sen. Phil King).

looking to America's history and tradition of whether the government may recognize our religious heritage.”³⁶

This type of thinking led both Texas and Louisiana to pass laws mandating that the Ten Commandments appear in public school classrooms.³⁷ Challenges to those laws are progressing through litigation, on their way, presumably, to the Supreme Court.³⁸ Note that the lawmakers have made the same assumption as the academics: the law has changed dramatically, and we now have a new “history and tradition” test.

The irony of the academics painting the Court as a bad actor is that they agree with the very people they oppose: those trying to place the Ten Commandments in schools. They, like their academic adversaries, conclude that *Lemon*, its foundations, and its progeny are dead, and *Kennedy* now allows a clear path to inject Christianity into schools. It is hard to imagine stranger bedfellows.

II. The New and Confusing Establishment Clause

A cornerstone of the academics' and lawmakers' positions is their claim that the Supreme Court has abandoned long-established Establishment Clause precedent and replaced it with a new “history and tradition” test. This is an exaggeration.

The overstatement comes in two steps. First, Establishment Clause jurisprudence has been many things over the decades,

36. LOUISIANA HOUSE OF REPRESENTATIVES, *Chamber Day 16, 24RS*, at 37:53 (Apr. 10, 2024), https://house.louisiana.gov/H_Video/Video-ArchivePlayer?v=house/2024/apr/0410_24_24RS_Day16 [https://perma.cc/VP7A-C5BC] (statement of Rep. Dodie Horton).

37. See TEX. EDUC. CODE ANN. § 1.0041 (2025); LA. STAT. ANN. §17:2124 (2024).

38. See *Roake v. Brumley*, No. 24-30706, 2026 WL 482555, at *1 (5th Cir. Feb. 20, 2026) (en banc) (vacating a preliminary injunction against the Louisiana law because “equitable relief was premature”); *Nathan v. Alamo Heights Indep. Sch. Dist.*, No. 25-50695, 2026 WL 1078691 (5th Cir. Apr. 21, 2026).

but clear is not one of them. The Court has always relied on some form of history when interpreting the Establishment Clause, going all the way back to the first case to apply it against the states.³⁹ Using history to understand its contours is nothing new. Neither is the confusion surrounding what it means. Fox, Ziegler, Katskee, and Corbin all independently suggest that the *Lemon* test was a well-defined, consistently applied precedent that settled Establishment Clause law for fifty years.⁴⁰ But even scholars sympathetic to *Lemon* are usually not willing to go that far. Courts at every level struggled to apply *Lemon* in a consistent way,⁴¹ and scholars across the ideological spectrum criticized it.⁴² Whatever *Lemon* was, decades of scholarship prove it was not functional;⁴³ perhaps the only reason it survived as long as it did was because a majority of Justices could not agree on how to replace it.

39. *Everson v. Bd. of Educ.*, 330 U.S. 1, 8–11 (1947) (discussing how early settlers came to the United States to escape government-favored churches).

40. *See* Corbin, *supra* note 1, at 9–10; Katskee, *supra* note 3, at 191; Fox & Ziegler, *supra* note 4, at 4–5.

41. Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church and Labor Relations and the Right of Church Autonomy*, 81 COLUM. L. REV. 1373, 1380 (1981); *see also* Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the “No Endorsement” Test*, 86 MICH. L. REV. 266, 269 (1987) (“Although the *Lemon* test has survived for over a decade and a half, few have found the formulation satisfactory.”); William J. Cornelius, *Church and State—The Mandate of the Establishment Clause: Wall of Separation or Benign Neutrality*, 16 ST. MARY’S L.J. 1, 8–9 (1984) (noting the unanimity among observers of how inconsistent case law had been).

42. *See* Smith, *supra* note 41, at 269–70 (collecting complaints about the *Lemon* test from ideologically diverse scholars); *see also* Corbin, *supra* note 1, at 10; Katskee, *supra* note 3, at 191; *Wolman v. Walter*, 433 U.S. 229, 264, 266 (1977) (Stevens, J., concurring).

43. *See* Smith, *supra* note 41, at 269.

A. *Misreading Kennedy and Other Precedent*

The second misstep, made by both the academics and lawmakers, is more important. They claim the Court has clearly replaced *Lemon* with a “history and tradition” test.⁴⁴ This is far from clear at this point. The Court’s language was vague. Justice Gorsuch reasoned, “[T]his Court long ago abandoned *Lemon* and its endorsement test offshoot.”⁴⁵ He cited a plurality opinion from *American Legion v. American Humanist Association*⁴⁶ in support of that proposition.⁴⁷ Neither Justice Gorsuch nor the *American Legion* plurality said the Court “overturn[ed]” or “overrule[d]” *Lemon*. The Justices clearly know how to use those words because they did so that very Term in *Dobbs v. Jackson Women’s Health Organization*.⁴⁸ All of this has left many wondering whether the Court meant to jettison *Lemon* entirely or whether it meant to abandon just the endorsement test while trying to preserve some aspects of *Lemon*, such as the no-entanglement rule.⁴⁹ *Lemon* purported to be a summary of all that had come before it, and many of the cases that relied on it were also relying on principles that existed before and independently of *Lemon*. It does seem evident going forward that a majority of the Justices will not apply *Lemon*. In *Groff v. DeJoy*,⁵⁰ all nine Justices signed onto an opinion that described *Lemon* as “abrogated.”⁵¹ But what of the doctrines that existed before it that it purported

44. See *supra* Part I.

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

46. 588 U.S. 29 (2019).

47. Kennedy, 142 S. Ct. at 2427 (citing *American Legion*, 588 U.S. at 48–52 (plurality opinion)).

48. 142 S. Ct. 2228, 2279 (2022).

49. Ira C. Lupu & Robert W. Tuttle, *The Ten Commandments in Louisiana Public Schools: A Study in the Survival of Establishment Norms*, 100 CHI.-KENT L. REV. 601, 602 (2025).

50. 143 S. Ct. 2279 (2023).

51. *Id.* at 2285, 2289.

to synthesize? And what of the many other doctrines that developed independently of it? They all could be alive and well.

Whatever the Justices meant to do, it certainly seems fair to say that *Lemon* is weakened and is likely not the lens through which lower courts should view the Establishment Clause. But where we go from there is less evident. The academics seem to assume that a “history and tradition” test now governs the interpretation of every constitutional provision and that such a test will never result in protecting religious minorities.⁵² But both of those conclusions are highly debatable.

Whatever the Court was doing with “history and tradition” in *Kennedy*, it was not clear. The majority opinion never once uses the phrase “history and tradition.” The only place in *Kennedy* that “history and tradition” appears is in the dissent,⁵³ which makes the same supposition the academics and lawmakers make. It assumes the majority applied the same test that it birthed in its Second Amendment cases⁵⁴ and has used sporadically since.⁵⁵ The academics do the same.⁵⁶ They do this, presumably, because it gives them a clear target to attack. In recent years, critics of the Court have lumped everything they do not like about the Justices’ methodology into the bogeyman “history and tradition.” While that does serve the purpose of offering an easily criticized mark, it does not accurately capture all that is happening.

52. See Corbin, *supra* note 1, at 4, 13, 45; Schragger et al., *supra* note 2, at 223; Fox & Ziegler, *supra* note 4, at *passim*; Katskee, *supra* note 3, at 199.

53. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2434 (2022) (Sotomayor, J., dissenting).

54. See *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2126 (2022) (quoting *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50, n.10 (1961)); *U.S. v. Rahimi*, 144 S. Ct. 1889, 1896–97 (2024).

55. See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2248 (2022); *Vidal v. Elster*, 144 S. Ct. 1507, 1518 (2024).

56. See *supra* Part I.

The real problem is different. What the Court has done so far is more confusing. It does seem that a majority of the Justices are now originalists, but all that has done is uncover the intra-originalist disputes that appeared less relevant when they were not writing majority opinions.⁵⁷ Perhaps nowhere are these disputes and confusion more evident than in *Kennedy*. What follows is the full paragraph in which the Court explains the methodology lower courts and others should use when interpreting the Establishment Clause. I leave in it the citations and quotations the Court relied on because they are an important part of the story:

In place of *Lemon* and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by “reference to historical practices and understandings.” *Town of Greece*, 572 U.S. at 576, 134 S.Ct. 1811; see also *American Legion*, 588 U. S., at ----, 139 S.Ct., at 2087 (plurality opinion). “[T]he line” that courts and governments “must draw between the permissible and the impermissible” has to “accor[d] with history and faithfully reflect the understanding of the Founding Fathers.” *Town of Greece*, 572 U.S. at 577, 134 S.Ct. 1811 (quoting *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 294, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963) (Brennan, J., concurring)). An analysis focused on original meaning and history, this Court has stressed, has long represented the rule rather than some “exception” within the “Court’s Establishment

57. See Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, 101 B.U. L. REV. 1953, 1965 (2021) [hereinafter Solum, *The Public Meaning Thesis*] (fleshing out the differences between original public meaning, original intent, and original methods originalism); Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243, 1251 (2019) (explaining original methods originalism); Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 271, 275 (2017) [hereinafter Solum, *Originalist Methodology*] (exploring the various originalist methodologies); William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2355 (2015) (considering four possible relationships that originalism could have with American law).

Clause jurisprudence.” 572 U.S. at 575, 134 S.Ct. 1811; see *American Legion*, 588 U. S., at ----, 139 S.Ct., at 2087 (plurality opinion); *Torcaso v. Watkins*, 367 U.S. 488, 490, 81 S.Ct. 1680, 6 L.Ed.2d 982 (1961) (analyzing certain historical elements of religious establishments); *McGowan v. Maryland*, 366 U.S. 420, 437–440, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961) (analyzing Sunday closing laws by looking to their “place ... in the First Amendment’s history”); *Walz v. Tax Comm’n of City of New York*, 397 U.S. 664, 680, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970) (analyzing the “history and uninterrupted practice” of church tax exemptions). The District and the Ninth Circuit erred by failing to heed this guidance.⁵⁸

An astute reader, one who has spent time becoming aware of the various strands of originalism, should see a web of confusion in that paragraph. At least three versions of originalism manifest themselves.

The first is a methodology the Justices refer to as “historical practices and understandings.”⁵⁹ They provide little explanation for what this means. They cite *Town of Greece*,⁶⁰ in which the Court had quoted the phrase from an opinion from Justice Kennedy in *County of Allegheny*⁶¹ and used it as support to uphold prayers before a town council because they appeared to be a longstanding practice acceptable from the founding to today.⁶² If that were the end of the analysis, it might give us a clear—although certainly disputed—methodology for interpreting the Establishment Clause. It might also provide the academics the obvious target they seek to criticize.

But Justice Gorsuch then offers a second methodology. The next sentence, once again citing *Town of Greece*, which in turn

58. *Kennedy*, 142 S. Ct. at 2428.

59. *Id.* at 2414.

60. *Town of Greece v. Galloway*, 572 U.S. 565 (2014).

61. *Cnty. of Allegheny v. Am. C.L. Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 670 (1989) (Kennedy, J., concurring in part and dissenting in part).

62. *Town of Greece*, 572 U.S. at 576–77.

was relying on a concurrence from Justice Brennan, dictates that courts, to determine if a government action violates the Establishment Clause, must determine whether that action “accor[ds] with history and faithfully reflec[ts] the understanding of the Founding Fathers.”⁶³ This appears to be a form of original intent originalism and seems to be a different methodology than searching for “historical practices and understandings.” According to this formulation, it appears lower courts should be looking for what the founders understood. It is somewhat quixotic because many originalists long ago abandoned original intent originalism.⁶⁴

That brings us to the next sentence in that paragraph, which requires courts to focus on “original meaning and history.”⁶⁵ This seems to speak to original public meaning originalism, which was the favorite for a time to replace the search for the elusive original intent. This methodology requires courts to look for the meaning of a given text to the public who ratified it, rather than focus on the subjective understanding of any of the founders.⁶⁶ It might also refer to original law originalism, which requires courts to look to the *legal* meaning of a given legal text when it was ratified, rather than the *public* meaning.⁶⁷ Which

63. *Kennedy*, 142 S. Ct. at 2428 (quoting *Town of Greece*, 572 U.S. at 577 (relying on Justice Brennan’s concurrence in *School Dist. Of Abington Township v. Schempp*, 374 U.S. 203)).

64. See Lawrence B. Solum, *What Is Originalism? The Evolution of Contemporary Originalist Theory*, in *THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION* 12, 12, 37 (Grant Huscroft & Bradley W. Miller eds., 2011).

65. *Kennedy*, 142 S. Ct. at 2414.

66. Solum, *Originalist Methodology*, *supra* note 57, at 275.

67. See William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 *Nw. U. L. Rev.* 1455, 1457 (2019); William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 *LAW & HIST. REV.* 809, 812 (2019); see also William Baude, *Is Originalism Our Law?*, 115 *COLUM. L. REV.* 2349, 2356–57 (2015).

methodology the Court had in mind is unknown because the opinion did not specify.

However we read that paragraph, it is far from clear precisely what methodology lower courts and government officials are to use when interpreting the Establishment Clause. We might be tempted to think the rest of the opinion provides insights, but they are fleeting at best, glimpsed only as flashes without explanation. Later in its *Kennedy* analysis, the Court notes that “coercion . . . was among the foremost hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment.”⁶⁸ This might suggest yet another methodology: that lower courts should look to see what the “hallmarks of religious establishments” were at the founding, then enjoin anything that mirrors them today. This, of course, appears to be a nod to Professor Michael McConnell’s famous law review article *Establishment and Disestablishment at the Founding*.⁶⁹ Yet once again, the Court does not clarify this as the new test.

To give a sense of the confusion, advocates and scholars disagree widely on what *Kennedy* means. As already explained, some academics, lawmakers, and the dissent in *Kennedy* conclude all prior caselaw is now abandoned, replaced with a “history and tradition” test.⁷⁰

Professors Lupu and Tuttle argue that *Kennedy* repudiated only the “endorsement test” that arose from *Lemon*, not prior principles on which *Lemon* was built.⁷¹ According to them, many longstanding antiestablishment principles remain in effect after *Kennedy*, including the requirement that government actions have a secular purpose, that they not advance religion, and that

68. *Kennedy*, 142 S. Ct. at 2429.

69. See Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2144–2146 (2003).

70. See *supra* Part I.

71. See Lupu & Tuttle, *supra* note 49, at 620–21.

they avoid excessive entanglement with religion.⁷² This may or may not be plausible, but *Kennedy*'s vagueness makes it a possibility.

The state of Louisiana and the Becket Fund for Religious Liberty reach an altogether different conclusion. They argue *Kennedy* abandoned *Lemon* and replaced it with a clear “hallmarks test,” as explained above.⁷³ Professors Helfand and Storslee reach a similar, more nuanced conclusion, with the caution of careful scholars rather than advocates in litigation.⁷⁴ Some lower courts have followed this approach as well.⁷⁵ How do they get there? According to both the scholars and the advocates, the way readers can find this clear test is by first reading footnote 5 in *Kennedy*, which is attached to the sentence using the word “hallmarks.” That footnote reads *en toto*:

See, e.g., Lee v. Weisman, 505 U.S. 577, 640–642, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992) (Scalia, J. dissenting); *Shurtleff*, 596 U. S., at ---- - ----, 142 S.Ct., at 1608-1610 (opinion of GORSUCH, J.) (discussing coercion and certain other historical hallmarks of an established religion); 1 Annals of Cong. 730–731 (1789) (Madison explaining that the First Amendment aimed to prevent one or multiple sects from “establish[ing] a religion to which they would compel others to conform”); M. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2144–2146 (2003).⁷⁶

Of course, nothing in the body text sentence or in the footnote explicitly instructs that the “hallmarks” test is the new

72. *Id.* at 621–629.

73. *See* Appellants’ Supplemental En Banc Brief at 38, *Roake v. Brumley*, 170 F.4th 292 (2026) (No. 24-30706).

74. *See* Storslee & Helfand, *supra* note 12, at 117.

75. *See* Andrew Koppelman & Michael Judah, *The New Establishment Clause Hallmarks Test: Sources and Distortions* 20–22 (Nw. Pub. L. Rsch. Paper No. 25-41, 2025) (available at <https://ssrn.com/abstract=5366546> [<https://perma.cc/3QVK-G7PR>]).

76. *Kennedy*, 142 S. Ct. at 2429 n.5.

methodology lower courts should apply. Instead, readers are to note that the second source cited in that footnote is Justice Gorsuch's concurrence in *Shurtleff v. City of Boston*.⁷⁷ They are then supposed to read that concurrence, which sets forth various hallmarks of religious establishments.⁷⁸ They are then to conclude that after *Kennedy* "courts should look to these and other 'telling traits' of historical establishments when discerning whether some government action violates the Constitution."⁷⁹ If that was the black letter law lower courts are to glean from *Kennedy*, Justice Gorsuch deserves an award for making its discovery a spectacular treasure hunt. And even then, lower courts and proponents of the test do not agree on how it should be applied.⁸⁰

A short essay is not the forum to dive deeper into these various theories about what *Kennedy* means or to take sides on who is interpreting *Kennedy* correctly. I share them only to highlight how confusing the law currently is and to point out that the assumption about the test that currently applies is premature. Our Establishment Clause jurisprudence is in a state of flux, and years of litigation will help settle it. The Supreme Court can do so as well, hopefully by choosing one methodology next time and clearly stating what it is and what it requires. The Fifth Circuit's April 2026 decision upholding Texas's Ten Commandments law⁸¹ gives them a wonderful opportunity. Academics may still disagree with whatever the Court states, but at least their object of criticism will be more evident than it is now.

77. *Id.* (citing *Shurtleff v. City of Boston*, 142 S. Ct. 1583, 1608–10 (2022) (Gorsuch, J., concurring)).

78. *Shurtleff*, 142 S. Ct. at 1608–10.

79. Storslee & Helfand, *supra* note 12, at 117 (quoting *Shurtleff*, 142 S. Ct. at 1609).

80. See Koppelman & Judah, *supra* note 75, at 19–20.

81. *Nathan v. Alamo Heights Indep. Sch. Dist.*, No. 25-50695, 2026 WL 1078691 (5th Cir. Apr. 21, 2026).

B. *Underestimating the No-Coercion Rule*

Katskee argues that the Supreme Court has now interpreted the “Free Speech and Free Exercise Clauses to require . . . coercion of children in public schools.”⁸² Corbin argues that *Kennedy* “scaled back” the no-coercion rule.⁸³ This, again, is overstatement, both about what existed before and what coercion looks like going forward. As much as I have lamented the confusion *Kennedy* has sown, I have offered it praise in my other writings.⁸⁴ One rule *Kennedy* clarified is that, when public employees are privately exercising religion, they do not violate the Establishment Clause unless they are coercing others to participate.⁸⁵ A public employee privately practicing religion and thus endorsing it on behalf of the state is no longer sufficient for a constitutional violation.⁸⁶ That clarity is both welcome and much needed.

The Court has never been a model of precision for when coercion applied or what it looked like. I do not have the space here to put meat on the bones of that claim, but I have written about it elsewhere.⁸⁷ In sum, the Court, for sixty years, oscillated between whether government coercion, endorsement, or something else would violate the Establishment Clause.⁸⁸

The academics suggest otherwise. Corbin argues that in its past cases, the Court set forth an explicit rule prohibiting government from engaging in “social coercion” in public schools.⁸⁹ She then contends that the coach in *Kennedy* violated that rule

82. Katskee, *supra* note 3, at 178.

83. Corbin, *supra* note 1, at 10–12.

84. See Steven T. Collis, *Public Employees as a Reflection of a Religiously Diverse Culture*, 99 NOTRE DAME L. REV. REFLECTION 229, 229–31 (2024).

85. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2429 (2022).

86. *Id.* at 2427–28.

87. Collis, *supra* note 84, at 231–33.

88. *Id.*

89. Corbin, *supra* note 1, at 10.

and the current Court allowed it, weakening the no-coercion rule in the process.⁹⁰ Schragger, Schwartzman, and Tebbe argue something similar.⁹¹ This is an oversimplification.

The no-coercion rule in the Court's past cases was far from clear, but it involved more than the presence of social coercion.⁹² The cases often involved "compelled attendance" and students as captive audiences with "no real alternative to avoid" participating in a religious exercise or experiencing the social coercion.⁹³ Reasonable minds can disagree with the Court's holding in *Town of Greece* that no coercion existed, but the gravamen of that decision was that members of the public were not compelled to attend the prayer, were not a captive audience, and experienced no adverse or positive treatment based on their reactions to the prayers.⁹⁴ Those factors have always been a critical component of what "coercion" means for Establishment Clause purposes.

Kennedy did not change that. Katskee,⁹⁵ Corbin,⁹⁶ and the dissent⁹⁷ reach the same conclusion many commentators make who are eager to criticize the current Court—they accuse the *Kennedy* majority of ignoring the most egregious prayers that seemed

90. *Id.* at 10–11.

91. Schragger et al., *supra* note 2, at 223 (arguing that the Court was clear in its early prayer cases about when coercion or endorsement resulted in an Establishment Clause violation).

92. *Contra* Corbin, *supra* note 1, at 11, 22–23 (suggesting social pressure has always been clearly enough to establish coercion).

93. *Lee v. Weisman*, 505 U.S. 577, 598 (1992); *see also* *Engel v. Vitale*, 370 U.S. 421, 422, 424 (1962) (involving mandatory prayers in front of captive students in public school classrooms); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 205 (1963) (involving mandatory Protestant Bible reading in classrooms of captive students).

94. *Town of Greece v. Galloway*, 572 U.S. 565, 587–91 (2014).

95. Katskee, *supra* note 3, at 179, 184–85.

96. Corbin, *supra* note 1, at 23.

97. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2434 (2022) (Sotomayor, J., dissenting).

to include coercive pressure and instead deciding the case on only a few cherry-picked prayers. This ignores the reality of the litigation. It was undisputed in *Kennedy* that when the conflict erupted into the headlines, Coach Kennedy was leading the team in prayer in the locker room and on the field.⁹⁸ He was also leading the team in what could be called sermons at the fifty-yard line.⁹⁹ He had inherited the locker room prayers from previous coaches.¹⁰⁰ The activity at the fifty-yard line began because the coach had been offering prayers by himself and eventually allowed students to join him.¹⁰¹

Once litigation commenced, however, Coach Kennedy agreed to abandon the locker room prayers and leading students in vocal prayers or sermons.¹⁰² This concession is important, and critics ignores it entirely. What Kennedy asked for in the litigation, in his complaint and in his request for a preliminary injunction, was the right to offer brief, quiet prayers of thanksgiving at the fifty-yard line after the game was over and players were about their own business.¹⁰³

Because that was the dispute in the case, it would have been inappropriate, even strange, for the Justices to focus on the other prayers Kennedy had willingly agreed to abandon. Neither the dissent nor Corbin explain why the existence of the earlier forms of prayer make his requested prayers coercive. Indeed, I can only surmise as to why Coach Kennedy made the concessions he did, but it is likely because each of those settings for the other prayers involved some element of the coercion the Court has long forbidden. The locker room prayers involved compelled attendance

98. *See id.* at 2416 (majority opinion).

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 2417, 2429.

103. *Id.* at 2417.

that “objecting student[s] had no real alternative to avoid.”¹⁰⁴ The prayers and sermons at the fifty-yard line created similar coercive pressure, for students could rightly expect that their coach would notice their absence.

Coercion, like many legal concepts, is difficult to define with precision. Difficult cases on which reasonable minds can disagree will always exist. In my view, *Town of Greece* and *Kennedy* are among them. It was a plausible argument in *Town of Greece*, even if it did not win the day, that prayers before town councils were not the same as legislative prayers in Congress or legislatures because lawmakers would notice if citizens did not participate.¹⁰⁵ It was a plausible argument in *Kennedy*, even if it did not win the day, that the position of a coach is so powerful that any amount of prayer in view of students would be coercive even if no other coercive pressure was evident.¹⁰⁶ But the academics engage in overstatement when they argue, as Corbin does, that the “Roberts Court’s view of coercion” has made the concept so “narrow” as to have no application to cases involving the posting of the Ten Commandments.¹⁰⁷

III. Historical Analysis and a No-Coercion Rule Need Not Lead to Establishment

Although I am very much sympathetic to originalism’s aims—the rule of law, constraining judges, and fixing some meaning to constitutional and statutory text¹⁰⁸—I am not a full convert to originalism, in part because I realize how difficult and nuanced the project is of determining original meaning,

104. *Lee v. Weisman*, 505 U.S. 577, 598 (1992).

105. *See* Brief for Respondents at 1, *Town of Greece v. Galloway*, 572 U.S. 565 (2014) (No. 12-696), 2013 WL 5230742, at *1.

106. *See* Brief of Baptist Joint Committee for Religious Liberty et al. as Amici Curiae in Support of Respondent at 14, *Kennedy*, 142 S. Ct. 2407 (2022) (No. 21-418), 2022 WL 1032638, at *14.

107. Corbin, *supra* note 1, at 22.

108. *See* Solum, *The Public Meaning Thesis*, *supra* note 57, at 1964.

especially the further we go back in time. But it is also evident that originalism, however the Court now seems to conceive of it (including a “history and tradition” test), can result in a robust Establishment Clause. It can also result in courts determining that prominent Ten Commandments displays in every public school classroom are a constitutional violation.

Katskee disagrees. He argues that “history and tradition” cannot be applied in any meaningful way:

The uselessness of this so-called historical approach in answering specific legal questions like the ones that *Kennedy* actually presented—or even the ones that the Court treated it as presenting—underscores a more basic problem: The Supreme Court’s admonishment to look to history and tradition is not a legal test at all. It’s a slogan. And one that nobody quite knows what to do with.¹⁰⁹

Here, he and Corbin differ. She provides lower courts guidance for how to perform what she calls a “[p]rincipled” analysis of history and tradition.¹¹⁰ She then offers principles derived from history that can be applied to today’s problem—exactly what originalism purports to do.¹¹¹ I am sure many would quibble with the principles Corbin sets forth, but I instead want to focus on her assumption that the Supreme Court, lower court judges, and academics sympathetic to originalism will never apply it in a principled way, as well as Katskee’s claim that doing so is impossible. Not so.

Consider the recent Ten Commandments cases out of Texas¹¹² and Louisiana.¹¹³ Professors Storslee and Helfand offer a

109. Katskee, *supra* note 3, at 189.

110. Corbin, *supra* note 1, at 48.

111. *Id.* at 54–64.

112. *Nathan v. Alamo Heights Indep. Sch. Dist.*, No. 25-50695, 2026 WL 1078691 (5th Cir. Apr. 21, 2026).

113. *Roake v. Brumley*, No. 24-30706, 2026 WL 482555 (5th Cir. Feb. 20, 2026) (en banc).

robust argument for why an original understanding of the Establishment Clause may prohibit the posting of the Ten Commandments in public school classrooms.¹¹⁴ Drawing on the history surrounding church-attendance laws, they persuasively show that, for the founding generation, “creating a captive audience through coercion to worship or impart government-approved religious teaching was a project that lay beyond the government’s proper authority.”¹¹⁵ Modern Ten Commandments laws, they contend, transgress that limit.

Professors McConnell and Chapman offer a forceful historical account of the Establishment Clause in their book *Agreeing to Disagree*.¹¹⁶ They point out that a “basic tenet of disestablishment, on which evangelical and enlightenment opponents of establishment at the founding fully agreed” was “that the government may not compel the performance of religious duties, such as attendance at worship services.”¹¹⁷ They go on to argue that many of the Court’s mid-twentieth-century school prayer cases “illustrate how the principles of historic disestablishment can be applied, convincingly, to modern circumstances.”¹¹⁸

The no-coercion rule the Court has maintained will also play an important role in antiestablishment cases. As noted, according to Corbin, the rule now seems to be “so narrow” that “it may be impossible to claim unconstitutional coercion when challenging religious displays, no matter their context or location.”¹¹⁹ That claim is more a tool for Corbin to attack the current Court than a reflection of the current doctrine.

114. Storslee & Helfand, *supra* note 12, at 166–71.

115. *Id.* at 130.

116. CHAPMAN & MCCONNELL, *supra* note 12.

117. *Id.* at 145.

118. *Id.*

119. Corbin, *supra* note 1, at 22–23.

Although coercion has never been fully defined, the Court has not abandoned its long-accepted features. When government compels attendance¹²⁰ and forces impressionable students as captive audiences¹²¹ to read religious text specific to only a few faiths, it has engaged in unconstitutional coercion.

Obviously, the specifics of every case matter. The mere presence of the Ten Commandments in a school classroom does not result in unconstitutional coercion. If they are part of a course on comparative religions or a history of the development of the Western world or religion's role in the development of our nation,¹²² their presence may be entirely appropriate. The Court might uphold some version of them in public schools. That remains to be seen, but using history to interpret the Establishment Clause does not guarantee it. Much depends on how schools are using them.¹²³ In cases such as those arising out of Texas and Louisiana, the argument for coercion is strong. They are at the front of the room where students cannot help but look at them.¹²⁴ By virtue of laws mandating school attendance,¹²⁵ students remain captive audiences that cannot escape the displays. In

120. *See, e.g., Lee v. Weisman*, 505 U.S. 577, 598 (1992) (“The prayer exercises in this case are especially improper because the State has in every practical sense compelled attendance and participation in an explicit religious exercise at an event of singular importance to every student, one the objecting student had no real alternative to avoid.”).

121. *See, e.g., Stone v. Graham*, 449 U.S. 39, 42 (1980); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 205 (1963); *Engel v. Vitale*, 370 U.S. 421, 430 (1962).

122. *See, e.g., Religious Curriculum in Schools*, 2026 Utah Laws Ch. 435 (S.B. 268) (providing for education on “the fundamental role of religion in United States history”).

123. It is well understood and uncontroversial that schools may teach about religions and religious history without running afoul of the Establishment Clause.

124. *See* TEX. EDUC. CODE ANN. § 1.0041 (2025); LA. STAT. ANN. § 17:2124 (2024).

125. *See* TEX. EDUC. CODE ANN. § 25.085; LA. REV. STAT. ANN. § 17:221.

contrast to *Kennedy*, the displays are obviously from the government and not the mere preference of an individual teacher.¹²⁶

The academics are so eager to criticize the Court, and the lawmakers so eager to praise it, that they both fail to acknowledge that originalism and anticoercion principles can work to prohibit Ten Commandments displays.

Conclusion

The Establishment Clause is an important pillar in the structure of religious liberty in the United States. The Court's doctrine regarding it still has a long way to go. One can reasonably argue that it is as confused now as it has ever been. Helping lower courts understand and apply whatever form of originalism the Supreme Court has adopted is far better than constructing a strawman and attacking it.

In another era, the Justices admitted that they could “only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law.”¹²⁷ That statement is as true as ever. Better to help them in the process.

126. For a more difficult case, see *Arroyo-Castro v. Gasper*, 812 F. Supp. 3d 203, 208, 210 (D. Conn. 2025), *appeal docketed*, No. 25-3047 (2d Cir. Dec. 3, 2025) (involving a teacher's ability to hang a cross in her personal space in the classroom).

127. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).