The Religion Clauses After *Kennedy v. Bremerton School District*

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ABSTRACT: The Supreme Court's recent decision in Kennedy v. Bremerton School District *marks an important point in the Court's doctrine regarding the First Amendment's Religion Clauses.* Kennedy*'s most noteworthy contribution to the law may have been its clear declaration that the* Lemon *test and its endorsement offshoots are no longer the governing legal standard. Instead, the Court will interpret the Establishment Clause "by 'reference to historical practices and understandings.'" But what, precisely, does this historical approach entail? And aside from that test, what does Kennedy have to say about doctrinal developments under the Free Exercise Clause?*

This Essay makes three primary observations about Kennedy. *First, the Court's refined Establishment Clause test is both more nuanced and more straightforward than many scholars suggest. The Court indicated that while coercion is one important historical hallmark of an established religion, it is not the only relevant hallmark. Thus, coercion has not become the new* sine qua non *for all future Establishment Clause violations. This Essay suggests that, in the future, the Court will likely look to whether relevant government action falls within a range of at least six distinct historical hallmarks, and unique doctrinal tests will apply in each of these distinct historically significant contexts. Second,* Kennedy *clarifies the relationship between the Establishment Clause and the Free Exercise Clause, rejecting the notion that*

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these clauses are in tension and instead embracing a vision of them as complementary and likely working together to decrease unnecessary government interference with religion. Third, the Court provided additional doctrinal clarifications protecting religious rights under the Free Exercise Clause, including categorically prohibiting official hostility toward religion, expanding an understanding of what it means for a law to fail either neutrality or general applicability, and requiring government to articulate its interest under strict scrutiny contemporaneously, rather than as a post hoc *litigation tactic. Thus, this Essay suggests that, in many ways, the impact* Kennedy *will have on the law has likely been overstated (particularly when combined with some of the factual disputes about the case). On the other hand, some of the potential important implications of* Kennedy *have yet to be appreciated.*

INTRODUCTION

The Supreme Court's recent decision in *Kennedy v. Bremerton School District* marks an important point in the Court's doctrine regarding the First Amendment's Religion Clauses.[1] *Kennedy*'s most noteworthy contribution to the law may have been its clear declaration that the *Lemon* test[2] and its endorsement offshoots are no longer the governing legal standard. Instead, the Court will interpret the Establishment Clause "by 'reference to historical

1. *See generally* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022) (holding that a school district burdened the rights of an employee under the Free Exercise and Free Speech Clauses).

2. *See generally* Lemon v. Kurtzman, 403 U.S. 602 (1971) (holding that Rhode Island statutes that aided nonpublic schools violated the Religion Clauses of the First Amendment).

practices and understandings.'"[3] But what, precisely, does this historical approach entail? Will it supply lower courts with sufficient guidance? And how does this approach interact with the Free Exercise Clause? Some critics have suggested that a historical test will prove hopelessly unworkable.[4] Others have suggested that the Court has simply replaced one abstract test (*Lemon*) with another (coercion).[5] And the importance of *Kennedy* for the Free Exercise Clause has largely been ignored altogether.

This Essay, however, closely analyzes *Kennedy* to both describe what the Court actually held and makes some observations about the potential trajectory of the Court's doctrine under the Religion Clauses. This Essay makes three primary observations. First, the Court's refined Establishment Clause test is both more nuanced and more straightforward than many scholars suggest. The Court indicated that while coercion is *one* important historical hallmark of an established religion, it is not the only relevant hallmark. Thus, coercion has not become the new *sine qua non* for all future Establishment Clause violations. This Essay suggests that in the future, the Court will likely look to whether relevant government action falls within a range of at least six distinct historical hallmarks, and unique doctrinal tests will apply in each of these distinct historically significant contexts. One implication is that this approach likely leaves in place much of the Court's longstanding Establishment Clause jurisprudence, including more of the school prayer cases than has been supposed. Second, *Kennedy* clarifies the relationship between the Establishment Clause and the Free Exercise Clause, rejecting the notion that these clauses are in tension and instead embracing a vision of them as complementary and likely working together to decrease unnecessary government interference with religion. This, along with the Court's decision in *Carson v. Makin*,[6] removes any justification for government to discriminate against religion when acting in the so-called "play in the joints" realm. Third, the Court provided additional doctrinal clarifications protecting religious rights under the Free Exercise Clause, including categorically prohibiting official hostility toward religion, expanding an understanding of what it means for a law to fail either neutrality or general applicability, and requiring government to articulate its interest under strict scrutiny contemporaneously, rather than as a *post hoc* litigation tactic.

Thus, this Essay suggests that in many ways the impact *Kennedy* will have on the law has likely been overstated (particularly when combined with some of the factual disputes about the case). On the other hand, some of the potential important implications of *Kennedy* have yet to be appreciated.

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3. *Kennedy*, 142 S. Ct. at 2428 (citing Town of Greece v. Galloway, 572 U.S. 565, 576 (2014)).

4. *See infra* Part II.

5. *See infra* Part II.

6. *See generally* Carson v. Makin, 142 S. Ct. 1987 (2022) ("Maine's decision to continue excluding religious schools from its tuition assistance program after *Zelman* thus promotes stricter separation of church and state than the Federal Constitution requires.").

I. BACKGROUND

Before delving into the Court's doctrinal analysis, it is worth getting some clarity on the facts of the case. Mr. Kennedy characterized his desired religious activity as "a quiet prayer by himself at midfield after the game ended."[7] The school district described Mr. Kennedy's desired religious activity as "a spectacle of delivering midfield prayers at the immediate conclusion of games and insist[ing] that students must be allowed to join."[8] As the photos Justice Sotomayor included in her dissent will attest, there is no doubt that during part of his tenure as a coach Mr. Kennedy prayed aloud with students.[9] These prayers with students occurred both in the locker room and on the field.[10]

But the question wasn't whether Mr. Kennedy *ever* prayed aloud with students. The relevant question was what type of prayer Mr. Kennedy was requesting the school to allow him to perform *moving forward* as a religious accommodation. That question was answered by the correspondence between Mr. Kennedy and the school district.

The school district initially expressed concern on September 17, 2015, about "two," and only two, "problematic practices" in which Mr. Kennedy had been engaging.[11] "First," he "provid[ed] an inspirational talk at midfield following the completion of the game" to students who were "invited to participate in this activity."[12] "Second, he . . . led [the] 'students and coaching staff in a prayer'" prior to most games, in the locker room.[13]

After receiving this letter from the school district, "[Mr.] Kennedy stopped participating in [the practice of] locker room prayers" to students.[14] He also stopped postgame prayers on the field that were directed to his students.[15] The school district acknowledged that he stopped doing both of these things and described this development as "positive."[16] The school district stated, "Mr. Kennedy has confirmed his understanding of" the school's written guidance received on September 17, "and to the District's knowledge, he has complied with the District's directives."[17] The school district also explained in a public Q&A document that Mr. Kennedy "ha[d] complied with the District's" instruction to refrain from "his prior practices of leading players in a pre-game

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7. Brief for Petitioner at i, *Kennedy*, 142 S. Ct. 2407 (No. 21-418).

8. Brief for Respondent at i, *Kennedy*, 142 S. Ct. 2407 (No. 21-418).

9. *Kennedy*, 142 S. Ct. at 2436–39 (Sotomayor, J., dissenting).

10. The locker room tradition in fact predated Mr. Kennedy. *See* Joint Appendix at 170, *Kennedy*, 142 S. Ct. 2407 (No. 21-418) [hereinafter Joint Appendix]; *see also Kennedy*, 142 S. Ct. at 2417, 2429.

11. *Kennedy*, S. Ct. at 2416.

12. Joint Appendix, *supra* note 10, at 40.

13. *Kennedy*, 142 S. Ct. at 2416.

14. *Id.* at 2437 (Sotomayor, J., dissenting); *see also id.* at 2417 (majority opinion).

15. *Kennedy*, 142 S. Ct. at 2417.

16. Joint Appendix, *supra* note 10, at 77.

17. *Id.*

prayer in the locker room or leading players in a post-game prayer immediately following games."[18]

However, Mr. Kennedy did not agree to cease praying all together. He asked to be able to say a prayer of thanks on the football field, but to do so without encouraging his students to participate.[19] Mr. Kennedy sent a letter to school officials informing them that, because of "his sincerely-held religious beliefs," he "felt compelled" to offer a "post-game personal prayer" of thanks at midfield.[20] He asked the District to allow him to continue what he described as his own "private religious expression."[21] Consistent with the District's written school policy,[22] Mr. Kennedy explained that "[h]e neither requests, encourages, nor discourages students from participating in" these prayers.[23]

This sort of midfield prayer, not directed to or including his students, is precisely the type of prayer Mr. Kennedy offered during his final three games that followed the school district's September 17 letter.[24] One can search the photographs of the games that followed September 17.[25] You may find members of the public or even members of other teams joining Mr. Kennedy in photographs the dissent features.[26] But none of Mr. Kennedy's own students joined his prayers during these three pivotal games after September 17, and for which the school district ultimately disciplined Mr. Kennedy.[27] Indeed, the only photo the dissent highlights of Mr. Kennedy praying with his own students is conspicuously missing a date, and none of the parties allege that this photo was taken after September 17.[28]

In his letter to the school requesting a religious accommodation, Mr. Kennedy objected to the implication of the school district's September 17 letter, which he understood as banning him "from bowing his head" even in the vicinity "where students may be praying," and as requiring him to "flee the scene if students voluntarily c[a]me to the same area" where he was praying.[29] Mr. Kennedy said that if a student voluntarily joined him, he would not stand up and "bravely r[u]n away."[30] After all, the school district's own policy prohibited teachers from "discourag[ing]" independent student decisions to pray.[31]

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18. *Id.* at 77, 105.
19. *See id.* at 62–72.
20. *Id.* at 62–64, 172.
21. *Id.* at 62.
22. *See id.* at 48.
23. *Id.* at 64; *see also* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2417 (2022).
24. *Kennedy*, 142 S. Ct. at 2417.
25. Joint Appendix, *supra* note 10, at 82, 97–98.
26. *See Kennedy*, 142 S. Ct. at 2436, 2438–39 (Sotomayor, J., dissenting).
27. *See id.* at 2418–19 (majority opinion).
28. *See* Joint Appendix, *supra* note 10, at 98.
29. *Id.* at 70.
30. *See* MONTY PYTHON, THE BRAVE SIR ROBIN SONG (BBC 1969).
31. *See* Joint Appendix, *supra* note 10, at 44.

If this were all Mr. Kennedy had said on the matter, one could understand the school district's arguments that Mr. Kennedy was bent on finding ways to continue praying with students. But Mr. Kennedy further explained his willingness to ensure his prayers were not directed to or with students. He explained in his letter to the school that he sought only the opportunity to "wait[] until the game is over and the players have left the field and then walk[] to mid-field to say a short, private, personal prayer."[32] He also later testified during his deposition that he "told everybody" that it would be acceptable to him to pray "when the kids went away from [him]."[33] He also clarified that this meant he may even be willing to say his "prayer while the players were walking to the locker room" or "bus," and then catch up with his team.[34] Notably, this is quite similar to the sort of solution that Professors Laycock and Lund advocated for in their excellent amicus brief before the Supreme Court.[35]

Given Mr. Kennedy's repeated communication to the school that he was willing to pray in ways that would separate himself from his students, one might wonder why the school district didn't promptly settle the case or resolve the dispute. The likely reason no such settlement was forthcoming is a reason offered by the school district itself: It wouldn't have been satisfied with Mr. Kennedy waiting to pray on the field even if students were in the locker room or on the bus. The school officials believed the Establishment Clause required the school to prohibit Mr. Kennedy from engaging in any "public religious display."[36] Otherwise, the District would "violat[e] the . . . Establishment Clause because . . . reasonable . . . students and attendees" might perceive the "district [as] endors[ing] . . . religion."[37] Thus, rather than accommodate Mr. Kennedy's desire to offer his own prayer on the field, separate from students, the school forbade him from engaging in "any overt actions" that could "appear[] to a reasonable observer to endorse . . . prayer[] while he is on duty as a District-paid coach."[38] This understanding of the Establishment Clause,

32. *Id.* at 69.

33. *Id.* at 292.

34. *Id.* at 280–82; *see also id.* at 59.

35. *See* Brief of Baptist Joint Comm. for Religious Liberty & Am. Jewish Comm. et al. as Amici Curiae in Support of Respondent at 15–16, Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022) (No. 21-418) 2022 WL 1032638, at *15–16 ("Petitioner has ample ways to avoid putting that religious pressure on his students. *Amici* respect Petitioner's religious obligation to pray after the game. But Petitioner can satisfy that obligation without involving his students. Most obviously, he can simply wait until the students leave, and then pray by himself. . . . To be sure, *amici* are not asking Petitioner to leave the stadium and then come back. All *amici* want Petitioner to do is pray in a way that clearly separates his private from his governmental capacity . . . . He could delay the prayer at the [fifty]-yard line. Or kneel to pray . . . while the students are otherwise occupied . . . .").

36. *See* Joint Appendix, *supra* note 10, at 104, 106, 107, 110.

37. *Id.* at 105.

38. *Id.* at 81.

the District believed, necessarily took precedence over Mr. Kennedy's religious exercise and free speech rights.[39]

II. HISTORICAL HALLMARKS AND DISTINCT DOCTRINAL TESTS

The Supreme Court made clear that the school district's understanding of the Establishment Clause is not the law. It explained "that this Court long ago abandoned *Lemon* and its endorsement test offshoot."[40] To be sure, previous Supreme Court cases had criticized *Lemon* and disavowed the test as controlling law in some areas.[41] But *Kennedy* now makes clear that *Lemon* and its endorsement test are not the controlling law in any context.

So what replaces *Lemon*? "In place of *Lemon* and the endorsement test," the Court instructed "that the Establishment Clause must be interpreted by 'reference to historical practices and understandings.'"[42] But what, precisely, does such a historical test entail?

Some scholars, such as Richard Epstein, have argued that the Court overruled *Lemon* "without developing a different test, beyond making a now-fashionable bow toward the 'original meaning and history' of constitutional language in [its] interpreting of the Establishment Clause."[43] Others have argued that going forward, the Supreme Court has simply replaced the *Lemon* test with a coercion test. As Noah Feldman stated:

> To the extent the court offered a hint about its historical test, it mentioned that the framers understood the establishment clause to prohibit religious coercion—forcing people to perform religious acts they do not wish to perform. . . . The court did not quite announce the bright-line rule that coercion is necessary—but that is a probable reading of the new rule.[44]

In other words, anything that constitutes government coercion of religious observances would violate the Establishment Clause, and coercion would be a necessary component of an Establishment Clause violation. Under such a view, practices like the school prayers at issue in *Engel v. Vitale* would be constitutional,

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39. *See id.*

40. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427 (2022) (citing Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2079–81 (2019)).

41. *See, e.g.*, Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring) ("Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again . . . .").

42. *Kennedy*, 142 S. Ct. at 2428 (citing Town of Greece v. Galloway, 572 U.S. 565, 576 (2014)).

43. Richard A. Epstein, *Unnecessary Church-State Confusion*, HOOVER INST.: DEFINING IDEAS (July 25, 2022), https://www.hoover.org/research/unnecessary-church-state-confusion [https://perma.cc/DE2X-RGSR].

44. Noah Feldman, *Supreme Court is Eroding the Wall Between Church and State*, WASH. POST (June 30, 2022, 10:15 AM), https://www.washingtonpost.com/business/supreme-court-is-eroding-the-wall-between-church-and-state/2022/06/27/197c7cd6-f63c-11ec-81db-ac07a394a86b_story.html [https://perma.cc/J9N8-5BGK?type=image].

where the school drafted a uniform prayer for all teachers to read with students but provided some sort of opt-out procedure.[45] Ira Lupu and Robert Tuttle similarly argue in this vein that "[p]rayer in schools may soon . . . requir[e] the provision of opt out rights to avoid compelled speech but no limitations on what schools may sponsor."[46]

However, I argue that a close read of the Court's opinion in *Kennedy* indicates that it is adopting a much more nuanced historical test, rather than replacing one abstract test with another one focused solely on coercion. Specifically, the Court appears to be adopting an approach that gives distinct meaning to a variety of historical hallmarks relevant to what was viewed as an established religion at the founding.

To this end, the Court explained that historically, government action that coerced individuals to participate in a religious exercise on pain of legal penalty "was *among* the foremost hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment."[47] Note the "*among*." The Court did not say that coercion, in the abstract, was the *sine qua non* of historical religious establishments.

To underscore that point, the Court concluded its sentence about coercion with a footnote citing Michael McConnell's scholarship that identifies multiple important historical hallmarks of established religions.[48] This footnote also cites approvingly to Justice Gorsuch's concurring opinion from the same term, which summarized these historical hallmarks and provided some doctrinal guidance relevant to the various hallmarks.[49] Specifically, Justice Gorsuch's concurrence stated as follows:

> Beyond a formal declaration that a religious denomination was in fact the established church, it seems that founding-era religious establishments often bore certain other telling traits. ***First***, the government exerted control over the doctrine and personnel of the established church. ***Second***, the government mandated attendance in the established church and punished people for failing to participate. ***Third***, the government punished dissenting churches and individuals for their religious exercise. ***Fourth***, the government restricted political participation by dissenters. ***Fifth***, the government provided financial support for the established church, often in a way that preferred the

45. *See* Engel v. Vitale, 370 U.S. 421, 422–23 (1962).

46. Ira C. Lupu & Robert W. Tuttle, Response, *Kennedy v. Bremerton School District—A Sledgehammer to the Bedrock of Nonestablishment*, GEO. WASH. L. REV. ON DOCKET (July 26, 2022), https://gwlr.org/kennedy-v-bremerton-school-district-a-sledgehammer-to-the-bedrock-of-nonestablishment [https://perma.cc/CM5A-6MQY].

47. *Kennedy*, 142 S. Ct. at 2429 (emphasis added).

48. *See id.* at 2429 n.5; *see also* Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2110–12, 2131 (2003).

49. *Kennedy*, 142 S. Ct. at 2429 n.5 (citing Shurtleff v. City of Boston, 142 S. Ct. 1583, 1608–10 (2022) (Gorsuch, J., concurring)).

> established denomination over other churches. And ***sixth***, the government used the established church to carry out certain civil functions, often by giving the established church a monopoly over a specific function.[50]

Notably, not all of these hallmarks involve coercion. For instance, it is not clear how preferential financial support of a religious group would be coercive. Yet such behavior would still constitute a problematic historical hallmark of an established religion. Further, even if a church welcomed government control over the doctrine and personnel of the established church, such entanglement would still likely pose Establishment Clause issues. When James Madison was Secretary of State, for instance, the Catholic Church solicited the Executive's opinion on who should be appointed to run church affairs in a new territory.[51] "Madison responded that the selection of church 'functionaries' was an 'entirely ecclesiastical' matter left to the Church's own judgment."[52]

Thus, in future cases when the Court is identifying whether a government practice constitutes a violation of the Establishment Clause, it will likely look to whether, at a low level of abstraction, the challenged practice resembles one of these hallmarks in important respects. And the Court will likely apply different types of doctrinal tests, depending on the relevant historical hallmark.

III. IMPLICATIONS FOR EXISTING ESTABLISHMENT CLAUSE DOCTRINE

The Court's current case law already reflects a sensitivity to these historical hallmarks of established religion in many ways. The first hallmark, regarding government control of church personnel or doctrine, is reflected in part through the Court's ministerial exception and church autonomy jurisprudence. Under *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission* and *Our Lady of Guadalupe School v. Morrissey-Berru*, the Supreme Court ruled that federal discrimination laws do not apply to religious organizations' employment relationship with their religious leaders.[53] And in recent cases, some members of the Court have signaled an interest in expanding and fleshing out the contours of the church autonomy doctrine outside of the ministerial context, including other areas where government control of church doctrine or staff would be problematic.[54]

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50. *Shurtleff*, 142 S. Ct. at 1609 (Gorsuch, J., concurring) (emphasis added) (citation omitted).

51. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 184 (2012).

52. *Id.*; *see also* Stephanie H. Barclay, Brady Earley & Annika Boone, *Original Meaning and the Establishment Clause: A Corpus Linguistics Analysis*, 61 ARIZ. L. REV. 505, 534–37 (2019) (discussing founding-era factors relevant to the establishment of a state religion). *See generally* Stephanie H. Barclay, *Untangling Entanglement*, 97 WASH. U. L. REV. 1701 (2020) (examining entanglement jurisprudence and its historical support).

53. *See Hosanna-Tabor*, 565 U.S. at 171; Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2055 (2020).

54. *See* Gordon Coll. v. DeWeese-Boyd, 142 S. Ct. 952, 952–53 (2022) (Alito, J., concurring) (respecting the denial of certiorari).

The second coercion hallmark, regarding mandated participation in a religious exercise, is relevant to cases like *Kennedy*, *Lee v. Weisman*,[55] and *Santa Fe Independent School District v. Doe*.[56] In *Kennedy*, for example, the Court analyzed whether the government was mandating participation in a religious exercise and punishing those who fail to do so.[57] There, the Court emphasized that historically problematic coercion included "mak[ing] . . . religious observance[s] compulsory," "coerc[ing] anyone to attend church,"[58] or otherwise "forc[ing] citizens to engage in 'a formal religious exercise.'"[59] But the Court found no coercion in Mr. Kennedy's context because he willingly ended his practice of postgame religious talks and locker room prayers with his team.[60] As discussed above in Part I, the only prayer Mr. Kennedy sought to continue was his own quiet prayer on the football field, while his students were otherwise occupied. Mr. Kennedy explained that he could pray "while the kids were doing the fight song" and "take a knee by [him]self and give thanks and continue on."[61]As the *Kennedy* Court described:

> Mr. Kennedy [also] considered it "acceptable" to say his "prayer while the players were walking to the locker room" or "bus," and then catch up with his team. In short, Mr. Kennedy did not seek to direct any prayers to students or require anyone else to participate. His plan was to wait to pray until athletes were occupied, and he "told everybody" that's what he wished "to do." It was for three prayers of this sort alone in October 2015 [where Mr. Kennedy prayed without any of his students involved] that the District suspended him.[62]

By contrast, the *Kennedy* Court explained why the school prayer was problematic in cases like *Lee* and *Santa Fe*.[63] In those cases, the prayer was publicly broadcast at events where school attendance was mandatory for some students (or essentially mandatory).[64] It is worth noting, however, that the *Santa Fe* Court independently engaged in an analysis relevant to a reasonable observer's perceptions of the prayer.[65] That type of reasonable observer analysis is likely no longer good law, as it is part of *Lemon*'s "endorsement test offshoot" the Court disavowed.[66]

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55. Lee v. Weisman, 505 U.S. 577, 580, 598 (1992).
56. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 294 (2000).
57. *See* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2429–33 (2022).
58. *Id.* at 2429 (quoting Zorach v. Clauson, 343 U.S. 306, 314 (1952)).
59. *Id.* (quoting *Lee*, 505 U.S. at 589).
60. Joint Appendix, *supra* note 10, at 70, 77, 170–72.
61. *Id.* at 294.
62. *Kennedy*, 142 S. Ct. at 2429–30 (citations omitted) (quoting Joint Appendix).
63. *See id.* at 2431–32.
64. *See id.*
65. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000).
66. *See Kennedy*, 142 S. Ct. at 2427.

The third hallmark, regarding punishment of dissenting religious individuals or groups, is probably coextensive with the Court's Free Exercise jurisprudence, discussed further below under Part V.

The fourth hallmark, regarding restriction of political participation, has led to the Court holding unlawful practices that restrict political participation by dissenters.[67] In *Torcaso*, the Court held unlawful the practices that restrict political participation by dissenters, including rules requiring public officials to proclaim a belief in God.[68]

The Court's analysis in the fifth hallmark context, regarding public support of religion, is illustrated in *Carson v. Makin*.[69] Building on previous cases like *Trinity Lutheran Church of Columbia v. Comer*[70] and *Espinoza v. Montana Department of Revenue*,[71] the Court upheld nondiscriminatory public financial support for religious institutions alongside other entities.[72] On the other hand, it would be problematic under the Establishment Clause if the government were giving this school aid to just one type of preferred denomination.

Finally, regarding the sixth hallmark, the Supreme Court has in the past invalidated government efforts to give churches monopolistic control over certain civil functions.[73] For example, in *Larkin*, Massachusetts enacted a law allowing any church located within 500 feet (150 m) of an establishment seeking a liquor license to unilaterally object to that license and essentially veto it.[74] The Court determined that such a law violated the Establishment Clause.[75] At the same time, the Court has upheld the ability of churches to perform important civil functions, like foster care, in the context where other secular options for the civil function are available to the public.[76]

What does the Court's historical approach to the Establishment Clause mean for its school prayer cases? Lupu and Tuttle have argued the implication of *Kennedy* is to essentially repudiate the Establishment Clause, sweep away the Court's school prayer precedent, and ignore the teachings of cases like *Engel*.[77] Lupu and Tuttle are probably correct that *Engel* did not involve coercion of the type that is likely cognizable under the second historical hallmark of the

67. *See* Torcaso v. Watkins, 367 U.S. 488, 490 (1961).

68. *Id.* at 495–96.

69. *See* Carson v. Makin, 142 S. Ct. 1987, 2002 (2022).

70. Trinity Lutheran Church of Colum., Inc. v. Comer, 137 S. Ct. 2012, 2024–25 (2017).

71. Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2260 (2020).

72. *Carson*, 142 S. Ct. at 2002; *see also Espinoza*, 140 S. Ct. at 2260–63; *Trinity Lutheran*, 137 S. Ct. at 2024–25; Zelman v. Simmons-Harris, 536 U.S. 639, 662–63 (2002).

73. *See* Larkin v. Grendel's Den, Inc., 459 U.S. 116, 127 (1982).

74. *Id.* at 117.

75. *Id.* at 120.

76. *See, e.g.*, Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1882 (2021).

77. Lupu & Tuttle, *supra* note 46.

Establishment Clause. But that does not mean that the facts of *Engel* raise no problems under the Establishment Clause.

Recall that the first historical hallmark of an establishment involved not just government control over church personnel, but also the religious doctrine or liturgy. Historically, the Act of Supremacy, originally passed in 1534, gave the monarch "authority to reform and redress all errors, heresies, and abuses" in the Church of England.[78] Parliament also enacted the Articles of Faith during the reign of Edward VI, and these articles "set forth the doctrinal tenets of the Church, and the Book of Common Prayer, which prescribed the liturgy for religious [exercise]."[79]

In *Engel*, the students could opt out of a daily school prayer practice, thus potentially negating relevant coercion.[80] But when one reads the Supreme Court's decision in *Engel*, it is striking that the Court spent almost no time expressing concern about coercion and almost all of the discussion expressing concern regarding the official composition by state officials of a uniform, state school prayer that students were encouraged to recite in public schools.[81]

In other words, because the government was essentially creating a religious liturgy for the public, it ran into Establishment Clause limitations, notwithstanding the potential lack of coercion. The *Engel* Court emphasized the challenged practice involved a "prayer [that] was composed by governmental officials as a part of a governmental program to further religious beliefs."[82] Citing relevant Establishment Clause history, the Court explained the following:

> It is a matter of history that this very practice of establishing governmentally composed prayers for religious services was one of the reasons which caused many of our early colonists to leave England and seek religious freedom in America. The Book of Common Prayer, which was created under governmental direction and which was approved by Acts of Parliament in 1548 and 1549, set out in minute detail the accepted form and content of prayer and other religious ceremonies to be used in the established, tax-supported Church of England. The controversies over the Book and what should be its content repeatedly threatened to disrupt the peace of that country as the accepted forms of prayer in the established church changed with the views of the particular ruler that happened to be in control at the time.[83]

78. McConnell, *supra* note 48, at 2112–13 (quoting Supremacy Act 1534, 26 Hen. 8 c. 1 (Eng.), *reprinted in* 1 SOURCES OF ENGLISH CONSTITUTIONAL HISTORY 311, 311 (Carl Stephenson & Frederick Marcham eds. & trans., 1937)).

79. *Id.* at 2113 (footnote omitted).

80. *See* Engel v. Vitale, 370 U.S. 421, 430 (1962).

81. *See id.* at 430–33.

82. *Id.* at 425; *see also id.* at 422–23 (quoting the prayer).

83. *Id.* at 425–26 (footnotes omitted).

This is not to say that any public prayers by government officials would rise to the level of liturgy or state-sponsored religious doctrine. After all, the same Congress that passed the First Amendment also instituted official congressional chaplains to offer prayer.[84] And prayers have been offered at inaugurations and other holidays since the nation's founding.[85] But where the government crosses the line into creating a type of standardized religious text meant for public consumption, this likely starts to bump against the historical hallmark of controlling or creating religious doctrine. Thus, *Engel* likely remains good law in that regard.

The Court's approach of focusing on the historical hallmarks of an establishment also likely means that the Court will not invalidate typical religious symbols in public anymore. As McConnell has observed, "[n]o one at the time of the founding is recorded as arguing that the use of religious symbols in public contexts was a form of religious establishment."[86] For most of its existence, this country had "an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life."[87] It was not until the 1970s that the Court began to invalidate religious displays after *Lemon*.[88] But that ahistorical detour no longer operates as the relevant law.

To the contrary, the *Kennedy* Court emphasized "that the Establishment Clause does not include anything like a 'modified heckler's veto, in which . . . religious activity can be proscribed' based on 'perceptions' or 'discomfort.'"[89] Nor is it consistent with a pluralistic religious society for government to "roam[] the land, tearing down monuments with religious symbolism and scrubbing away any reference to the divine."[90]

IV. IMPLICATIONS FOR THE INTERPLAY BETWEEN THE ESTABLISHMENT AND FREE EXERCISE CLAUSES

Perhaps one of the most important implications of *Kennedy* is that it rejects the idea that the Establishment Clause and the Free Exercise Clause are conceptually in "direct tension" with one another.[91] Instead, the Court conceived of these Clauses as having complementary purposes:

84. *See* Barclay et al., *supra* note 52, at 517–18.

85. *See* Martin J. Medhurst, *From Duché to Provoost: The Birth of Inaugural Prayer*, 24 J. CHURCH & STATE 573, 573 (1975) (discussing inaugural prayer); Barclay et al., *supra* note 52, at 517–18 (discussing the "resolutions['] [call] upon the President to proclaim days of prayer and thanksgiving").

86. Michael W. McConnell, *No More (Old) Symbol Cases*, 2019 CATO SUP. CT. REV. 91, 107.

87. Lynch v. Donnelly, 465 U.S. 668, 674 (1984).

88. *See* CYNTHIA BROUGHER, CONG. RSCH. SERV., RS22223, PUBLIC DISPLAY OF THE TEN COMMANDMENTS AND OTHER RELIGIOUS SYMBOLS 1–2 (2011); McConnell, *supra* note 86, at 107.

89. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427 (2022) (alteration in original) (quoting Good News Club v. Milford Cent. Sch., 533 U.S. 98, 119 (2001)).

90. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2084–85 (2019).

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

> [T]he District argues that its suspension of Mr. Kennedy was essential to avoid a violation of the Establishment Clause. On its account, Mr. Kennedy's prayers might have been protected by the Free Exercise and Free Speech Clauses. But his rights were in "direct tension" with the competing demands of the Establishment Clause. . . . 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." A natural reading of that sentence would seem to suggest the Clauses have "complementary" purposes . . . . In truth, there is no conflict between the constitutional commands before us. There is only the "mere shadow" of a conflict, a false choice premised on a misconstruction of the Establishment Clause.[92]

One implication of the Court's rejection of the existence of this type of inherent tension is that, in many ways, it makes the "play in the joints" concept irrelevant. That phrase has been used in different contexts, but it was made famous in the Supreme Court's decision in *Locke v. Davey*.[93] There, the Court said the following:

> The Religion Clauses of the First Amendment provide: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." These two Clauses, the Establishment Clause and the Free Exercise Clause, are frequently in tension. Yet we have long said that "there is room for play in the joints" between them. In other words, there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause.[94]

The need for some "play in the joints," or some room for permissible action, arose from the idea of this tension between the Clauses, and that there might be a narrow realm of government action regarding religion that neither the Establishment Clause prohibited, nor the Free Exercise Clause required. And sometimes this narrow realm of government action would permit discrimination against religious groups to allow government to err on the

92. *Id.* at 2426, 2432 (citations omitted).

93. Locke v. Davey, 540 U.S. 712, 718 (2004); *see also* Alan Trammell, Note, *The Cabining of* Rosenberger*:* Locke v. Davey *and the Broad Nondiscrimination Principle That Never Was*, 92 VA. L. REV. 1957, 1988 (2006) ("Although several Supreme Court opinions have alluded to this idea since 1963, 'play in the joints' hardly enjoyed the status of settled doctrine. This Section traces the evolution of the theory, which clearly inspired the thinking of several Justices over the years but never figured into an actual holding by the Supreme Court until *Davey*.").

94. *Locke*, 540 U.S. at 718–19 (citations omitted).

"safe side" of the Establishment Clause, even if such discrimination was not required by the Establishment Clause.

By rejecting the fabricated tension between Clauses in *Kennedy*, the Court is signaling that this particular area is irrelevant, often hostile to religion in a way that discouraged government funding, accommodation, or acknowledgement of religion. Instead, there will be wide swaths of activity that are protected by the Free Exercise Clause and not prohibited by the Establishment Clause, and vice versa, where the government actions operate to decrease government control of religion. And in some cases, there will be government action that both the Establishment Clause and the Free Exercise Clause together prohibit, speaking with one voice. For example, the Establishment Clause and Free Exercise Clause are perfectly aligned in prohibiting government interference with the employment relationship between a religious organization and the religious leader. One could view both clauses as working together in tandem to decrease unjustified government control of religion, though from different vantage points.

To be sure, there may still be outlier cases where a specific Free Exercise Clause claim does raise Establishment Clause concerns. For example, if a teacher claimed a free exercise interest in requiring children in school to pray with the teacher as part of the class or if a religious institution claimed a free exercise right in receiving preferential public funding over other religious denominations, these sorts of claims would likely raise Establishment Clause concerns. But the possibility of tension at the margins is far different from a framework that envisions these clauses at odds with one another by their very nature.

V. IMPLICATIONS FOR THE FREE EXERCISE CLAUSE DOCTRINE

Kennedy will likely be most widely remembered for its impact on the Court's Establishment Clause jurisprudence. But as a final coda to this piece, it is worth noting a few important implications in the opinion for the Free Exercise Clause that should not go unnoticed.

To begin, the Court has now made explicit what was implicit in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*[95]: The government is categorically prohibited from burdening religious exercise when it is doing so based on "'official expressions of hostility' to religion."[96] The government will not have an opportunity, under strict scrutiny, to present a justification for this type of government action. The action will simply be per se invalid. Indeed, in *Masterpiece*, the Court did not go on to analyze the government's justification and allow it the chance to rebut its burden under strict scrutiny after the Court had identified expressions of hostility made against religion.[97]

95. *See* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1729–31 (2018).
96. *Kennedy*, 142 S. Ct. at 2422 n.1.
97. *See Masterpiece Cakeshop*, 138 S. Ct. at 1731–32.

This categorical prohibition may also cohere with other doctrinal elements of the Religion Clauses when one considers that one hallmark of the Establishment Clause is that the established church often "punished dissenting churches and individuals for their religious exercise."[98] The Establishment Clause generally gives rise to categorical, rather than rebuttable, prohibitions. And here, the Establishment Clause and Free Exercise Clause speak with one voice in strongly prohibiting this type of government action.

What is also interesting about the Court's categorical prohibition on this official form of hostility is it emphasizes that a lack of "neutrality" under *Employment Division v. Smith*'s neutral and generally applicable framework is something far less than official hostility or government animus.[99] Indeed, there appear to be two independent avenues through which a law can fail neutrality. "A government policy will not qualify as neutral if it is 'specifically directed at . . . religious practice.' A policy can fail this test if it 'discriminate[s] on its face,' *or* if a religious exercise is *otherwise its* '*object.*'"[100] If a government policy either facially calls out religion or if the policy or government action otherwise treats religion as the object of the government action, this will be subjected to strict scrutiny even absent any ill motive toward religion.

The Court also clarified that there are two independent avenues that a law can fail general applicability: "[I]f [the government] 'prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way,' *or* if it provides 'a mechanism for individualized exemptions.'"[101] This individualized exemption mechanism is important. Basically, even if the government has not granted comparable secular exemptions, if the government has a method through which it *could* grant exemptions (i.e., the government maintains a significant amount of discretion), then strict scrutiny applies. This doctrine is arguably consistent with the reasoning of *Smith* itself, which envisioned a world in which legislatures were passing laws to try and advance the good of society and may not always know or anticipate burdens that would arise with religious exercise. As such, burdening religion would "merely [be] the incidental effect of" the law.[102] But where a government official has received a request for a religious accommodation, maintains a mechanism for granting such an exemption, but knowingly refuses to do so anyway, there is nothing incidental about that religious burden. As a result, the official must justify that refusal under strict scrutiny.

In sum, there are two independent avenues for a law to fail neutrality, two independent avenues to fail general applicability, and any of those four avenues

98. Shurtleff v. City of Boston, 142 S. Ct. 1583, 1609 (2022) (Gorsuch, J., concurring in judgment).

99. *See generally* Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872 (1990) (providing a two-part test).

100. *Kennedy*, 142 S. Ct. at 2422 (alteration in original) (emphasis added) (citations omitted).

101. *Id.* (emphasis added) (quoting Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1877 (2021)).

102. *Smith*, 494 U.S. at 878.

will be sufficient to subject a law burdening religious belief to strict scrutiny. Official hostility toward religion, by contrast, results in a categorical prohibition that bypasses the strict scrutiny framework under *Smith* altogether.

In *Kennedy*, the Court also further clarified the requirement that the government articulate its interest in burdening religion contemporaneously to satisfy its burden under strict scrutiny analysis. The Court in *Kennedy* rejected an argument from the school district, raised years into litigation, "that it had to suppress Mr. Kennedy's protected First Amendment activity to ensure order at Bremerton football games."[103] The Court noted that "the District never raised concerns along these lines in its contemporaneous correspondence with Mr. Kennedy."[104] In rejecting this late-coming rationalization, the Court emphasized that "[g]overnment 'justification[s]' for interfering with First Amendment rights 'must be genuine, not hypothesized or invented *post hoc* in response to litigation.'"[105]

Finally, the Court signaled that the debate about the validity of the Court's decision in *Smith* is still alive and well. It stated, "while the test we do apply today has been the subject of some criticism, we have no need to engage with that debate today because no party has asked us to do so."[106] Litigants in future cases were not discouraged from asking the Court to overrule *Smith* and to replace it with a different doctrinal test.

CONCLUSION

One once brushes aside the factual misconceptions about *Kennedy*, this case provides a number of important developments in the Court's jurisprudence under the Establishment Clause and Free Exercise Clause. The historical approach to the Establishment Clause does not leave courts with a blank slate, but instead encourages them to focus on whether the challenged government practice is analogous to one of six specific historical hallmarks of an establishment. The Court further clarifies its protections of religion under the Free Exercise Clause. And moving forward, these clauses likely will not be viewed as in tension, but as working in tandem to protect different aspects of religious freedom.

103. *Kennedy*, 142 S. Ct. at 2432 n.8.

104. *Id.*

105. *Id.* (second alteration in original) (quoting United States v. Virginia, 518 U.S. 515, 533 (1996)).

106. *Id.* at 2422 n.1 (citations omitted).