The Establishment Clause: No Longer a Lemon

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"I appeal to the gentlemen who have heard the voice of their country."
James Madison

INTRODUCTION

The Federal Constitution's First Amendment contains two Religion Clauses: the Establishment Clause and the Free Exercise Clause.[1] The former prohibits the government from enacting laws *respecting an establishment of religion.*[2] The latter protects individuals' rights to *free exercise of religion*,[3] so long as the religious practice does not conflict with "social duties or good order" and a "legitimate" governmental interest.[4] At times, these constitutional provisions *may appear* to conflict, but "[i]n truth, there is no conflict between the[se] constitutional commands."[5]

Since 1990, Free Exercise disputes have been resolved under *Employment Division, Department of Human Resources of Oregon v. Smith*.[6] *Smith* holds that neutral and generally applicable laws, even those that incidentally impact religion, are subject only to rational basis review.[7] However, when laws are not neutral and generally applicable, or involve other constitutional rights, such laws are subject to strict scrutiny.[8] While *Smith* has been called into question, it continues to provide a framework for Free Exercise disputes.[9]

Unlike its approach to Free Exercise disputes, the Court has failed to use a consistent test for Establishment cases. Like the unstable

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1. U.S. Const. amend I.
2. *Id.*
3. *Id.*
4. Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872 (1990); Reynolds v. United States, 98 U.S. 145 (1878).
5. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2432 (2022) ("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."); *see also* Sch. Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203, 308 (1963) (Goldberg, J., concurring) ("[T]he measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow.").
6. 494 U.S. 872.
7. *See generally id.*
8. *Id.* at 872.
9. *See* Fulton v. City of Phila., 141 S. Ct. 1868, 1871 (2021).

Hamlet, the Supreme Court's Establishment Clause doctrine has chaotically alternated course so much that it has left even careful readers confused. From the unworkability of the *Lemon* test to the poorly reasoned *Lee* coercion test, the Court has failed to adopt a proper standard to address Establishment Clause cases.[10] As a result, practitioners have been unable to rely on precedent as they argue the constitutionality of laws and regulations in this area.

This article explores (1) why original public meaning, not intent, is integral to the interpretation of the Establishment Clause; (2) the history and development of the Establishment Clause; and (3) the future of the Establishment Clause.

ORIGINAL PUBLIC MEANING

The Establishment Clause reads, "Congress shall make no law respecting an establishment of religion …."[11] Two important textual details stand out.[12] First, this clause is absolute. It allows *no law* respecting an establishment of religion. Second, is the term *establishment*. What does it mean to *establish*? Does it mean the government cannot support a religion? Erect a cathedral? Direct funds to religious-sponsored schools? When a constitutional term or provision is ambiguous, such as the term *establishment*, the most appropriate practice is to look to the term's original public meaning.[13]

Original public meaning is sometimes conflated with original intent; however, the two are distinct. Those who look to the original intent adopt the same reasoning as those who look to legislative intent.[14] Both succumb to the same problem. How is one objectively meant to discern the intent of either, assuming a unitary intent exists? Each statesman likely possesses a different motive when he or she votes on a

10. *See generally, e.g.*, Cnty. of Allegheny v. ACLU, 492 U.S. 573 (1989), *abrogated by* Town of Greece v. Galloway, 572 U.S. 565 (2014); Lemon v. Kurtzman, 403 U.S. 602 (1971); Town of Greece v. Galloway, 572 U.S. 565 (2014); Van Orden v. Perry, 545 U.S. 677 (2005); Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017).

11. U.S. CONST. amend. I.

12. *See generally, e.g.*, Engel v. Vitale, 370 U.S. 421, 425 (1962). Other textual details should stand out, but for purposes of this article, these two details will suffice.

13. *See generally, e.g.*, Lawrence B. Solum, *Originalist Theory and Precedent: A Public Meaning Approach*, 33 CONST. COMMENT. 451 (2018); *see also* JOHNATHAN O'NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY 86–90, 151–52 (2005) (discussing how the mid-twentieth century First Amendment cases resulted in a greater focus on originalism); *contra* John O. McGinnis & Michael B. Rappaport, *Unifying Original Intent and Original Public Meaning*, 113 NW. U. L. REV. 1371 (2019).

14. ANTONIN SCALIA, A MATTER OF INTERPRETATION 34–35 (1997).

proposed law.[15] Therefore, looking at the Federalist Papers—authored by only three Founding Fathers—or legislative history—stemming from committee reports authored by only a handful of legislators—one cannot be certain as to the intent of every member in a given body. Further, only legislative bodies are *vested* with the power to pass laws, not individual legislators.[16] Unlike the focus on original intent, original public meaning seeks to understand what the words of the Constitution meant to the public at the time of ratification based on historical context and practices.[17]

One of the clearest applications of original public meaning is noted in Justice Scalia's interpretation of the Eighth Amendment. In *Atkins v. Virginia*, the Court held that the execution of "mentally retarded" criminals was "cruel and unusual punishment," thereby violating the Constitution.[18] The Court did not consider historical practices when rendering its decision; rather it focused on "evolving standards of decency."[19] In dissent, Justice Scalia argued that judges should interpret the Constitution as it was ratified by the People.[20] Recognizing that capital punishment, for defendants comparable to Atkins, was universally accepted in 1791, Justice Scalia concluded that there was no Constitutional violation.[21]

Some legal scholars argue that original public meaning ought to rely on public understanding during the Reconstruction era (when the Fourteenth Amendment was ratified).[22] However, the Court "generally assume[s] that the scope of the protection applicable to the Federal Government and States is pegged to the public understanding … when the Bill of Rights was adopted in 1791."[23] As noted by those who prescribe to original public meaning, its principle aim is to respect the

15. *See* Lee v. Weisman, 505 U.S. 577, 626 (1992) (Souter, J., concurring) ("[A]t best… the Framers simply did not share a common understanding of the Establishment Clause, and, at worst, that they, like other politicians, could raise constitutional ideals one day and turn their backs on them the next.").

16. U.S. CONST. Art. I.

17. *See, e.g.*, Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot., 560 U.S. 702, 725 (2010) (The Court looked to the original or "classic" meaning of "takings" under the Fifth Amendment).

18. Atkins v. Va., 536 U.S. 304, 320–21 (2002).

19. *Id.*

20. *See, e.g.*, *id.* at 337–40 (Scalia, J., dissenting).

21. *Id. See also* SCALIA, *supra* note 14, at 37–41.

22. Kurt Lash, *Respeaking the Bill of Rights: A New Doctrine of Incorporation*, 97 INDIANA L.J. 1439, 1441. ("When the people adopted the Fourteenth Amendment, they readopted the original Bill of Rights, and did so in a manner that invested those original 1791 texts with new 1868 meanings.").

23. N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2137 (2022).

democratic voice of the People and prevent judges from usurping the laws adopted by the People.[24]

THE HISTORY AND DEVELOPMENT OF THE ESTABLISHMENT CLAUSE

The United States Supreme Court first addressed the boundaries of the Establishment Clause in 1947.[25] In *Everson v. Board of Education*, the Court addressed two issues: (1) whether the Establishment Clause is incorporated against the states and (2) whether a government-subsidized transportation program that applies equally to both public and parochial schools violated the Establishment Clause.[26] The Court, without providing significant analysis, answered affirmatively to the first issue.[27] In addressing the second issue, Justice Black, writing for the Court, focused largely on the work of Thomas Jefferson and James Madison, whose advocacy led to the passage of the Virginia Bill for Religious Liberty.[28] In their advocacy, Jefferson and Madison allegedly favored a strict separationist approach.[29] Justice Black concluded that because the Virginia Bill for Religious Liberty and the First Amendment had the "same objective," it was reasonable to assume that, as Thomas Jefferson stated in personal correspondence, the First Amendment erects "a wall of separation between Church and State."[30] This focus on Jefferson and Madison is a prime example of the Court erroneously relying upon the original intent rather than the original public meaning of the Establishment Clause's text. Although the Court did not strike down the program as unconstitutional, it did not attempt to look beyond the intent of two Framers. Regardless of this case's resolution, its reasoning set an unprincipled precedent.

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24. *See e.g.*, SCALIA, *supra* note 14, at 37–41. *See generally also* Thomas A. Schweitzer, *Justice Scalia, Originalism and Textualism*, 33 TOURO L. REV. 749 (2017).

25. Everson v. Bd. of Educ., 330 U.S. 1 (1947).

26. *Id.*

27. *Id.* at 8.

28. *Id.* at 12.

29. *Id.*

30. *Id.* ("The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.").

In the decades following, the Court's Establishment Clause jurisprudence continued to focus on the original intent.[31] For example, in *Wallace v. Jaffree*, then-Associate Justice Rehnquist suggested that the Framers intended to allow the government to financially support religion if the state did not prefer one sect over another.[32] While Justice Souter, also arguing on original intent grounds, suggested that the "Framers opposed government financial support for religion … With respect to money, religion was to be wholly voluntary. Churches either would support themselves or they would not, but the government would neither help nor interfere."[33]

Taken together, these interpretations of the Establishment Clause demonstrate a major shortcoming of relying on original intent when interpreting the Constitution. Relying on original intent requires going into the minds of others. If the Federal Rules of Evidence prohibit jurors from considering testimony based on speculation of what others think, how could the same tactic be useful to judges?

Historically, the Court's approach to the Establishment Clause has "rest[ed] upon the changeable philosophical predilections of the Justices of [the] Court."[34] Some circuit court judges have even referred to the Court's everchanging Establishment Clause jurisprudence as a "hot mess."[35] Among the numerous tests announced by the Court are, the *Lemon* test, the endorsement test, and the *Lee* coercion test.[36] None of which acknowledge original public meaning.

Although not the first test used by the federal courts, the *Lemon* test was the first widely used Establishment Clause test.[37] In *Lemon v. Kurtzman*, the Court struck down a state program aiding religious schools.[38] The so-called three-prong *Lemon* test requires that the government action (1) have a secular purpose; (2) not have the primary

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31. *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 612–16 (1992) (Souter, J., concurring).

32. Wallace v. Jaffree, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting) ("The Framers intended the Establishment Clause to prohibit the designation of any church as a 'national' one.").

33. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 872 (1995) (Souter, J., dissenting) (quoting Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 WM & MARY L.R. 875, 921, 923 (1986)).

34. Lee v. Weisman, 505 U.S. 577, 631 (1992) (Scalia, J., dissenting).

35. *See* Kondrat'yev v. City of Pensacola, 903 F.3d 1169, 1179 (11th Cir. 2018) (Newsom, J., concurring in the judgment) ("The Court's Establishment Clause jurisprudence is, to use a technical legal term of art, a hot mess."), *vacated and remanded*, 139 S. Ct. 2772 (2019); *Kondrat'yev*, 903 F.3d at 1184 (Royal, J., concurring in the judgment).

36. *See generally* Town of Greece v. Galloway, 572 U.S. 565 (2014) (The *Lee* coercion test was given new life by the *Town of Greece* Court).

37. Lemon v. Kurtzman, 403 U.S. 602, 606 (1971) (The *Lemon* Court did not formally establish a three-prong test).

38. *Id.*

effect of advancing or inhibiting religion; and (3) must not result in excessive government entanglement with religion.[39] In pronouncing the *Lemon* test, the Court failed to provide clear guidance as to what constitutes *excessive entanglement* or when a law advances or inhibits religion. As a result, lower courts struggled to apply *Lemon*, forcing the Supreme Court repeatedly to revamp the *Lemon* test.[40]

In the mid-1980s and early 1990s, the Court often implemented Justice O'Connor's endorsement test.[41] First articulated in *Lynch v. Donnelly*, the endorsement test interprets the Establishment Clause as prohibiting government action that would be perceived by a reasonable observer as endorsing or disapproving of religion.[42] The endorsement test is not a standalone test; rather, its purpose is to supplant the purpose prong of the *Lemon* test.[43] In *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, the Court examined whether religious holiday displays violated the Establishment Clause. The two displays in question included (1) a crèche on the steps leading to the courthouse and (2) a Chanukah menorah placed outside a county building, next to a Christmas tree and a sign saluting liberty.[44] Implementing the endorsement test, the Court held that the crèche violated the Establishment Clause because "[n]o viewer could reasonably think that [the crèche] occupies [the Grand Staircase to the courthouse] without the support and approval of the government."[45] However, the display featuring a Christmas tree, menorah, and a sign saluting liberty did not violate the Establishment Clause because it was "not sufficiently likely that residents … will perceive the … display… as an endorsement or disapproval" of religion.[46]

The endorsement test has received widespread criticism.[47] Chief among them is that the ill-defined *reasonable observer* standard is partly responsible for inconsistent holdings.[48] In truth, the Court never defined what constitutes a reasonable observer. The only guidance for lower courts were concurring opinions from Justices O'Connor and

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39. *Id.*

40. *See* Agostini v. Felton, 521 U.S. 203 (1997).

41. *See* Cnty. of Allegheny v. ACLU, 492 U.S. 573 (1989) (The Court demonstrated that the endorsement test was subsumed by the second prong of the *Lemon* test), *abrogated by* Town of Greece v. Galloway, 572 U.S. 565 (2014).

42. *See* Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

43. *Id.* at 691 ("The proper inquiry under the purpose prong of *Lemon*, I submit, is whether the government intends to convey a message of endorsement or disapproval of religion.").

44. *See generally id.* at 668.

45. *Cnty. Of Allegheny*, 492 U.S. at 599–600, *abrogated by* Town of Greece v. Galloway, 572 U.S. 565 (2014).

46. *Id.* at 620 (internal quotations omitted).

47. *See generally, e.g.*, Jesse H. Choper, *The Endorsement Test: Its Status and Desirability*, 18 J.L. & POL. 499 (2002).

48. *Id.* at 510–21.

Stevens.[49] Because Justices O'Connor and Stevens had differing views on "[h]ow much information [courts]… impute[d] to a reasonable observer [was] unclear."[50]

Lower federal courts failed to consistently apply the reasonable observer standard. For example, the Ninth Circuit held that a city's sponsorship of a statue representing an ancient Aztec deity did not violate the Establishment Clause because "[t]he reasonable observer is not an expert on esoteric religions."[51] In contrast, the Third Circuit adopted a less stringent reasonable observer standard.[52] In *ACLU New Jersey v. Schundler*, a city held a "celebration of diversity throughout the year" that featured, among other things, "symbols of Christianity and Judaism."[53] The city argued that those familiar with the celebration understood that the display was not an endorsement of religion.[54] However, the Third Circuit reasoned that because a reasonable observer cannot be expected to have a general awareness of such festivities, the use of the religious symbols violated the Establishment Clause.[55]

Some have postulated that inconsistency is baked into the endorsement test because it forces judges to supplant their views when deciding cases.[56] Perhaps this is because the endorsement test is not rooted in original public meaning. Whatever one's views, the endorsement test proved to be unworkable and was subsequently "abandoned" in 2014.[57]

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49. *See* Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 807 (1995) (Steven, J., dissenting) ("Many (probably most) reasonable people do not know the difference between a public forum, a limited public forum, and a non-public forum … For a religious display to violate the Establishment Clause, I think it is enough that some reasonable observers would attribute a religious message to the State."); Cnty. of Allegheny, 492 U.S. at 632 (O'Connor, J., concurring) ("[A] reasonable observer would take into account the values underlying the Free Exercise Clause in assessing whether the challenged practice conveyed a message of endorsement.").

50. Buono v. Norton, 371 F.3d 543, 550 (9th Cir. 2004); Am. Atheists, Inc. v. Duncan, 616 F.3d 1145, 1159 (10th Cir. 2010), *amended* and *superseded* on reh'g sub nom. Am. Atheists, Inc. v. Davenport, 637 F.3d 1095 (10th Cir. 2010).

51. Alvarado v. City of San Jose, 94 F.3d 1223, 1232 (9th Cir. 1996); *see also* Jesse H. Choper, *The Endorsement Test: Its Status and Desirability*, 18 J.L. & POL. 499, 513 (2002).

52. ACLU v. Schundler, 104 F.3d 1435, 1448 (3d Cir. 1997) ("We agree with Justice Stevens that assuming the reasonable observer is aware of history and context when viewing a municipality's religious display is a highly unlikely supposition.").

53. *Id.*

54. *Id.*

55. *See id.*

56. *See* Utah Highway Patrol Ass'n v. Am. Atheists, Inc., 565 U.S. 994 (2011) (Thomas, J., dissenting) (explaining that Courts have struggled to provide continuity with the endorsement test); Doe ex rel. Doe v. Elmbrook Sch. Dist., 687 F.3d 840, 857–58 (7th Cir. 2012) ("The danger, of course, is that this 'reasonable, objective observer,' as in most fields of law, tends to sound a lot like the judge authoring the opinion.").

57. Elmbrook Sch. Dist. v. Doe, 573 U.S. 922 (2014) (Scalia, J., dissenting) (noting that the majority in "*Town of Greece* abandoned the antiquated 'endorsement test' …").

In *Town of Greece v. Galloway*, the Court revisited the *Lee* coercion test.[58] In *Lee v. Weisman*, the Court held that peer pressure amounted to undue coercion and that such coercion to participate in religious activities was unconstitutional.[59] Adding to the *Lee* coercion test, the *Town of Greece* Court held that federal courts must interpret the Establishment Clause in harmony with historical practices. Accordingly, the Court concluded that because legislative prayers were conducted by Congress in 1791, prayer before a city hall meeting was likewise appropriate.[60] Not only was the Court's judgment in *Town of Greece* proper, but its shift towards a historical analysis was a welcomed change.

THREE LONE JUSTICES

Throughout the modern history of the Supreme Court, only three Justices have *seriously* considered original public meaning when interpreting the Establishment Clause—Justices Scalia, Thomas, and Gorsuch. In *Lee v. Weisman*, the Court held that prayer at a high school graduation violated the Establishment Clause because it placed undue peer pressure on attendees to engage in religious practices.[61] However, Justice Scalia argued that the Establishment Clause was limited to "force of law and threat of penalty."[62] Under this standard, now referred to as legal coercion, only laws that force religious activity or inactivity violate the Establishment Clause. In pursuit of the original public meaning of the Establishment Clause, he surveyed historical practices of the People in 1791.[63]

Justice Scalia underscored that "[t]he history and tradition of our Nation are replete with public ceremonies featuring prayers of

58. Town of Greece v. Galloway, 572 U.S. 565, 567 (2014).

59. Lee v. Weisman, 505 U.S. 577, 593 (1992) ("We need not look beyond the circumstances of this case to see the phenomenon at work. The undeniable fact is that the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction.").

60. *See generally Town of Greece*, 572 U.S. 565.

61. *Lee*, 505 U.S. at 593.

62. *Id.* at 631 (1992) (Scalia, J., dissenting).

63. Lynch v. Donnelly, 465 U.S. 668, 673 (1984) ("[Our] interpretation of the Establishment Clause [has] comported with what history reveals was the contemporaneous understanding of its guarantees."); *see also*, Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641, 647 (2013) ("History provides evidence of what is fixed at the time of adoption, and the result of historical inquiry, when properly conducted, is a legal norm that we must follow in the present if we want to continue to be faithful to the Constitution. According to the originalist model of authority, constitutional interpretations are legitimate to the extent that they are consistent with what is fixed at the time of adoption; they are illegitimate to the extent that they are not.").

thanksgiving and petition."[64] This is evident in the Declaration of Independence's "appeal to the Supreme Judge of the world," George Washington's swearing-in with a Bible in hand, Thomas Jefferson's and James Madison's unmistakable references to God in their inaugural addresses, and in a myriad of additional settings.[65] In fact, references to God have continued into modern-day government practices.[66]

Further undercutting the majority's reasoning in *Lee* and *Everson* are the presidential actions of Jefferson and Madison, the purported strict separationists. Jefferson signed treaties that sent religious ministers to the Native Americans and Madison issued proclamations of religious fasting and thanksgivings, none of which sparked widespread controversy.[67] Clearly, Jefferson and Madison, and most importantly the American People, did not, and have continued not, to believe in a "strict wall of separation."

In *Elk Grove Unified Sch. Dist. V. Newdow*, Justice Thomas notes that textually, the Establishment Clause "probably prohibits Congress from establishing a national religion… [and] made clear that Congress could not interfere with state establishments, notwithstanding any argument that could be made based on Congress' power under the Necessary and Proper Clause."[68] In support of this argument, Justice Thomas cites that at least six states had established religions contemporaneous with the ratification of the Bill of Rights.[69] In Justice Thomas's view, the Establishment Clause is a "federalism provision"—a barrier to prevent Congress from interfering with state establishment—and thereby is not incorporated against the states by the Fourteenth Amendment.[70] In interpreting the Constitution's original public meaning, Justice Thomas, like Justice Scalia, has concluded that legal coercion, when applicable, is the most appropriate Establishment Clause test that reflects the original public meaning of the Constitution.[71]

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64. *Lee*, 505 U.S. at 633 (Scalia, J., dissenting); *see generally Town of Greece*, 572 U.S. 565.

65. *Lee*, 505 U.S. at 633 (Scalia, J., dissenting).

66. *See e.g.*, Natalia Almdari, *Joe Biden Was Sworn in on a Massive Bible with a Long Family History. Here's the Story Behind It*, USA TODAY (Jan. 20, 2021, 1:34 PM), https://www.usatoday.com/story/news/politics/2021/01/20/biden-family-bible-appears-inauguration-day-joe-gets-sworn/4232523001/.

67. *See* Hana M. Ryman & J. Mark Alcorn, *Establishment Clause (Separation of Church and State)*, THE FIRST AMEND. ENCYCLOPEDIA (last visited Sept. 17, 2022), mtsu.edu/first-amendment/article/885/establishment-clause-separation-of-church-and-state.

68. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 50 (2004) (Thomas, J., concurring).

69. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1437 (1990).

70. *Id.*

71. *Id.*

Justice Gorsuch has echoed similar sentiments while criticizing the *Lemon* and endorsement tests.[72] In a concurring opinion, Justice Gorsuch opined that *Lemon* was a "misadventure" and that so-called "offended observers" lack standing.[73] Likewise the endorsement test left lower courts confused and unable to evenhandedly apply the law consistently.[74] Of course one of the most troubling issues with *Lemon* and the endorsement tests is that they fail to honor what the People ratified in 1791.[75] Recently in *Shurtleff v. City of Boston*, *Massachusetts*, Justice Gorsuch noted, that while people may agree or disagree with the *Everson* Court, its focus on history was far more appropriate than *Lemon* or subsequent tests.[76] This highlights that original intent, with all of its flaws, is preferable to court-made tests without grounding. Justice Gorsuch also appears to believe that Justice Scalia's legal coercion test is in harmony with historical practice.[77]

Some criticize the legal coercion standard, arguing that it is not what a "majority of the country would be comfortable with."[78] However, such arguments against a legal coercion standard are misplaced. When interpreting the Constitution, the role of Supreme Court Justices is not to ask *what do most people want*, but to ask *what did People adopt when they ratified the Constitution*. Those who ask the former belong in a Congressional chamber, not on the judicial bench.

THE CURRENT STATE AND FUTURE OF THE ESTABLISHMENT CLAUSE

In one of its most recent pronouncements, the Court, in *American Legion v. American Humanist Association*, refused to apply the *Lemon* test.[79] Rather, the Court created a new history-focused test for monument disputes.[80] This shift toward a historical test recognizes, as Justice Scalia indicated in *Lee*, that history and tradition are proper guideposts when addressing Establishment issues. Perhaps more interesting than the majority opinion is the concurring opinion from Justice Kavanaugh. Although Justice Kavanaugh does not mention original

72. *See* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2098 (2019) (Gorsuch, J., concurring).

73. *Id.*

74. *See id.*

75. *See id.* at 2101.

76. Shurtleff v. City of Bos., Ma., 142 S. Ct. 1583, 1606 (2022) (Gorsuch, J., concurring) ("Agree or disagree with the conclusions in these cases, there can be little doubt that the Court approached them in large part using history as its guide.").

77. *Id.* at 1609.

78. *See* Steven G. Gey, *Reconciling the Supreme Court's Four Establishment Clauses*, 8 U. PA. J. CONST. L. 725, 746 (2006).

79. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2080 (2019).

80. *Id.*

public meaning, he, like Justices Thomas and Gorsuch, outright rejects the *Lemon* test and has called for a unifying Establishment Clause test rooted in history and based on coercion.[81] Perhaps Justice Kavanaugh will become the fourth Justice to recognize the importance of original public meaning in this area of law.

Last year, the Supreme Court issued an opinion providing much-needed redirection and reform to its Establishment test.[82] In *Kennedy v. Bremerton School District*, the Court addressed whether a high school football coach's decision to kneel at midfield after games to offer a quiet prayer violated the Constitution.[83] Here, the Court, with guidance from Justice Brennan, held that there was no Establishment Clause violation.[84] Although the Court did not adopt a legal coercion test, it, for the second time, instructed lower courts to dismiss the *Lemon* and endorsement tests.[85] The Court further instructed that all Establishment Clause disputes are to be resolved by "referenc[ing] … historical practices and understandings" (the "*Bremerton* standard").[86]

The *Bremerton* standard resolves many problems present in the *Lemon* and endorsement tests; however, issues remain. The *Bremerton* standard is partly derived from a concurrence authored by Justice Brennan in 1963.[87] According to Justice Brennan, the Court's Establishment Clause approach should be rooted in "history" and must "faithfully reflec[t] the understanding of the Founding Fathers."[88] Unfortunately, he further indicates that what the Founding Fathers intended to foreclose should be forbidden by the Court.[89] With Justice Brennan's concurrence, the *Bremerton* standard opens the door for federal courts

81. *See id.* at 2093 (Kavanaugh, J., concurring) ("If the challenged government practice is not coercive and if it (i) is rooted in history and tradition; or (ii) treats religious people, organizations, speech, or activity equally to comparable secular people, organizations, speech, or activity; or (iii) represents a permissible legislative accommodation or exemption from a generally applicable law, then there ordinarily is no Establishment Clause violation.").

82. *See generally* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022).

83. *Id.* at 2428.

84. *Id.*

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

86. *Id.* (internal quotations omitted) (quoting Town of Greece v. Galloway, 572 U.S. 565, 576) (The Court also stressed the importance of "original meaning and history," underscoring the role of Justices). Though this standard may be referred to as the *Kennedy* Standard, referring to the standard as the *Bremerton* Standard avoids confusion with the coercion test use in the *Town of Greece* which is sometimes referred to as Justice Kennedy's test.

87. Sch. Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203, 233 (1963) (Brennan, J., concurring) (Justice Brennan also explains that contemporary changes impact constitutional interpretation). It should be noted that Justice Brennan would likely have dissented in *Bremerton*. *See generally* Aguilar v. Felton, 473 U.S. 402 (1985), overruled by Agostini v. Felton, 521 U.S. 203 (1997).

88. *Id.* at 294.

89. *Id.* at 294–95.

to examine not only original public meaning, but original intent. As previously examined, original public meaning and original intent are two different tools of interpretation that can lead to contrary conclusions.

A puzzling aspect of *Bremerton* is that it was authored by Justice Gorsuch and fully joined by Justice Thomas. Contrary to *Bremerton*, these two Justices have zealously advocated for original public meaning and have generally shied away from interpretive tools focused on "intent."[90] Perhaps unlike Justice Scalia, who refused the call to be a "consensus builder," Justices Thomas and Gorsuch have, at least in this case, adopted the Brennan approach—willing to make "deal[s]" to get closer to what they believe to be right.[91] However, it is more likely that Justices Thomas and Gorsuch, while practitioners of original public meaning, will nevertheless examine original intent in some circumstance.[92]

Although the *Bremerton* standard on its face allows federal courts to examine original intent, the Court's precedents have provided some guard rails. *Bremerton* and *Town of Greece* have made clear that prayers encouraged or offered by public officials do not violate the Establishment Clause. This is significant because it eliminates the "strict wall of separation" argument that could otherwise be made by federal judges. With regard to coercion, the *Bremerton* Court clarified three points: (1) the Establishment Clause prohibits the government from compelling religious participation; (2) the mere cause of offense or pressure does not equate to impermissible government action; and (3) the types of actions akin to Coach Kennedy's do not "come close to crossing any line one might imagine separating protected private expression from impermissible government coercion."[93] With these instructions, only time will tell if lower federal courts choose to focus on original public meaning, original intent, or coercion.

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90. *See, e.g.*, Neil M. Gorsuch, *Justice Neil Gorsuch: Why Originalism Is the Best Approach to the Constitution*, TIME (Sept. 6, 2019, 8:00 AM), https://time.com/5670400/justice-neil-gorsuch-why-originalism-is-the-best-approach-to-the-constitution/; *see generally* Barr v. Am. Ass'n of Pol. Consultants, Inc., 140 S. Ct. 2335 (2020) (Justice Thomas does not sign onto part three addressing legislative intent and Justice Gorsuch joins only in judgment).

91. CBS Mornings, *Justice Antonin Scalia: "I Can't be a Consensus Builder"*, YOUTUBE (2012), youtube.com/watch?v=CNPuKv_pNks.

92. *See generally* Gregory E. Maggs, *Which Original Meaning Matters to Justice Thomas?*, 4 NYU J. LAW & LIBERTY 494 (2009).

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

CONCLUSION

With a focus on original public meaning and original intent, the Court's clear and official departure from previous Establishment Clause tests is a welcomed change for those who prescribe to original public meaning. With federal courts now guided by recent Supreme Court precedent and "historical practices and understanding," the Constitution's Establishment Clause will now be *more properly* interpreted.[94] Though legal coercion is not the official test adopted by the Court, the *Bremerton* standard does appear to strongly aligned with original public meaning.[95] The effectiveness of the *Bremerton* standard will be tried and tested as cases make their way through the circuit courts.

94. *See* Lee v. Weisman, 505 U.S. 577, 633 (Scalia, J., dissenting) (The *Lemon* and endorsement test left the Court with a "bedeviled" standard).

95. *Kennedy*, 142 S. Ct. at 2430.