THE ESTABLISHMENT OF ORIGINALISM IN *KENNEDY V. BREMERTON SCHOOL DISTRICT*

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Introduction

When ranking America's most famous football coaches, few would expect an assistant coach from a Division Two high school in Washington state to become as notorious as Bill Belichick and Bear Bryant. Nonetheless, Coach Joe Kennedy has become to SCOTUSblog aficionados what Nick Saban is to college football fans: beloved by his friends and despised by everyone else.

In *Kennedy v. Bremerton School District* (2022), the Supreme Court held that Coach Kennedy's choice to kneel and pray on the field after games did not violate the Establishment Clause of the First Amendment. Justice Neil Gorsuch's majority opinion quickly became known for its statement that the Court had "long ago abandoned" the infamous "*Lemon* test." Derived from *Lemon v. Kurtzman* (1971), this oft-reviled test held that the government violates the Establishment Clause when its actions do not have a secular purpose, have a primary effect of advancing or inhibiting religion, or promote "excessive government entanglement" with religion. After *Kennedy*, though, proper interpretation of the Establishment Clause must draw "[t]he line . . . between [ ] permissible and [ ] impermissible" public displays of religion in accordance with history and "the understanding of the Founding Fathers."

Even as the Court articulated this new approach, it left one mystery unsolved: surprisingly, the *Kennedy* Court never explains how exactly Coach Kennedy avoided an Establishment Clause violation under the new standard.

Of course, Justice Gorsuch's opinion lays out the clear principle that Establishment Clause analysis must proceed "by reference to historical practices and understandings." The problem, though, is that he does not apply his own test. The opinion is thin on historical evidence and argumentation, leaving *Kennedy* open to the critique that the Court abandoned originalism while merely paying lip service to history. As Professor Richard Epstein argues, the *Kennedy* Court

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abandoned *Lemon* "without developing a different test, beyond making a now-fashionable bow toward the 'original meaning and history' of constitutional language."

Through a close reading of the *Kennedy* opinion, this Note attempts to understand why exactly Coach Kennedy's actions passed Establishment Clause muster under the Court's new test. Asking this question yields four potential answers:

1) Coercion is the primary historical "hallmark[ ]" of Establishment Clause violations. On the majority's view, Coach Kennedy did not coerce any students into joining his religious exercise. Therefore, he did not violate the Establishment Clause.

2) At the Founding, there were several well-understood "hallmarks" of established religions that were unacceptable to the Founders. Coach Kennedy's actions were not analogous to any of these categories. Therefore, he did not violate the Establishment Clause.

3) Before it was incorporated against the states, the Establishment Clause primarily addressed federal government actions that implicated religious institutions. Against this historical backdrop, it makes no sense to say that an individual's free exercise of religion could become an unconstitutional establishment. To say that Coach Kennedy violated the Establishment Clause would be a contradiction in terms.

4) The historical purpose of the Establishment Clause was to protect the free exercise of religion. By analogy, the Bremerton School District appears to be weaponizing an "establishment" of secularism against Coach Kennedy's free exercise. The Bremerton School District is violating the Establishment Clause by "establishing secularism" to thwart Coach Kennedy's constitutionally protected religious practice.

By exploring the textual hooks for each approach in the opinion, this Note suggests a range of future pathways for *Kennedy*. Justice Gorsuch's broad reliance on history sowed the seeds for multiple interpretations of the Establishment Clause's scope. Because *Kennedy* could come to stand for a number of different propositions, then, lower-court judges will need to consider how far the Establishment Clause can bend before it breaks.

I. Coercion: A Narrow Establishment Clause

In *Kennedy*, Justice Gorsuch discusses the Establishment Clause in three parts. First, he criticizes the lower courts' reliance on

the *Lemon* test. To eradicate this "'ambitiou[s],' abstract, and ahistorical" approach, he replaces *Lemon* with the "historical practices and understandings" standard. Second, he discusses the Bremerton School District's alternative arguments about coercion. Finally, he provides two paragraphs on the general purpose of the Establishment Clause to round out his analysis.

Despite the importance of the meaning and contours of the "historical practices and understandings" test, the Court says remarkably little about it. Indeed, Justice Gorsuch's opinion establishes the test at the end of the first section, but dedicates little space to explaining how to use historical evidence to identify an Establishment Clause violation. Instead, the opinion immediately shifts to evaluating the Court's precedent on coercion.

Helpfully, the coercion analysis uses more history, commencing with the claim that "a historically sensitive understanding of the Establishment Clause" forbids government from compelling religious observances. It is plausible, then, to say that coercion—"among the foremost hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment"—comfortably falls within the scope of the Establishment Clause's "historical practices and understandings." Against this background, scholars like Noah Feldman have argued that *Kennedy* functionally reduces Establishment Clause questions to a coercion test.

From this, then, we can derive the first possible answer to Coach Kennedy's salvation: he avoided Establishment Clause liability because he did not coerce students to join him in any religious exercise. Of course, this analysis presumes that the majority was correct in finding that Coach Kennedy's actions did not indirectly coerce students to participate in religious conduct—a conclusion that Justice Sonia Sotomayor vigorously rejects in dissent.[1] Notwithstanding its precise scope, though, it seems that any version of the Establishment Clause that only contemplates coercion (direct or indirect) would be far narrower than *Lemon* and its offspring.

II. The "Historical Hallmarks" Approach

Despite the Court's limited use of historical material in *Kennedy*, perhaps there is a way to add meat to the bare-bones "historical practices and understandings" test. Professor Stephanie Barclay, for example, has argued that coercion is only one "historical

[1] Justice Sotomayor, along with other commentators, has argued that the *Kennedy* majority subtly transformed the Court's traditional coercion doctrine to protect more religiously motivated conduct.

hallmark" of Establishment Clause jurisprudence. Barclay contends that the other five hallmarks can be found in Justice Gorsuch's concurrence in *Shurtleff v. City of Boston* (2022), which was decided the same Term as *Kennedy* and was cited at critical points in the opinion. *Shurtleff* is a free speech case in which the Court held that it was unconstitutional for Boston to prohibit a Christian group from flying its flag at City Hall. Though the majority opinion studiously avoids Establishment Clause questions, Justice Gorsuch contends that "[t]he real problem" was that Boston defended its actions with *Lemon*—a case that was an "anomaly and a mistake."

In advocating for the same standard that he later describes in *Kennedy*, Justice Gorsuch notes in *Shurtleff* that there is a "partial remedy" for the difficulty of determining the original meaning of the Establishment Clause. Citing the work of Establishment Clause expert Professor Michael McConnell, Justice Gorsuch identifies several historical hallmarks of establishments at the Founding. On his reading, the Founders were particularly concerned with situations in which the government exercised control over churches by influencing doctrine, mandating attendance, or punishing dissenting institutions and individuals. Furthermore, they worried about governments providing financial benefits to a particular religious institution or using established churches to execute civil functions.

Barclay astutely recognizes that Justice Gorsuch cites to this discussion from *Shurtleff* in *Kennedy*, and she argues that his opinion incorporates these "historical hallmarks" into *Kennedy*'s "historical practices and understandings" test. Under this view, the coercion analysis undertaken in *Kennedy* is an important category, but it does not represent the entirety of prohibited governmental conduct. Barclay's reading of the Establishment Clause is broader than the pure coercion view, but not by much. She synthesizes *Kennedy*'s unabashed originalism with unaffected areas of the Court's precedent, recognizing both the seismic shifts and remaining constants in the law.

With this background, we can complete the step not taken in Barclay's analysis. On her theory, it matters that Coach Kennedy's prayers are not coercive, but it is equally important that none of the other "historical hallmarks" map onto his actions. Equating his silent prayer with the manipulation of church doctrine, taxation, or performance of civil functions, for example, does not make much sense. Perhaps both Barclay and the Court felt that this conclusion was too obvious to mention. How could an individual make an impact at the scale of establishment that the Founders feared?

III. Anti-Incorporation: The Total Return to History

This lingering doubt about the importance of individual conduct raises a third concern. If Justice Gorsuch's "historical hallmarks" define the contours of the Establishment Clause's scope, how should a court compare eighteenth- and nineteenth-century practices with contemporary religious expression?

A faithful application of Barclay's view implicates the tensions in originalist methodology discussed in another hot-button Supreme Court case: *New York State Rifle & Pistol Ass'n v. Bruen* (2022). In this landmark Second Amendment case, the Supreme Court held that state-level gun regulations must accord with the "Nation's historical tradition of firearm regulation" to avoid infringing upon the right to bear arms. When considering how to compare contemporary gun regulations with their historical analogues, Justice Clarence Thomas instructed courts to look for "relevant[ ] similar[ities]" between the two—otherwise, judges could exploit the fact that everything can be "similar in infinite ways to everything else."

To find an appropriate analogy, *Bruen* counsels that one must determine a relevant metric for comparison that suitably relates a historical phenomenon to current practices. For Barclay's theory to succeed, then, it would need an adequate metric for comparing contemporary religious practices with those of the Founders. If the relevant metric is, say, the means employed by the religious party in suppression of another's exercise of religion, then the connection between history and the present would be stronger. Coercion is the clearest example: the Founders were clearly concerned that people might be compelled to follow a certain religious practice in public, which may arise in Establishment Clause cases today.

If the relevant metric considers *who* is engaging in the religious practice, though, the analogy immediately breaks down. Since the Establishment Clause was incorporated against the states in *Everson v. Board of Education* (1947), scholars have recognized the logical inconsistency in applying this provision against state governments (as has Justice Thomas). At a basic level, the Establishment Clause historically served as a "structural limitation," prohibiting Congress from establishing a national religion while also protecting established churches at the state level from federal interference.

To analogize between the Founding-era focus on institutions and the contemporary landscape, today's judges would have to make a substantial logical jump. For starters, they must declare that one individual can be analogous to the government and that another can be compared to a religious institution. Furthermore, it requires imagining

how two completely different constitutional cultures align. Given a historical world with no Fourteenth Amendment and no state action doctrine—not to mention no public schools and very limited government at both the state and federal levels—the *Kennedy* approach may require jumping through too many analogical hoops to make any sense.

At this point, then, there may be a third argument for why Coach Kennedy's actions did not violate the Establishment Clause. Following the lead of those opposed to incorporation, it makes little sense to say that an individual's free exercise can constitute an establishment of religion, even when it affects other individuals. It is impossible to draw coherent analogies between pre-incorporation America and the present day, as the Founders could never imagine today's sprawling federal government. To pretend otherwise risks distorting the original purpose and meaning of the Establishment Clause.

Though Justice Gorsuch does not explicitly support this view in *Kennedy*, he provides a few arguments that sound in anti-incorporation rhetoric. In particular, he rejects the claim that Kennedy's free exercise rights "were in 'direct tension' with the competing demands of the Establishment Clause." His text-driven response concludes that "[a] natural reading of [the First Amendment] would seem to suggest the Clauses have 'complementary' purposes, not warring ones where one Clause is always sure to prevail over the others." Later, he rejects the idea that any "visible religious conduct by a teacher or coach should be deemed . . . impermissibly coercive." It is absurd that "[i]n the name of protecting religious liberty, [the school district] would have us suppress it."

A full-blown return to the history of the Establishment Clause, especially the "understanding of the Founding Fathers," may open the door to undermining more precedents that the *Kennedy* decision ostensibly keeps intact. The opinion's sweeping language about the return to history does not suggest a limiting principle, creating the risk that major pieces of the doctrine may, like the *Lemon* test, be deemed "'ambitiou[s],' abstract, and ahistorical." In such a world, the Establishment Clause could quickly cover even less conduct than it would on the coercion view.

IV. The Establishment of Secularism

Beyond the historical hallmarks, analogies, and purposes of the Establishment Clause, there is one lingering element of the *Kennedy* decision that also deserves recognition. Near the end of the opinion, Justice Gorsuch states that the school district's understanding of

coercion "would have us preference secular activity." He imagines schools firing teachers for praying at lunch or wearing religious garb because their personal religious exercise is viewed as inherently coercive—a result that would "defy this Court's traditional understanding" of the relationship between individual rights and coercion.

Justice Gorsuch again mentions secularism in the final paragraph of the opinion. Describing Coach Kennedy's plight, he writes, "a government entity sought to punish an individual for engaging in a brief, quiet, personal religious observance doubly protected by the Free Exercise and Free Speech Clauses of the First Amendment." At the root of this abuse was the government's mistaken belief that "it had a duty to ferret out and suppress religious observances even as it allows comparable secular speech." This section faintly depicts an "establishment" of secularism against religion. One of the principal hallmarks of an establishment, per *Shurtleff*, is that "the government punished dissenting churches and individuals for their religious exercise." Here, the state is punishing an individual religious dissenter in the name of *secularism*, not religion.

Though unlikely to be taken further in practice, this image suggests an extremely broad, sweeping version of the Establishment Clause primed to fight back against a secularizing culture. In a twist on the classic phrase from *Everson* that governments cannot "pass laws which aid one religion, aid all religions, or prefer one religion over another," the *Kennedy* opinion implicitly adds "or aid irreligion at the expense of religion." Perhaps this expansive reading of the Establishment Clause echoes the recent preoccupation with discrimination against religious groups in First Amendment jurisprudence, which Justice Amy Coney Barrett highlights in her concurrence in *Fulton v. City of Philadelphia* (2021). At the same time, though, this conclusion leads to a strange inversion of the First Amendment. Even as the Free Exercise Clause has become a shield against discriminatory laws, *Kennedy*'s version of the Establishment Clause could potentially become a sword, weaponized against efforts to remove religion from the public square.

Conclusion

In *Town of Greece v. Galloway* (2015), the Supreme Court noted that "it is not necessary to define the precise boundary of the Establishment Clause where history shows that [a] specific practice is permitted." In *Kennedy*, Justice Gorsuch stretched that advice, giving the reader a glimpse of four different interpretive pathways for the Establishment Clause without precisely identifying the historical precedent that got Coach Kennedy off the hook. All four of these

approaches can be supported by the text of the opinion and by "historical practices and understandings" (to varying degrees). Each has its virtues and its vices. The coercion test sits well with the *Kennedy* opinion, but it does not fully consider history. Barclay's "historical hallmarks" approach synthesizes current case law, yet it may not be able to consistently theorize the analogies between historical practices and contemporary precedent. The anti-incorporation view is historically purist but upsets longstanding precedential interests. The "establishment of secularism" view protects free exercise to the extreme but risks opening a Pandora's box that could thrust thorny issues of public morality and political toleration into litigation.

Like Joe Kennedy and Nick Saban, this originalist approach to the Establishment Clause likely brings hope to its advocates, while enraging its detractors. However, it seems clear that the establishment of full-throated originalism in First Amendment doctrine is not an end, but a beginning. With so many doctrinal complexities needing resolution, both proponents and opponents of *Kennedy* should open their history books and wrestle with the complexities of the history of American religion. There is much more work to be done.

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