From Shield to Sword: Straying from the Original Meaning of the Establishment Clause

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I. INTRODUCTION

The Establishment Clause is an integral part of the First Amendment, which states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[1] Although this clause prohibits the establishment of a national religion, thereby eliminating federal government control of the church, it does not specify how near or far the two can, or must, be to coexist in a functioning manner. As such, the courts are left to grapple with the practicalities of such a clause.

The original view on this matter, was one based in textualism-originalism, which held the Establishment Clause's purpose was to protect citizens only from actual legal coercion.[2] More recently, a living constitutionalist perspective, which champions strict separation, has risen to challenge textualism-originalism.[3] This challenge has resulted in a flood of litigation which produced the mess that is Establishment Clause jurisprudence.[4] A departure from the standard of actual legal coercion has left the country with an array of inconsistent decisions across a myriad of subjects including access to government programs and facilities, government imagery, and school choice.[5] Most recently, the conflict has extended to question the

[1] U.S. CONST. amend. I.
[2] *See* discussion *infra* section II.A.
[3] *See* discussion *infra* section II.A.
[4] *See* discussion *infra* Part IV.
[5] *See* discussion *infra* section IV.B–D.

constitutionality of legislator-led prayer, and courts across the country are split.[6] Although these practices have long prevailed, they no longer stand without legal challenge.

In light of the Supreme Court's decision in *Kennedy v. Bremerton School District*, which clarified that a test of history and tradition should be used to evaluate the Establishment Clause, this Article advocates for an interpretation of the relevant history and tradition which promotes religious liberty, freedom of conscience, and maintains respect for the founding.[7] It will propose a return to the founders' original conception of actual legal coercion, which would not only provide the broadest protection for these rights, but also provide an easily applicable test for courts.

Following the introduction in Part I, Part II of this Article discusses the two prominent approaches to the Establishment Clause. Part III delves into a few relevant aspects of the history surrounding the purpose of the Clause and its force and funds background. Part IV explores the current condition of the jurisprudence via an overview of the case-law in a variety of areas, including legislative prayer. Part IV also explains the inconsistent rules and standards which have arisen as a result of living constitutionalism. Part V addresses the recent ruling in *Kennedy v. Bremerton School District*, while Part VI outlines questions still left by *Kennedy*, and previews new areas of litigation. It also serves as a reminder of the dangers posed by departing from an actual legal coercion standard.

II. The Split in Views Which Led to the Misunderstanding of the Establishment Clause

In 1802, Thomas Jefferson wrote a letter to the Danbury Baptist Church reassuring them that their fears of persecution by the federal government, based on religion, were unfounded

[6] The use of the word "split" in this instance has a two-fold meaning. First, there is an actual circuit split on the issue of legislator-led prayer. *See infra* subsection IV.C.1, n.126. Second, the term is also used more broadly to encompass the general feeling of confusion across the country as to how the Establishment Clause should be handled. *See infra* Part IV.

[7] *See* discussion *infra* Part V.

because the First Amendment "buil[t] a wall of separation between church and state."[8] The letter mentions nothing of restrictions on religion itself.[9] One hundred and forty-five years later, in *Everson v. Board of Education*, the Supreme Court addressed its first case on the Establishment Clause.[10] In that case, the majority, written by Justice Black, cited Jefferson's letter and his language of separation to justify a wall that was "high and impregnable" so as to "stamp out" and "forever suppress" religion in the public sphere.[11] After 145 years, the meaning of the Establishment Clause was misunderstood. After 222 years, courts have not gotten any closer to correcting this misunderstanding. How and why is this happening?

A. Two Perspectives

In Establishment Clause jurisprudence, two competing views have emerged and created confusion surrounding the purpose of the Clause, and, as this Article asserts, have contributed to its misinterpretation. The first view champions a living constitutionalist viewpoint.[12] In general, this perspective allows for fluidity of interpretation because of its belief that the Constitution is a continually evolving document.[13] Therefore, a living constitutionalist's viewpoint is informed by, and can change with, societal norms, economic turns, and judicial perception, since there is no one meaning ascribed to the Constitution.[14] With regard to the Establishment Clause specifically, living constitutionalists point to the history of religious

[8] V. To the Danbury Baptist Association (Jan. 1, 1802) *in* 36 THE PAPERS OF THOMAS JEFFERSON, 1801–1803, 1, 258 (Barbra B. Oberg ed., 2009). *See also* Rodney K. Smith, *Getting off on the Wrong Foot and Back On Again: A Reexamination of the History of the Framing of the Religion Clauses of the First Amendment and a Critique of the Reynolds and Everson Decisions*, 20 WAKE FOREST L. REV. 569, 597–99 (1984) (explaining Jefferson's word choice, and what he meant by it, while suggesting his relative lack of importance in the actual creation of the Bill of Rights, and perhaps why his views should not be granted much weight).
[9] JEFFERSON, *supra* note 8, at 258.
[10] Everson v. Bd. of Educ., 330 U.S. 1, 5 (1947).
[11] *Id.* at 8–15.
[12] ERWIN CHEMERINSKY AND HOWARD GILLMAN, THE RELIGION CLAUSES: THE CASE FOR SEPARATING CHURCH AND STATE 1–21 (Oxford Univ. Press 2020) (using the phrase "Separation view" to refer to what this Article calls the living constitutionalist view).
[13] Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. UNIV. L. REV. 1259–60 (2019).
[14] *Id.*

strife and violence as the reason to maintain strict separation.[15] This first view is best illustrated through a variety of opinions written by Justice Breyer, although the roots of the argument can be traced back to *Everson*[16] (the first main case to discuss the Establishment Clause).[17]

In *American Legion v. American Humanists Association*, a case regarding a WWI memorial shaped as a cross, Justice Breyer stated "the religion clauses were meant to . . . avoid religiously based social conflict and maintain that separation of church and state.[18] The opinion is similarly stated in *Zelman v. Simmons-Harris*,[19] which found "[the religion clauses] seek to avoid that divisiveness based upon religion that promotes social conflict, sapping the strength of government and religion alike."[20] The same was again noted in the Justice's dissent in *Carson v. Makin*,[21] where he stated, "with greater religious diversity comes greater risk of religiously based strife, conflict, and social division," and alleged the religion clauses were intended to "help avoid that disunion."[22]

Oddly enough, however, considering its grounding in history, this view espouses that neither history nor tradition can be an adequate test for Establishment Clause jurisprudence, and that, in reality, no test will prove sufficiently satisfactory because, as the Justice explained, no test can balance a measure of an action's neutrality, nor the tolerance level of the

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[15] *Everson*, 330 U.S. at 8–15; CHEMERINSKY & GILLMAN, *supra* note 12, at 21 (referencing the strife in England caused by inter-faith marriages, persecution, invasions of countries, and revolutions which were pursued in the name of religion).

[16] *Everson*, 330 U.S. at 8–9 ("The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy.").

[17] This view is not exclusive to Justice Breyer, however. It has been championed by many scholars. *See* Paul A. Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1692 (1969). *See also* CHEMERINSKY AND GILLMAN, *supra* note 12 at 21–42 (explaining that living constitutionalists "believe that the meaning of a constitutional provision is determined by original understanding. But we do believe that contemporary debates should be informed by the concerns of the framers who understood the dangers of religious establishments, and the threats to religious liberty, and thought it important to avoid the bloody and oppressive mistakes of their forefathers.")

[18] Am. Legion v. Am. Humanists Ass'n, 139 S. Ct. 2067, 2090–91 (2019) (Breyer, J., concurring).

[19] Zelman v. Simmons-Harris, 536 U.S. 639, 662–63 (2002) (holding that a parent's choice to apply a public funds voucher to education at a private religious school does not violate the Establishment Clause.).

[20] *Id.* at 717.

[21] Carson v. Makin, 142 S. Ct. 1987, 2001 (2022) (holding the Establishment and Free Exercise clauses do not allow either use-based or status-based discrimination in determining access to public funds.).

[22] *Id.* at 2005 (Breyer, J., dissenting).

Establishment Clause.[23] Instead of using any particular test, Justice Breyer advocated for the flexibility of judicial discretion and review on a case-by-case basis.[24] This, again, reflects a living constitutionalist's belief that the Constitution's meaning is malleable and ever changing with societal shifts.[25] It is easy to see how this lack of any guideposts contributed to the lack of uniformity in case law, which is discussed further below.

The second viewpoint is that of textualism-originalism.[26] As can be inferred, textualist-originalists seek to interpret the constitution based on what it meant at the time of enactment by those who enacted it, thereby using history to determine original meaning and the general public's understanding of the application of the clause.[27] In this view, however, the focus of the history is on those action which created a threat of actual legal coercion through "force," mandated religious observance, or "funds," financial support of a religion; in other words, "force and funds."[28] This phrase, "force and funds," will be returned to frequently throughout this Article, and represents the standard of actual legal coercion, which is advocated for in this Article. This viewpoint is classically embodied by Justice Thomas, although other judges could be cited, as well.[29]

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[23] *Id.*

[24] Am. Legion v. Am. Humanists Ass'n, 139 S. Ct. 2067, 2090–91 (2019); Van Orden v. Perry, 545 U.S. 677, 699–700 (2005) (Breyer J., concurring) ("I see no test-related substitute for the exercise of legal judgement").

[25] Solum, *supra* note 13, at 1255–56 (acknowledging that, "the core idea is that 'living constitutionalism' sanctions departure from the constitutional text.").

[26] It is recognized that there are many different sects and types of originalism, which this Article does not have the ability to fully discuss. For that reason, this term will be loosely used to encompass all major branches of the view. Therefore, the reader should keep in mind the broadest meaning and understanding of the philosophy, without specifics.

[27] Solum, *supra* note 13, at 1250–55; Marsh v. Chambers, 463 U.S. 783, 790 (1983) ("historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied.").

[28] Brief for the United States as Amicus Curiae Supporting Petitioners, Lee v. Weisman, 1991 U.S. S. Ct. 308 (1991) (No. 90-1014), ("Force and Funds were the twin evils that animated the drafters of the Establishment Clause.").

[29] Justice Scalia, for example, frequently joined opinions with Justice Thomas, or vice versa. *See* Lee v. Weisman, 505 U.S. 575, 632 (1992) (Scalia, J., dissenting) (Justice Scalia echoes Justice Thomas' sentiment, saying, "today's opinion shows more forcefully than volumes of argumentation why our Nation's protection, that fortress which is our Constitution, cannot possibly rest upon the changeable philosophical predilections of the Justices of this Court, but must have deep foundations in the historic practices of our people."); *Van Orden*, 545 U.S. at 692–93 (Scalia, J., concurring) (in that case, the two Justices wrote similar concurring opinions).

In *Van Orden v. Perry*,[30] Justice Thomas reminded the majority that, "establishment at the founding involved, for example, mandatory observance or mandatory payment of taxes supporting ministers" and that any government practices which do not fall within this, "simply do not implicate the possible liberty interest."[31] In *Town of Greece v. Galloway*,[32] he similarly stated the areas of establishment which were of concern, "involved actual legal coercion. They exercised government power in order to exact financial support [or] compel religious observance."[33]

Although the difference in implication and application of these views is drastic, in both of these perspectives, history is cited as the foundation for the view. Since history is central to both views, it is becoming to analyze some of the history of the Establishment Clause in order to determine which view of the history is the most accurate view.

III. THE LONG FORGOTTEN, AND OFTEN IGNORED, HISTORY OF THE ESTABLISHMENT CLAUSE

In order to grasp the broader debate surrounding the Establishment Clause, it is not only important, but also vital to assess the ideological background of those individuals in the founding generation. The history of the Establishment Clause is nuanced and complicated, however. [34] It is neither the purpose nor the hope of this Article to exhaustively relay the entirety of the Establishment Clause's history; other works have done so already, and they have been drawn upon to craft this Article. Instead, the history being referenced here focuses on the religious beliefs behind the Establishment Clause and how these religious frameworks

[30] *Van Orden*, 545 U.S. at 691–92 (finding a Ten Commandments display on the grounds of the Texas capitol building to be constitutional).
[31] *Id.* at 693–94.
[32] *See* discussion *infra* subsection IV.C.b.
[33] Town of Greece v. Galloway, 572 U.S. 565, 608 (2014).
[34] It is worth noting that the American experiment was not formed in a vacuum; it was in large part a reiteration and adaptation of the ideas of many European and Enlightenment thinkers. A full examination of their impact on the founding is prudent, but outside of the scope of this Article. For a more in-depth analysis, *see* Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, (2003); Smith, *supra* note 8; DONALD S. LUTZ, THE ORIGINS OF AMERICAN CONSTITUTIONALISM (La. State Univ. Press 1988).

impacted the social and political decisions at the time of the founding. More specifically, this historical analysis explores the effects of religious strife on the Establishment Clause, while tracing the concept of actual legal coercion.

A traditional establishment is defined as, "the promotion and inculcation of a common set of beliefs through government authority."[35] Roughly six categories exist for the types of laws amounting to an establishment: "(1) control over doctrine, governance, and personnel of the church; (2) compulsory church attendance; (3) financial support; (4) prohibitions on worship in dissenting churches; (5) use of church institutions for public functions; and (6) restriction of political participation to members of the established church."[36] Already it can be seen that these categories revolve around either forcing an individual into some type of religious observance, or making them fund the same. In this regard, "compulsion is not just an element, it is the essence of an establishment."[37]

Around the time of the founding, these religious establishments were very common.[38] The United States is a country influenced heavily by Christianity.[39] Nearly every individual of European decent in the colonies identified as a Christian in 1776, excluding roughly 2,500 Jews.[40] Within Christianity, however, there remained great religious variety and distinction between sects, which, in many ways, is distinct from the denominational differences of today.[41]

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[35] *Id.*

[36] NATHAN S. CHAPMAN & MICHAEL W. MCCONNELL, AGREEING TO DISAGREE: HOW THE ESTABLISHMENT CLAUSE PROTECTS RELIGIOUS DIVERSITY AND FREEDOM OF CONSCIENCE 18 (Oxford Univ. Press 2023).

[37] Michael W. McConnel, *Coercion: The Lost Element of the Establishment Clause*, 27 WM. & MARY L. REV. 933, 938 (1986).

[38] *Id.*

[39] DANIEL S. DREISBACH, READING THE BIBLE WITH THE FOUNDING FATHERS 7 (Oxford Univ. Press 2017) ("the fact that a founder was 'influenced' by the Bible does not indicate whether he or she was a Christian or a skeptic—both were influenced by the Bible . . . it simply acknowledges that they added Biblical notions to their arsenal of ideas and arguments"); LUTZ, *supra* note 34, at 153–56 (discussing the social utility of religion to a republican form of government because of its inculcation of virtue).

[40] BARRY A. KOSMIN & SEYMOUR P. LACHMAN, ONE NATION UNDER GOD: RELIGION IN CONTEMPORARY AMERICAN SOCIETY 28–29 (Crown Publishers, Inc. 1993).

[41] Although there are still denominational distinctions today, it is most uncommon to come across a locality that does not have a place of worship for multiple denominations, if not multiple religions. In the colonial era, however, as will be explained, the religious denominations were largely and distinctly confined to particular municipalities. McConnell, *supra* note 34, at 2116–30.

It is those differences which have allowed scholars to calculate the specific denominational percentages of the various colonies.[42]

Virginia's charter, for example, specifically mandated its loyalty to the Church of England, following the same establishment provisions as the mother country.[43] The colony remained appropriately loyal to the Church, and accordingly hostile to other protestant denominations until the eve of the Revolution.[44] New England was slightly more diverse in the fact that the religious sect of an area changed based on the majority denomination in each municipality.[45] At the inception of the northern colonies, the population consisted of either Puritans or Pilgrims, but slowly those two groups became less distinct and by the Revolution, the New England colonies were also populated with Anglicans, Quakers, and Baptists.[46]

Georgia and the Carolinas were slower in their religious development because of the difficulty in building churches and attracting members of the clergy, not for lack of faith.[47] Later, both Georgia and South Carolina adopted the Church of England as their state established religion, although they still remained more tolerant than some of their colonial counterparts.[48] Pennsylvania, Delaware, New Jersey, and Rhode Island, along with parts of New York, did not have government-established religion, which made them especially appealing to those who dissented from the Church of England.[49]

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[42] *See generally* Roger Stark & Roger Finke, *American Religion in 1776: A Statistical Portrait*, 49 SOCIO. ANALYSIS 39, (1988) (discussing the number of churches in the colonies as well as a denominational assessment by percentages.).
[43] McConnell, *supra* note 34, at 2116.
[44] *Id.* at 2119–20 (in 1776 The Virginia Declaration of Rights was passed, which allowed those of all religious sects to practice openly without persecution. It is important to note, however, that this in no way disestablished religion in the state.).
[45] *Id.* at 2121.
[46] *Id.* at 2123–24, 2130 (Because of its Dutch charter, New York was originally under the rule of the Dutch Reformed Church, but this was no longer the case by the time of the Revolution, since England had taken over the colony in 1664.).
[47] *Id.* at 2126–29 (noting that proprietors put great effort into attracting those religious persons and encouraged healthy immigration of many Christian sects, and those of other non-Christian beliefs.).
[48] *Id.*
[49] *Id.* at 2111.

The different denominational makeups of the colonies often caused friction between those in the majority and those in the minority religions in the colony. Accordingly, the colonies were anything but free from religious strife.[50] This is evidenced by the religious persecution the various denominations inflicted upon each other.[51] "Quakers were persecuted in both Anglican and Puritan colonies, and in a few instances exiled or executed for their faith. . . . Baptists were also widely despised. But Catholics were the most common target of religious intolerance."[52] Between 1720 and 1750, a study found that absence from church services was the most commonly indicted offense in many of the counties studied.[53] The example of the trial of Anne Hutchinson, which took place in the Massachusetts Colony personifies these intolerances.[54] Anne Hutchinson was put on trial, because she held religious meetings in her home, where she interpreted the Bible to proclaim salvation through faith.[55] Leaders in Massachusetts at the time held tight to the idea of salvation by works.[56] For her "crime," Anne Hutchinson was imprisoned and then forever banished from the Massachusetts colony.[57]

The involvement of religion generally, and Christianity specifically, was not limited simply to personal identification and the happenstance of geographical location alone, however.[58] Because many of the founders fundamentally believed in the concept of a sovereign God[59] with higher authority than all earthly government,[60] religion seeped its way into the political

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[50] *See generally*, *Id.* at 2159–69 (detailing several instances of persecution and religious strife).
[51] CHAPMAN & MCCONNELL, *supra* note 36 at 22. *See also id.* at 18–22 (discussing 6 categories of establishments and how carrying out these establishments utilized various forms of coercion, which negatively impacted minority religions in the area).
[52] *Id.* at 18–22
[53] *Id.* at 20.
[54] Ann Fairfax Washington & Jack Schwartz, *The Political Trial of Anne Hutchinson*, 51 NEW ENG. Q. 226, 226 (1978); McConnell, *supra* note 34, at 2162.
[55] Washington & Schwartz, *supra* note 54, at 227.
[56] *Id.*
[57] *Id.* at 233.
[58] LUTZ, *supra* note 34, at 136–49.
[59] MARK DAVID HALL, DID AMERICA HAVE A CHRISTIAN FOUNDING? 3 (Nelson Books 2019) (This would have been true even for those who were deists. A deist believes there is a God, who is a higher than all human authority, even though they believe God is no longer involved in human events.).
[60] DRESISBACH, *supra* note 39, at 12 ("Almost all agreed that there was a Supreme Being who intervened in the affairs of men and nations. They believed God was the author of the rights of man; and the rights God had granted to humankind, no man should take away.").

dialogue and was frequently used to articulate political and social philosophies.[61] We need not look further than the Declaration of Independence, with its famous language "We hold these truths to be self-evident that all men are created equal."[62] The language which follows, however, is frequently forgotten – "they are endowed by their *Creator* with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness."[63] This phrase explained the founders' belief that these unalienable rights were granted by the Creator, not the state.[64] This belief about the authority of God is particularly important because it informed the founders' view that religion could only be decided between man and God, whose authority was over government, and therefore was a private matter which could not be influenced by government.[65] Because religion was a matter of conscience, it would stand that government's only role would be the prevention of forcing and funding religion, not the censorship of it in the public square.[66]

The Declaration of Independence is not, however, the only evidence of religious thought merging with political writing. According to a famous and extensive study done on the citations in the public political literature from 1760-1805, the Bible was found to be the most frequently cited work, accounting for roughly a third of all citations over 45 years (encompassing 44 percent of citations in the 1770's).[67] Saint Paul was cited as many times as the two leading thinkers, Montesquieu and Blackstone (8.3 percent and 7.9 percent respectively).[68] These

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[61] LUTZ, *supra* note 34, at 136–49; DREISBACH, *supra* note 39, at 7 ("Orators and writers drew on the Bible for a variety of purposes. The diverse uses ranged from the strictly literary and cultural to the essentially theological, from the stylistic to the substantive.").
[62] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
[63] *Id.* (emphasis added).
[64] Vincent Phillip Muñoz, *The Original Meaning of the Establishment Clause and the Impossibility of its Incorporation*, 8 UNIV. PA. J. CONST. L. 585, 620–21 (2006).
[65] *See id*.
[66] Memorial and Remonstrance Against Religious Assessments (June 20, 1785), *in* 8 THE PAPERS OF JAMES MADISON 295, 295 (Robert A. Rutland & William M.E. Rachal eds., 1973) (In the opening paragraph, Madison states, "Because we hold it for a fundamental and undeniable truth, 'that Religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence.'").
[67] LUTZ, *supra* note 34, at 140–45.
[68] *Id.* at 140.

numbers only considered a tenth of the political sermon pamphlets which were published.[69] If those had been counted, the percentage would have been much higher.[70]

It is within this backdrop, both of religious strife and political-religious discourse, that the Revolutionary War occurred, and the United States of America was founded. In other words, the founders had certainly seen religious conflict, but they had also seen the free use of religion in political and public life, and if their intent in drafting the Establishment Clause had been to avoid religious conflict, they could have called upon those experiences. Instead they went quite the other way.

In 1789 the states ratified the Constitution, but for many of the states, a condition upon their ratification was the promise of a bill of rights[71] which was to be appended to the document.[72] The importance of liberty of conscience was so innately enshrined in Americans, however, that it was severely debated whether a bill of rights was necessary, because, to many, its adoption implied such freedom was not a natural right, but one that had to be granted by the government.[73] Early Americans feared such a bill of rights would actually limit their ability to freely exercise their religion.[74] Thus, began the heated debate regarding the First Amendment.

James Madison was the primary author of the entire Bill of Rights, which is quite significant, because it brings to the fore a set of instances which almost certainly impacted his drafting of the text.[75] In 1785, a bill was proposed in the Virginia legislature to support the salaries and education of ministers.[76] James Madison quickly responded by penning his famous

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[69] *Id.*
[70] *Id.*
[71] The term "bill of rights" is not capitalized in the following few instances because it is only referring to a general bill of rights rather than the specific Bill of Rights.
[72] Muñoz, *supra* note 64, at 616.
[73] *See* THE FEDERALIST NO. 84 (Alexander Hamilton).
[74] *See id.*
[75] Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1431 (1990) [hereinafter *Origins*].
[76] Memorial and Remonstrance Against Religious Assessments (June 20, 1785), *in* 8 THE PAPERS OF JAMES MADISON 295, 295 (Robert A. Rutland & William M.E. Rachal eds., 1973).

Memorial and Remonstrance, objecting to the proposal.[77] He outlined fifteen distinct offenses of the bill and all but three focused on either religious liberty and the necessity of protecting it in its fullest extent, or of the harm which would be done to the prosperity of religion if the government attempted to either promote or restrict it.[78]

These objections made Madison's fears clear. He was afraid, not of the religious sects, but that any individual, by government authority, would be either forced to follow, or required to fund, the beliefs of another (actual legal coercion).[79] "Force and funds were the twin evils that animated the drafters of the Establishment Clause."[80] Madison was not afraid of religious unrest; in fact, he completely dispelled that possibility by saying:

> Ought their Religions to be endowed above all others with extraordinary privileges by which proselytes may be enticed from all others? We think too favorably of the justice and good sense of these denominations to believe that they either covet pre-eminences over their fellow citizens or that they will be seduced by them from the common opposition to the measure.[81]

In case there were any doubts regarding his feelings on the idea of religious friction, in his eleventh objection, Madison turned the living constitutionalist argument on its head.[82] Rather than religion having caused the discord and violence as Justice Breyer would later believe, Madison accused the state, saying, "Torrents of blood have been spilt in the old world, by vain

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[77] *Id.*
[78] *Id.* (paragraph ten was focused on the potential deterrent of emigration, paragraph thirteen focused on the poor policy of enacting a law which was not well received, and paragraph fifteen stated that when government coerces citizens into undesirable sanctions, it weakens the legitimacy of the laws generally); Smith, *supra* note 8, at 579–601.
[79] Memorial and Remonstrance Against Religious Assessments (June 20, 1785), *in* 8 THE PAPERS OF JAMES MADISON 295, 295 (Robert A. Rutland & William M.E. Rachal eds., 1973) (referring to paragraph three).
[80] Brief for the United States as Amicus Curiae Supporting Petitioners, Lee v. Weisman, 1991 U.S. S. Ct. 308 (1991) (No. 90-1014).
[81] Memorial and Remonstrance Against Religious Assessments (June 20, 1785), *in* 8 THE PAPERS OF JAMES MADISON 295, 295 (Robert A. Rutland & William M.E. Rachal eds., 1973) (referring to paragraph four).
[82] *Id.* (referring to paragraph 11).

attempts of the secular arm, to extinguish religious discord."[83] He explains the remedy has been shown to be the "relaxation of narrow and rigorous policy," and "equal and compleat liberty."[84] Simply put, preventing the forcing and funding of religion were supposed to be the only roles of the government as it pertained to religion, not preventing division.[85]

Madison's brilliant defense garnered great support, and the bill died in committee the following year.[86] It was replaced instead, by Thomas Jefferson's Bill for Establishing Religious Freedom,[87] which was championed by Madison, and swiftly passed into law protecting the very concerns Madison identified.[88]

Only three years later, Madison drafted the amendments, and it would seem odd to think the meaning he so desired and found lacking in the proposed bill, and championed for when found in Jefferson's statute, would have become very different in meaning when drafted in the Establishment Clause.[89] This also, of course, seems logical when considering that the cry for a Bill of Rights had been for the purpose of protecting the citizen from the government, and not the other way around.[90]

This entire history is relevant to ultimately make one point: in an environment of religious discord, the founders drafted and interpreted the First Amendment, not to protect against religious strife, but to shape a country that would allow it.

IV. A SHIFT IN PERSPECTIVE: Changing the Establishment Clause from a Shield to a Sword.

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[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] Muñoz, *supra* note 64, at 597.
[87] A Bill for Establishing Religious Freedom (June 18, 1779), *in* 2 THE PAPERS OF THOMAS JEFFERSON 545, 553 (Julian F. Boyd ed., Princeton Univ. Press 1950) (To address the possibility of a future Virginia Assembly repealing the measure it was written, "the rights hereby asserted, are of the natural right of mankind, and that if any act shall be hereafter passed to repeal the present, or to narrow its operation, such act will be an infringement of natural right.").
[88] *Id.*
[89] Origins, *supra* note 75, at 591.
[90] Smith, *supra* note 8, at 582–99.

A. The Breadth of the Attack: A Brief Survey of Establishment Clause Cases

As the history above indicates, the founding generation's concern was for the longevity, livelihood, and fervor of the nation's religions. The emergence of the living constitutionalist viewpoint (as it has been applied to the Establishment Clause) has misguided Americans, and subsequently redirected Establishment Clause jurisprudence, changing it from a shield of protection to a sword used in an attempt to cut out religion from any aspect of the public sphere. The living constitutionalist view, however, is not completely illogical, and if its premises had been true (that the founders intended for the Establishment Clause to prohibit even the potential for religious conflict) then the only logical conclusion would be to attack and litigate on every possible front. The following cases, spanning the breadth of the Establishment Clause are a witness to this philosophy.

Everson v. Board of Education provided the springboard for what would soon become a frontal assault on the Establishment Clause, although standing alone, the case would not raise eyebrows. In that case, the court held that reimbursing parents for the transportation of their children to private schools (whether religious or otherwise) was not a violation of the Establishment Clause.[91] The issue came not from the conclusion of the case, however, but in the analysis written by Justice Black, where the focus was entirely on religious strife, and the duty of government to control it.[92] The logic begins with the phrase, "America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects."[93] This reasoning justifies the ominous end rationale that, "the wall must be kept high and impregnable. We could not approve the slightest breach."[94]

Only a year later, in *McCollum v. Board of Education*, following the same logic, the Court found it was a violation of the Establishment Clause to allow religious leaders to provide

[91] Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947).
[92] *Id.* at 8–15.
[93] *Id.* at 8.
[94] *Id.* at 18.

optional classes on various religions to students in public schools whose parents granted express permission.[95] Already departing from the idea of force and funds, the Court stated, although "an alternative may reduce the constraint; it does not eliminate the operation of *influence*."[96]

Building on this, *Engle v. Vitale* held the mere *encouragement* of reciting a nonsectarian daily prayer was a religious activity and could therefore not be done in public schools.[97] Shortly thereafter, in *School District of Abington Township v. Schempp*, reading a scripture passage and reciting the Lord's Prayer was also held to violate the Establishment Clause.[98]

Perhaps even more concerning was the Court's decision in *Lee v. Weisman*.[99] There, it held that a Rabbi, the guest speaker, could not pray for a middle or high school graduation.[100] To do so, the Court reasoned, would subject the students to "psychological coercion" and "social pressure," despite the fact the "individual can concentrate on joining its message, meditate on her own religion, or let her mind wander."[101]

In all cases mentioned above, the practice was found to be entirely voluntary.[102] In some instances, the practice was also entirely passive because all that was required was listening to the teacher, speaker, or intercom message.[103] In these cases, the court began to consider inconsistent standards of influences far less than actual coercion (encouragement, influence, psychological coercion, etc.), which are difficult to pinpoint and always subject to changing interpretations.[104] It is like building a fortress on shifting sand.

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[95] McCollum v. Bd. of Educ., 333 U.S. 203, 231 (1948).
[96] *Id.* at 231–32 (emphasis added).
[97] Engle v. Vitale, 370 U.S. 421, 424 (1962).
[98] Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 224–25 (1963).
[99] Lee v. Weisman, 505 U.S. 577, 599 (1992).
[100] *Id.*
[101] *Id.* at 594.
[102] *Id.* at 594; *Abington*, 374 U.S. at 205–09; McCollum v. Bd. of Educ., 333 U.S. 203, 238 (1948); *Engle*, 370 U.S. at 430.
[103] *Abington*, 374 U.S. at 205–209; *McCollum*, 333 U.S. at 206–209.
[104] *Lee*, 505 U.S. at 631, 644 (Scalia, J., dissenting) (lamenting that the "Court invent[ed] a boundless, and boundlessly manipulable, test of psychological coercion," which is "as infinitely expandable as the reasons for psychotherapy itself.").

Establishment Clause jurisprudence took a more disturbing turn, however, in *Lemon v. Kurtzman*. That case created the first notable standard for the Establishment Clause.[105] In *Lemon*, the court decided the constitutionality of two state statutes (one from Pennsylvania and the other from Rhode Island).[106] Both statutes provided certain percentages of compensation to teachers at parochial schools for such things as salaries, textbooks, and supplies.[107] The intent of the legislation, was to improve the quality of education at private schools by providing the salaries necessary to attract qualified professionals.[108] Although the resources were only used for teachers teaching non-religious materials, the court held both statutes were unconstitutional.[109] Drawing from the patterns of its approval or denial of previous cases, the Court created three factors by which to judge future cases: (1) the practice must have a secular purpose, (2) it cannot advance or inhibit religion, and (3) it cannot "foster 'an excessive government entanglement in religion.'"[110]

Pulling from Justice O'Connor's concurrence in *Lynch v. Donnelly*, (where the Court held it was not a violation of the Establishment Clause for the city to use a government-owned Nativity scene in its downtown park Christmas display) the court officially added the Endorsement test to the *Lemon* test in *County of Allegheny v. ACLU*.[111] The Endorsement test asks if the reasonable observer who viewed such an activity would believe the government was endorsing a religion in that particular context.[112] Following a mix of *Lemon* and the Endorsement test, the Court in *Allegheny* decided a Nativity scene, similar to that in *Lynch*, placed in a court house during Christmas, violated the Establishment Clause, because it could

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[105] Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).
[106] *Id.* at 606.
[107] *Id.* at 608–10.
[108] *Id.* at 607.
[109] *Id.* at 614.
[110] *Id.* at 612–13 (quoting Walz v. Tax Commission, 397 U.S. 664, 668, 674 (1970).)
[111] Lynch v. Donnelly, 465 U.S. 668, 687–94 (1984) (O'Connor, J., concurring) (Justice O'Connor recommended that in addition to the factors from *Lemon*, the court should also analyze the level of government endorsement, which she wanted to measure through the reasonable observer.); Cnty. of Allegheny v. ACLU, 492 U.S. 573, 620 (1989).
[112] *Allegheny*, 492 U.S. at 592–96, 620.

appear to some that the city was endorsing Christianity.[113] Ultimately, within the span of only five years, the Court's inconsistent standards created rulings where a Nativity in a park, made up of government-owned components was acceptable but a Nativity inside a government-owned building was not.

B. Other Battle Grounds: Access to Government Programs and Facilities, Government Imagery, and School Choice

Lemon, along with its implementation in *Alleghany*, opened the floodgates of litigation, where there was no end to the religious practices which could be attacked, despite the fact that none dealt with the original concern of force or funds.[114] The litigation over the next several decades span hundreds of cases and multiple topics, but they can broadly be broken into four categories: government displays adorned with religious imagery, equal access to public facilities and government programs, school choice, and legislative prayer.

Squarely between *Lemon* and *Alleghany*, the Court decided *Stone v. Graham*. There, the court dealt with a Kentucky statute which required that a copy of the Ten Commandments be put in every public classroom in the state.[115] The court found this insufficiently secular as defined in *Lemon*, even though each display had printed on it, the explanation that its function was to display the role of the Ten Commandments in western legal tradition of the common law.[116] The court then found a Ten Commandments display in a Kentucky courthouse to be unconstitutional in *McCreary County v. ACLU*.[117] In the very next breath, however, the Court

[113] *Id.* at 620–21 (The court house had also set up a display of a large Menorah, but the Court found this to be constitutional, because it was outside next to a Christmas Tree, rather than inside the court house, like the Nativity.).

[114] This increase of litigation will be evidenced by the following several cases. It should, however, be noted that if one adheres to a living constitutionalist viewpoint, then the ultimate good is for government to stop all inklings of religion from seeping into public life. The logical conclusion then is, of course, to follow the endorsement test regardless of its lack of ability to provide uniform jurisprudence.

[115] Stone v. Graham, 449 U.S. 39, 39–40 (1980).

[116] *Id.* at 41–43.

[117] McCreary Cnty. v. ACLU, 545 U.S. 844, (2005).

decided *Van Orden v. Perry*,[118] where a Ten Commandments display was constitutional as displayed in the Texas capitol, because it was more "passive" than the display identified in *Stone*.[119]

Yet another set of cases to compare is *Alvarado v. City of San Jose* and *American Atheist, Inc. v. Duncan*. In *Alvarado*, a Ninth Circuit case, it was held that a statue of the Aztec god Quetzalcoatl, on government land, was not a violation of the Establishment Clause, because a reasonable observer would not think the state was endorsing Aztec religion.[120] *American Atheist, Inc. v. Duncan*, was a Tenth Circuit case where the court held a memorial to highway patrol officers who had given their lives, which was shaped like a cross, was a violation because a reasonable overseer would believe it was state-endorsed.[121] These cases had similar fact patterns, yet somehow came to differing results.

The following cases deal with the issues, first, of access to government facilities and programs, and second, with school choice. *Bowen v. Kendrick* dealt with a federal grant program providing services for teenage pregnancy and sexuality.[122] It held that giving funding to religiously affiliated organizations, which met the qualifications of the statute, was not unconstitutional.[123] *Rosenberger v. Rector* found the University of Virginia violated a student newspaper's right to free speech by denying them reimbursement for their club costs on the grounds that they were a religious organization.[124] The Court also found it did not violate the Establishment Clause to allow the school funds to be allotted to the religious newspaper.[125] In the recent case of *Trinity Lutheran Church of Columbia v. Comer*, the Court ruled denying

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[118] Van Orden v. Perry, 545 U.S. 677, 686, 691–92 (2005) (This was also one of the first cases where the court declined to apply the *Lemon* test because it was not workable in this context. The court instead gave an overview of the history, but declined to adopt any sort of formal test based on it.).
[119] *Id.* at 691–692.
[120] Alvarado v. City of San Jose, 94 F.3d 1223, 1227–32 (9th Cir. 1996) (reasoning that Quetzalcoatl was not a sufficiently well-known or currently worshiped God.).
[121] American Atheists v. Duncan, 637 F.3d 1095, 1111 (10th Cir. 2010).
[122] Bowen v. Kendrick, 487 U.S. 589, 622 (1988).
[123] *Id.*
[124] Rosenberger v. Rector & Visitors of the Univ. Va., 515 U.S. 819, 845–46 (1995).
[125] *Id.*

government funds to an otherwise qualified organization solely because of it being a church, was not required by the Establishment Clause, and violated the Free Exercise Clause.[126] In this context, courts have done a slightly better job of holding to the original guideposts of force and funds.

The issue of school choice has not escaped the barrage of litigation. As briefly mentioned above, *Zelman v. Simmons-Harris* held a parent's choice to apply a public funds voucher to education at a private religious school does not violate the Establishment Clause.[127] Finally, in 2022, *Carson v. Makin* confirmed that the Establishment Clause does not require use-based discrimination of religious groups from public benefits, and the Free Exercise Clause prohibits both use and status-based discrimination.[128]

In the areas of access to government facilities and school choice, the Court has been more willing and able to maintain a conception of actual legal coercion, providing something akin to uniformity. These cases are slightly different from the others in that they contain either a Free Speech or Exercise component, which may contribute to this phenomenon. Another explanation for this may be that it is easier to see the religious discrimination when it is put into monetary contexts. This is not to say these issues are not continually challenged in court, however.[129]

C. Legislator-Led Prayer: A Current Battleground

As has been evidenced by the slew of cases above, leaving no topic unscathed, the torrent of litigation has yielded much confusion in its varied results, which certainly departed from the

[126] Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2025 (2017).
[127] Zelman v. Simmons-Harris, 536 U.S. 639, 662–63 (2002).
[128] Carson v. Makin, 142 S. Ct. 1987, 2001 (2022). The Establishment Clause and the Free Exercise Clause are both found in the First Amendment, and therefore serve complementary purposes, and are frequently intertwined in cases. This Article, however, will not address the detailed interplay between the clauses, nor the jurisprudential history of the Free Exercise Clause. *See* Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 523-24 (2022) (explaining and supporting the idea of the connectedness of the two clauses).
[129] *See, e.g.*, OPLAC, Inc. v. Statewide Virtual Charter Sch. Bd., No. CV-2023-1857 (Dist. Okla. filed July 31, 2023) (the OPLAC has sued to challenge the Charter School Board's ability to approve an application for a virtual Catholic charter school.).

Establishment Clause's force and funds origin. This final area of contention highlights the differences between the textualist-originalist and living constitutionalist perspectives, and shines a light on one of the newest battlegrounds. The Supreme Court has yet to address a case on this topic, making it especially contentious.

1. The History of Legislator-led prayer

At the founding of the republic, and even before, it was found that the practice of prayer during legislative assemblies united colonists towards their common purposes as legislators.[130] This was the case during the course of the Continental Congress, and at the inception of the U.S. Congress, with the near immediate adoption of permanent chaplains in both legislative bodies.[131] The Supreme Court has since deemed such a practice to be presumptively consistent with the Bill of Rights and the Constitution.[132] After all, it seems inconceivable that the founders would have implemented the office of the House and Senate Chaplain, only days after adopting the Bill of Rights, if they assumed it to be a violation of the freshly penned First Amendment.[133]

Although Supreme Court precedent on the issue of *legislative* prayer has generally been uniform,[134] *legislator-led* prayer has confused courts and caused a split in circuits.[135] This

[130] Town of Greece v. Galloway, 572 U.S. 565, 601 (2014) (Alito, J., concurring) ("This first congressional prayer was emphatically Christian, and it was neither an empty formality nor strictly nondenominational. But one of its purposes, and presumably one of its effects, was not to divide, but to unite.").

[131] Rev. Jacob Duché, First Prayer of the Continental Congress, (Sept. 7, 1774) 1, *in* THE PAPERS OF JACOB DUCHÉ) (The offices of both Senate and House chaplains were adopted only 3 days after the passage of the Bill of Rights and it would be illogical to believe the congressmen would have adopted a practice (legislator prayer), which they deemed to be in conflict with the document they had passed days earlier.). *Town of Greece*, 572 U.S. at 602.

[132] *Town of Greece*, 572 U.S. at 602 (Alito, J., concurring).

[133] Marsh v. Chambers, 463 U.S. 783, 789 (On September 25, 1789, three days after Congress authorized the appointment of paid chaplains, the language of the Establishment Clause was agreed upon.).

[134] *See* discussion *infra* subsection IV.C.1.a–b.

[135] *See* Bormuth v. Cnty. of Jackson, 870 F.3d 494, 497 (6th Cir. 2017) (holding that legislator-led prayer did not violate the establishment clause when a town board opened its meetings with sectarian prayers led exclusively by the elected commissioners, without the possibility of outside benedictions. The court also found it was not coercive to ask the community members to rise and assume a reverent position.). *See also* Gundy v. City of Jacksonville, no. 21-11298, 2022 U.S. App. LEXIS 27438, at *44–45, (Sept. 30, 2022) (holding a pastor's speech was government speech when he gave an invocation at the city council meeting. Therefore, when the sound was deliberately turned off, he could not sue under the Free Exercise or Free Speech Clauses. Because a claim was never brought under the Establishment Clause, the court did not reach this issue. It is possible, this could be considered as adding to the current circuit split on legislator-led prayer.).

should not be the case because legislator-led prayer has a wealth of historical support akin to that of legislative prayer.[136] Again, this Article includes only a few examples of this similarly long history.

States have broadly allowed legislator-led prayer for over a century.[137] In 1775 the South Carolina Provincial Congress assigned one of its members to pray at the opening of each session.[138] The Connecticut Senate has included the practice since 1861, the House of Representatives of New Hampshire since 1863, and the Illinois Senate since 1849, along with many others.[139] Additionally, in 1853, the Senate Judiciary Committee released a report on its analysis of the Establishment Clause in which it specifically stated, "the clause was not 'intend[ed] to prohibit a just expression of religious devotion by the legislators of the nation, even in their public character as legislators.'"[140]

a. *Marsh v. Chambers*

Although the Supreme Court has not decided a case on legislator-led prayer specifically, it has decided the issue of prayer in legislative sessions generally, and those decisions are instructive.

In 1983, the Supreme Court decided *Marsh v. Chambers*, a case in which a Nebraska legislator challenged the state's practice of opening its legislative sessions with a prayer led by a chaplain, who received a salary from the state.[141] The lower courts, applied the test from *Lemon* and found the practice to be an Establishment Clause violation.[142] Once the case came before it, however, the Supreme Court reneged on its test from *Lemon*, reversing the

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[136] Daniel M. Vitagliano, Note, *Government Speech Doctrine—Legislator-Led Prayer's Saving Grace*, 93 ST. JOHN'S L. REV. 809, 830 (2019) ("History reflects a tradition of legislator-led prayer dating back to before the Founding.").
[137] *Id.* at 830.
[138] *Id.*
[139] *Id.*
[140] *Id.*
[141] Marsh v. Chambers, 463 U.S. 783, 784–85, 794–95 (1983) (the legislature had employed the same minister for sixteen years, but the tenure was considered irrelevant unless the reappointment stemmed from poor motive. Compensation was also not an issue since such a practice was also grounded in historic precedent.).
[142] *Id*. at 785.

decision.[143] Instead, it reasoned that such a prayer practice had been continuously present since the founding, and although no unconstitutional act can be deemed constitutionally acceptable by mere grandfathering, such a lengthy history was persuasive.[144] The only major caveat identified by the Court was that unless there is clear indication of proselytization, the judges should not entangle themselves with the contents of prayers.[145]

Some have considered *Marsh* to be an exception to the Court's Establishment Clause jurisprudence.[146] It is not, however, as much an exception, as it is an early indication of the Court's realization of the inadequacies of *Lemon*, and their desire to be rid of it.[147] Because of the strong historical support for the constitutionality of legislative prayer, it was unnecessary to utilize the *Lemon* test.[148] In a foreshadowing of what the test for the Establishment Clause would eventually become, the court stated, "it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted."[149]

b. *Town of Greece v. Galloway*

Similarly, *Town of Greece* involved a town board, which opened its meetings with prayers given by the community members.[150] The board obtained speakers by systematically calling churches in the local directory and keeping a list of willing volunteers, who happened to be from mostly Christian churches simply due to the religious demographics of the area.[151] All faiths were welcome to pray, and the contents of the prayers were not monitored in any way,

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[143] *Id.* at 786.
[144] *Id.* at 791–92.
[145] *Id.* at 794–95. *But see Id.* at 803 (the dissent lays out what if believes are the four main purposes of the Establishment Clause: to protect the right of conscience from direct or indirect coercion, prevent interference with self-autonomy through maintenance of government neutrality, prevent the trivialization of religion, and ensure sensitive religious issues do not enter the political arena. These reflect a living constitutionalists belief in strict separation.).
[146] Vitagliano, *supra* note 136 at 810–11.
[147] *Id.* at n.11; Lee v. Weisman, 505 U.S. 577, 644, (1992). *See generally* Hunt v. McNair, 413 U.S. 734 (1973) (only a couple years after *Lemon*, the court already seemed to be referring to the test a mere guidepost, rather than a set of hardline standards to follow).
[148] Town of Greece v. Galloway, 572 U.S. 565, 575 (2014).
[149] *Id.* at 577.
[150] *Town of Greece*, 572 U.S. at 570.
[151] *Id*. at 571.

yet the plaintiffs claimed they felt coerced into the prayer practice by the invitation to stand.[152] Following the historical approach from *Marsh*, the Court held the practice to be constitutional because the government was not to be involved in the content of prayers.[153] Echoing *Marsh*, the Court ruled that sectarian prayer was per se constitutional, so long as it was not for the purpose of proselytizing the audience.[154]

With regard to the test for coercion, however, the court could not create a majority opinion.[155] Justice Kennedy, delivering the plurality opinion, wrote the Court should analyze the prayer practice over time for the likelihood of coercion, subtle social pressures such as directing prayer and the singling out of dissidents.[156] Justice Alito, concurring, however, believed the test should only be actual legal coercion (force and funds), so as not to fall into the trap that is subjectivity.[157] Legal coercion, as defined by Alito, would follow the historical meaning of force and funds and encompass such things as financial support for the church, or compelling observance.[158] The indecision over the coercion test in *Town of Greece*, however, made the matter that much more difficult for lower courts to grapple with, as evidenced by the following material.

2. Lund v. Rowan County

a. Facts

The issue of legislator-led prayer, has stumped judges and drastically displayed the conflict between living constitutionalism and textualist/originalist views. [159]

In *Lund v. Rowan County*, the board of commissioners opened their twice monthly meetings with a prayer led by one of the five commissioners.[160] The prayers were never led by a member

[152] *Id*. at 589.
[153] *Id*. at 575.
[154] *Id*. at 583.
[155] *Id*. at 586–92, 608–10 (Alito, J., concurring).
[156] *Id*. at 586–88.
[157] *Id.* at 610 (Alito, J., concurring).
[158] *Id.* at 608 (Alito, J., concurring).
[159] *See supra* note 135 (discussing the current circuit split on legislator-led prayer).
[160] Lund v. Rowan Cnty., 863 F.3d 268, 272 (4th Cir. 2017).

of the public or the clergy.[161] Before prayers, the public was asked to stand for the benediction by using such phrases as "Please pray with me" and "Let us pray."[162] The content of the prayers themselves, were also openly sectarian, in that they regularly called on Jesus' name, the Holy Spirit, and other basic Christian tenets, although the commissioners' prayers were never reviewed nor were there requirements or limitations as to their phraseology.[163] Nonetheless, the plaintiffs, attendees of the board meetings, said they felt "compelled to stand" and "excluded from the political process"[164]

b. Views of the court

Although acknowledging the doctrinal importance of *Marsh* and *Town of Greece*, the court dismissed them as factually dissimilar to the present situation in *Lund*, because in *Lund* the prayers could only be offered by commissioners.[165] The court concluded that prior jurisprudence focused only on examples of prayer given by members of the public or of religious groups, and that therefore, it was deliberate, because any other type of prayer (namely legislator-led prayer) improperly "identifies the government with religion more strongly" and "heightens the constitutional risk."[166] Echoing the living constitutionalist view that no one test will suffice, the court reasoned that *Marsh* and *Town of Greece* "in no way sought to dictate the outcomes of every subsequent case," allowing the court to wildly abandon precedent, and instead follow a "fact intensive" balancing analysis.[167]

The court alternatively focused its analysis specifically on commissioners as the sole prayer-givers, what they interpreted as the sectarian and/or proselytizing nature of the prayer, invitations to participate in the invocation, and the local government setting.[168] The court stated

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[161] *Id.* at 272–73.
[162] *Id.*
[163] *Id.* at 273 (it was acceptable that "97% of the prayers over a five-year period contained prayers that mentioned 'Jesus,' 'Christ,' or 'Savior.'").
[164] *Id.* at 274.
[165] *Id*. at 276.
[166] *Id.* at 278.
[167] *Id.* at 275–80.
[168] *Id.* at 281.

that because only the commissioners were allowed to pray, it created a closed-universe of prayer-givers, which, in conjunction with the invites to stand, and the intimate nature of local government, created a coercive environment.[169] The court also took issue with the fact that the prayer-givers were all Christian and only gave Christian benedictions, despite the fact that each member had been elected by their town, and could, of course, be voted out in the following election.[170] Ironically, the court recognized that legislator-led prayer was not a rare phenomenon, even and especially, within the Fourth Circuit itself, nor could it be deemed per se unconstitutional.[171] Nonetheless, the court found the practice unconstitutional and coercive, and justified its decision with the classic living constitutionalist view, explaining the Establishment Clause is an "instrument of social peace" used to "safeguard religious liberty and ward off political division along religious lines."[172]

To complete yet another example of the warring between the two views, the dissent points the reader to evidences of the majority's underlying assumption that the Establishment Clause is an anti-religion clause.[173] The dissent also criticizes the court-created emphasis on the prayer giver's identity, saying it was inconsistent with the analysis in *Town of Greece*, because that case did not make the prayer giver's identity a central point of the analysis, and it certainly did not exclude legislators.[174] It has never been the policy of the Court that when an opinion is

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[169] *Id.* 283–88.
[170] *Id.* at 282.
[171] *Id*. at 279–80 (the court cites to several amicus briefs, which reference instances where Congress allows its members to pray, along with a survey that was done showing "a majority of [state] legislatures allow lawmakers to offer invocations").
[172] *Id.* at 275.
[173] *Id.* at 296–97 (Niemeyer, J., dissenting)

> [T]he Establishment Clause was designed to enable the presence of religion in civic life without impairing the religious diversity central to the Republic. This is a far different understanding than that assumed by the majority, in which the Establishment Clause is designed to erect barriers around public life through which expressions of faith are not allowed.

Id. at 297.
[174] *Id*. at 307 (Niemeyer, J., dissenting) ("the fact that the Supreme Court has not specifically addressed lawmaker-led prayer signifies nothing. Could it simply be that until recently, no one since 1788 had conceived that legislators leading legislative prayers for legislators was outside the historical tradition 'followed in Congress and the state legislatures'?").

silent on a matter, as is *Town of Greece* on the matter of prayer-giver identity, it is to be interpreted as taking a position against the issue.[175] Nevertheless, the Fourth Circuit ignored this logic.[176]

Because it disregarded *Town of* Greece, *Marsh*, and any rule which might have been applicable, the majority was free to unacceptably dissect the individual prayer contents. *Town of Greece* had established sectarian prayers were acceptable in that if a prayer is allowed in governmental bodies, there can no longer be any limitations as to its content, otherwise it would "involve government in religious matters to a far greater degree than is the case under the town's current practice" where there was no prior review or formal requirements.[177] The only analysis necessary is a brief glance at the prayers over time to ensure they focus on solemnizing the situation and do not bring to question the possibility of actual legal coercion.[178] The majority ignored this, as well.

Most notably, the *Lund* dissent expressed its concern for the majority's use of the coercion test in a way that was inconsistent with both precedent and the original meaning of the Establishment Clause.[179] The majority took issue with the fact that the parties were invited to rise and/or bow their head, but this is precisely what happened in *Town of Greece*, which the Supreme Court found acceptable.[180] In claiming the local government setting was more intimate, therefore individuals may comply to receive a desired outcome from the board, the majority completely ignored the fact that individuals were free to arrive late, leave the meeting,

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[175] *Id.* at 307–08 (Niemeyer, J., dissenting) (citing State v. Stewart, 650 F.2d 178, 180 (1981)) (asserting it would be improper to draw a conclusion from the Supreme Court's silence because the decision "would rest not on a pronouncement of the Supreme Court, but on the curious foundation that a party had failed to raise an issue. We should not deal with precedent in such a cavalier fashion.").
[176] *Id.* at 280.
[177] Town of Greece v. Galloway, 572 U.S. 565, 581 (2014).
[178] *Id.* at 590.
[179] *Lund*, 863 F.3d at 296 (Niemeyer, J., dissenting) ("the majority opinion, beyond simply sidestepping *Town of Greece*, actively undermines the appropriate role of prayer in American civic life. While it pays lip service to controlling law, it nonetheless seeks to avoid it.").
[180] *Town of Greece*, 572 U.S. at 574–75.

or simply decline to rise or bow their head.[181] The dissent argued that *Lund* was actually more inclusive than *Marsh*, because rather than one prayer-giver, of one faith, for sixteen years, there were five prayer givers, who could be from any religious background and who were elected every few years.[182]

c. A Circuit Split

Only two months after the decision in *Lund*, the Sixth Circuit came to the opposite conclusion in *Bormuth v. County of Jackson*, a case with a nearly identical factual background, officially creating a circuit split on the matter.[183] There, the court held that legislator-led prayer did *not* violate the Establishment Clause when a town board opened its meetings with sectarian prayers led exclusively by the elected commissioners, without the possibility of outside benedictions.[184] Adopting a definition of actual legal coercion, the court specifically found it was not coercive to ask the community members to rise and assume a reverent position.[185] The legal arguments articulated in *Bormuth* by the majority and dissenting opinions are nearly identical to those in *Lund,* albeit in reverse, of course.

The above examination of legislative prayer, specifically the legal analyses surrounding the circuit split on legislator-led prayer, showcases the competing arguments advanced by the living constitutionalist and textualist-originalist perspectives. It also, however, displays the inconsistency which arises in a line of caselaw when the living constitutionalist, no-one-test-perspective, is utilized rather than a textualist-originalist viewpoint as had been employed in *Marsh*, *Town of Greece* and *Bormuth*.[186] While these cases serve their explanatory purposes

[181] *Lund*, 863 F.3d at 287–88; *Town of Greece*, 572 U.S. at 567.
[182] *Lund*, 863 F.3d at 310 (Niemeyer, J., dissenting).
[183] Bormuth v. Cnty. of Jackson, 870 F.3d 494, 497 (6th Cir. 2017) (holding that legislator-led prayer did not violate the establishment clause when a town board opened its meetings with sectarian prayers led exclusively by the elected commissioners, without the possibility of outside benedictions. The court also found it was not coercive to ask the community members to rise and assume a reverent position).
[184] *Id.* at 514.
[185] *Id.* at 517.
[186] Marsh v. Chambers, 463 U.S. 783, 791–92; *Town of Greece*, 572 U.S. at 591–92.

well, it is important to remember legislative prayer, including legislator-led prayer is as old as this country, making the need for this critique especially troubling.

D. Modern Day: The Current Chaos of the Establishment Clause

Despite its comparatively short jurisprudential history, courts have managed to thoroughly distort the Establishment Clause with a series of incongruent standards, tests and non-tests, and subjective balancing acts. Never has it been accepted that coercion can encompass all those things which one finds disagreeable, or even that which offend, yet that is precisely the premise many of these cases now draw from.[187] As Judge Easterbrook reminded in *American Jewish Congress v. Chicago*, "speech is not coercive; the listener may do as he likes."[188] Therefore, it does not follow that the test for the Establishment Clause should be one of subjectivity, based on such things as "subtle coercive pressures," psychological coercion, a reasonable observer, a particular prayer-giver, or whatever one assesses to be excessive government entanglement.[189] Regardless of an individual's views on each of the aforementioned cases, should they choose to follow a living constitutionalist view, they would be hard-pressed to know what behavior would be permissible or impermissible in the future. Only one thing can be certain, neither *Lund*, nor most of the other cases mentioned above, involved force or funds, that is, actual legal coercion.

V. THE TRIUMPH OF THE KENNEDY CASE

Confused judges and scholars were finally granted some relief in June 2022 with the decision in *Kennedy v. Bremerton School District*.[190] In that case, a high school football coach had the practice of giving a private prayer of thanks on the 50-yard line after games,

[187] *Town of Greece*, 572 U.S. at 567, 589, 591–92 ("offense does not equate to coercion, [since] adults often encounter speech they find disagreeable, and an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views in a legislative forum."); *Marsh*, 463 U.S. 783, 791–92; *Bormuth*, 870 F.3d at 519.

[188] Am. Jewish Cong. v. Chicago, 827 F.2d 120, 132 (1987) (Easterbrook, J., dissenting), *overruled* by Woodring v. Jackson City, 986 F.3d 979, 993 (2021).

[189] These are the various tests extracted from the discussion above.

[190] Kennedy v. Bremerton Sch. Dist., 597 U.S. 507 (2022).

occasionally incorporating religious references into his post-game motivational talks, and participating in pre-game locker room prayer (this practice predated his time as the coach).[191] At the district's request, he ended all practices except his private prayer, where occasionally students or the other teams' players would join him, but the school district fired him for this behavior.[192] The school believed a reasonable observer would think it was an endorsement of religion.[193]

Before reaching the Establishment Clause issue, the Court addressed the viability of a Free Speech and Exercise claim. Although these particular claims are not the focus of this Article, they are worth noting. First, the Court established that Coach Kennedy did in fact have a legitimate Free Exercise Claim, because the school district specifically burdened his religious practice in a way that was neither neutral nor generally applicable.[194] The Free Speech claim required the Court to determine if the coach's prayer was uttered while in his capacity as a coach, and therefore was government speech, or if it was private speech addressing a matter of public concern.[195] Because the prayers were given after the games and the speech did not relate to his coaching obligations, the majority had no issue labeling this as private speech.[196]

Finally reaching the Establishment Clause issue, the Court ruled the prayers were not a violation because there was no coercion involved in the prayer practice.[197] Instead, in accordance with the Court's findings mentioned above, they held that the school's actions had violated Mr. Kennedy's Free Speech and Exercise rights.[198] The majority took great issue with the prospect of a citizens' Free Speech and Exercise rights being found subordinate to the

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[191] *Id.* at 514–16.
[192] *Id.* at 516.
[193] *Id.* at 514.
[194] *Id.* at 525–26 (during this same post-game period, other coaches and administrators were free to take a phone call, speak with family and friends or do engage in other activities so long as they were not religious in nature.).
[195] *Id.* at 527.
[196] *Id.* at 529–30.
[197] *Id.* at 532–33.
[198] *Id.* at 514.

government's interests in preventing an Establishment Clause violation.[199] The opinion forcefully clarified, "the three clauses appear in the same sentence of the same amendment . . . A natural reading of that sentence would suggest the Clauses have 'complementary' purposes, not warring ones where one Clause is always sure to prevail over the others."[200]

Ridiculing the Ninth Circuit for relying on *Lemon* and not noticing its irrelevance, the Court lectured, "the 'shortcomings' associated with this 'ambitious', abstract, and ahistorical approach to the Establishment Clause became so 'apparent' that this Court long ago abandoned *Lemon* and its Endorsement test offshoot."[201] In its place, the Court instituted an official test of History and Tradition,[202] the roots of which had been seen informally in cases like *Marsh* and *Town of Greece* for decades.[203]

Only briefly explaining this new test, the Court stated, "the line that courts and governments must draw between the permissible and the impermissible has to accord with history and faithfully reflect the understanding of the Founding Fathers."[204] Pulling from an originalist perspective, the opinion references an analysis of original meaning being "the rule" not an "'exception.'"[205] Unfortunately, however, other than these statements, the case offers little instruction on how it foresees this test being applied.

Justice Gorsuch spent a great deal of time explaining that there was no coercion involved in the prayer practice at hand because the only religious activity Mr. Kennedy sought to

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[199] *Id.* at 532–33.
[200] *Id.* at 533.
[201] *Id.* at 534. An example of this earlier disregarding of *Lemon* can be seen in Am. Legion v. Am. Humanist Association, 139 S. Ct. 2067, 2092 (2019) (Kavanaugh, J., concurring) (stating, "this Court no longer applies the old test articulated in *Lemon*.").
[202] The specific phrase "history and tradition" are only used in conjunction in the dissent, but the test has colloquially come to be known as such. See *Kennedy*, 597 U.S. at 547.
[203] *Id.* at 534–35 (quoting Town of Greece v. Galloway, 572 U.S. 565 at 577 (2014)).
[204] *Id.*
[205] *Id.* at 536. *See* Randy E. Barnett & Lawrence B. Solum, *Originalism After Dobbs, Bruen and Kennedy: The Role of History and Tradition*, 118 N.W. U. L. REV. 433 (2023) (analyzing how the Court's use of the History and Tradition test fits within its larger use of public meaning originalism).

continue was his private prayer, which he did not ask his players to join.[206] Emphasis is placed on the fact that the record did not contain any complaints from parents or players regarding a feeling of coercion. In fact, for the three instances of prayer specifically in question, no students from Bremerton High School had even joined the prayer practice, making any arguments of coercion difficult to substantiate.[207] In light of the lack of evidence for coercion, the school district proposed that any religious activity by a government employee, regardless of if there was any coercion, should be considered a violation of the Establishment Clause as a matter of law.[208] Such "phantom constitutional violations," the Court held, were insufficient.[209] An actual legal coercion standard was alluded to, but not cemented.[210]

VI. THE NEXT FRONTIER

By eliminating the *Lemon* and Endorsement tests, the Court took a step towards bringing its jurisprudence closer in line with the force and fund tradition that defined the Establishment Clause at its inception. There is still, however, a great deal of work to be done to fully conform the jurisprudence to this standard. *Kennedy v. Bremerton School District* was likely only the first in a series of cases which will be needed to right and clarify the years of varying tests which left an incoherent string of precedents. The History and Tradition test, as annunciated by the Supreme Court, is not without flaws. Indeed, those flaws are already coming to the fore and will need judicial clarification. The answers to the questions regarding this new test will determine the outcomes of many cases across the myriad of First Amendment topics discussed above. Specifically, such will likely be the case for the resolution of the circuit split on legislator-led prayer.

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[206] *Kennedy*, 597 U.S. at 538; *id.* at 546, 548–60 (Sotomayor, J., dissenting) (It should be noted that the majority and the dissent described the facts in different ways. The dissent sough to draw attention to all three religious practices even though the pre and post-game talks had been discontinued upon request, and that Mr. Kennedy did not seek to reinstate them.).
[207] *Id.* at 539.
[208] *Id.* at 540–41.
[209] *Id.* at 543.
[210] *Id.* at 537.

This following critique, however, is uttered with great caution and the warning that these comments should not be taken as criticism of the *Kennedy* case, or the progress being made in this area.

A. The Flaws of History and Tradition

As mentioned above, this new approach of History and Tradition, or rather the solidification of the supremacy of this approach, is much improved from the previous confusion of the *Lemon* test. It will help ensure much broader security and freedom for individuals specifically, along with greater respect for the Establishment Clause more generally.[211] It may, unfortunately, be the case that such a test will not obtain this broader security with the desired uniform enforcement of religious liberty. Any instruction on the implementation of this test was scant.[212] As Barnett and Solum stated, *Kennedy's* "discussion of history and tradition is brief and cryptic."[213] This fact, in and of itself, begs for inconsistency to arise in lower court decisions.[214]

Further, such a test will inevitably mean a case-by-case, historical assessment of potential Establishment Clause violations. Newer, but equally valuable practices may not be able to date themselves back to the founding era.[215] This may, particularly, be the case for issues arising

[211] *Id.* at 526–27 (highlighting that the school admitted its requirement that Mr. Kennedy stop his prayers was not a generally applicable policy).
[212] *Id.* at 573 (Sotomayor, J., dissenting) ("[f]or now, it suffices to say that the Court's history-and-tradition test offers essentially no guidance for school administrators.").
[213] Barnett & Solum, *supra* note 205, at 477.
[214] *S5, Ep. 03: SCOTUS is Fixated on History. What's Prayer Got to do With it*, BJC (Oct. 26, 2023), https://bjconline.org/s5-ep-03-scotus-is-fixated-on-history-whats-prayer-got-to-do-with-it/ (discussing the potential difficulty lower court's might face in implementing this test).
[215] American Legion v. American Humanist Association, 139 S. Ct. 2067, 2091 (2019) (Breyer, J., concurring) (In that case the majority adopted a history and tradition test. In his opinion, however, Justice Breyer explained that, in his view, a test of history and tradition would only protect practices that had been around since the founding. He expressed the possibility that the exact same circumstances could lead to a different result if the history was not deemed sufficiently lengthy.).

within public schools[216] because public schools (as they are known today) did not even exist at the time of the founding.[217] The Court gave no instruction as to what length or quality of history would be necessary for a practice to be constitutional.[218] This may provide an easy escape route for judges unfriendly to the Establishment Clause, or even ones who simply misunderstand its purposes and origins.

There is, of course, the usual objection to any use of history which can also be made: judges and lawyers may conduct "law office" history.[219] The argument goes that neither judges nor lawyers are trained historians and therefore when they conduct historical analyses, they are typically incomplete and selective.[220] Although this argument can easily reduce to a cheap excuse for abandoning any historical analysis, it is relevant to the extent that it leaves the Court more vulnerable to accusations of impartiality or inadequate discussions of particular sources. History and Tradition in the context of *Kennedy* is, of course, being used in light of the larger originalist perspective of the Court for the purpose of discovering the original public meaning.[221] In this sense, the essence of the historical uses are familiar.[222] Until further guidelines can be issued, however, the loose references to history and tradition will likely bring greater subjectivity to the Establishment Clause than the *Kennedy* Court intended.

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[216] One such example arises in the context of parental rights within public schools. With this issue, the Establishment Clause is not typically at issue; many parents in these cases have raised Free Exercise concerns. *See, e.g.*, Mahmoud v. McKnight, No. 23-1380, 2023 WL 5487218, *1 (D. Md. 2023). The test for evaluating parental rights, however, is one of history and tradition, as well (originating from Washington v. Glucksberg, 521 U.S. 702 (1997) and clarified by Dobbs v. Jackson Woman's Health Org., 597 U.S. 215 (2022)). The problem, however, is that although parental rights generally are grounded in an exceptionally long history and tradition, parental rights within the public school context specifically, may not be. *Cf.* Eric A. DeGroff, *Parental Rights and Public School Curricula: Revisiting Mozert after 20 years*, 38 J. L. & EDUC. 83 (2009); Hugh C. Phillips, Note, Liberating Liberty: How the Glucksberg Test Can Solve the Supreme Court's Confusing Jurisprudence on Parental Rights, 16 LIBERTY U. L. REV. 345 (2022). The same problem may arise in the area of school board prayer. *See* Johnathan Watts, *Between a Rock and A Hard Place: The Struggle to Analyze School Board Prayer and a New Method of Establishment Clause Analysis*, 71 EMORY L. J. 273 (2021).

[217] CHAPMAN & MCCONNELL, *supra* note 36 at 92.

[218] *See generally* Kennedy v. Bremerton Sch. Dist., 597 U.S. 507 (2022).

[219] Erwin Chemerinsky, *History, Tradition, the Supreme Court, and the First Amendment*, 44 HASTINGS L.J. 901, 913 (1993).

[220] *Id.*

[221] Barnett & Solum, *supra* note 205, at 476–77.

[222] *Id.*

The above discussed issues can already be seen to some extent in *Freedom from Religion Foundation, Inc. v. Mack*, which was issued a mere three months after *Kennedy*. There, the Fifth Circuit held it was not a violation of the Establishment Clause for a judge to allow chaplains from a variety of different denominations and religions to pray before calling the court to order.[223] Before each prayer, the bailiff read aloud instructions (which were also on a screen) that no one was required to participate in the invocation.[224]

The court came to its conclusion by analyzing history, as directed by *Kennedy*, but in a worrisome manner. Rather than objectively observing history, the court broke the history into different categories based on the type of historical evidence, before weighing to see which categories of evidence had enough to "satisfy the legal standard."[225] The court also spent significant time determining which pieces of history have the most probative value.[226] For example, when discussing evidence of similar practices at ceremonial openings of court sessions versus daily court sessions the majority stated, "prayers in the first category are less probative than they would be if they had occurred before daily court sessions."[227] The probative value of different historical practices is an inherently subjective standard, which will pose many difficulties for later application, begging the question, "how much history is needed to sustain a practice?" [228]

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[223] Freedom From Religion Found., Inc. v. Mack, no. 21-20279, 2022 U.S. App. LEXIS 27321, at *39 (Sept. 29, 2022).
[224] *Id.* at *6–7.
[225] *Id.* at *19–22 (the four categories analyzed were: "*first*, the behavior of early federal judges and Justices in court-related proceedings; *second*, the in-court behavior of those judges and Justices; *third*, the in-court behavior of non-federal judges; and *fourth*, indirect evidence of the prevalence of courtroom prayer." In this case, only two of the categories were found to have sufficient historical backing.).
[226] *Id.* at *22–23.
[227] *Id.*
[228] New York Rifle and Pistol Association v. Bruen, 597 U.S. 1, 30 (2022) (In this case, Justice Thomas' majority opinion applied the history and tradition test to a New York gun licensing regime. His comments regarding the application of the test are instructive. He states, "On the other hand, analogical reasoning requires only that the government identify a well-established and representative historical analogue, not a historical twin. So even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster.").

Another, and perhaps more pressing issue with the History and Tradition test, stems from the informality with which the Court addressed the coercion standard.[229] The Court analyzes the two ends of the coercion spectrum, but left the rest to a lower court's deduction skills.[230] First, as discussed above, the Court thoroughly dispelled the notion that the particular practice at issue was coercive.[231] The district's admission that there was "no evidence that students have been *directly* coerced to pray with Kennedy" was relevant to the Court's inquiry in this regard.[232] Accordingly, the language of the opinion clearly leans towards an actual legal coercion standard, which would return the clause to its original force and funds meaning.[233] The Court, however, refrains from officially drawing any hard lines.[234] Second, and on the other end, the Court also renounced the types of "coercion" used in many of the cases discussed in Part IV.[235] It clarified there was not an automatic Establishment Clause violation simply because the government does not censor religion in the public square.[236] The majority, instead, singled out the example of forced church attendance saying, "coercion along these lines was among the foremost hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment."[237] Hinting at the "invited chaos" and "minefield" of tests created by a living constitutionalist viewpoint, the Court noted, "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.'"[238] Although, this is certainly an improvement, it still essentially leaves courts to choose a level of coercion somewhere between

[229] Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 537 (2022) (saying members of the Court have disagreed as to what level of coercion is necessary, but that whatever that standard may be, the practice in *Kennedy* does not fall outside those bounds.).
[230] *Id.* at 520–40.
[231] *Id.* at 520.
[232] *Id.*
[233] *Id.* at 537–39.
[234] *Id.* at 535-38.
[235] *Id.* at 540.
[236] *Id.* at 537.
[237] *Id.*
[238] *Id.* at 534.

discomfort and actual legal coercion.[239] So long as any ambiguity remains, judges will continue to create stricter rules based on perceived coercion.

B. Further Implications of the History and Tradition Test: Who can Pray:

As analyzed above, the question of legislator-led prayer still hangs in the balance.[240] Any subsequent cases on the matter will now need to be decided within the framework of the History and Tradition test. Accordingly, the outcome of lower court case, and hopefully a Supreme Court case, will be dependent entirely on that the way history is analyzed, and the way coercion is defined.

Even if the Court were to resolve the issue of legislator-led prayer specifically, there is still a broader question which is being asked, and which will be equally dependent on the History and Tradition conclusions. Imagine a question is assigned to describe the issue involved in each of the legislative prayer cases. If the question in *Marsh* was "Can you pray?" to which the answer was yes, the question in *Town of Greece* was "What can you pray?." This makes the question posed from *Lund*, and the question which still stands, "Who can pray?."[241]

Example cases already exist in this context. in *Barker v. Conroy*, a case addressed by the D.C. Circuit, an atheist wanted to give a secular invocation before the House of Representatives, but was denied.[242] The court reasoned that because the House interpretation of their rules was that a prayer must be religious, and because Barker wished to give a secular prayer, the court could not order the relief, so therefore the claim was dismissed for failure to state a claim.[243] Similarly, the Third Circuit in *Fields v. Speaker of the Pennsylvania House of*

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[239] Matt Clark, *Kennedy v. Bremerton School District's Effect on the Establishment Clause*, THE FEDERALIST SOCIETY (Aug. 9, 2023), https://fedsoc.org/commentary/fedsoc-blog/kennedy-v-bremerton-school-district-s-effect-on-the-establishment-clause.

[240] *Supra* section IV.C.; On June 28, 2018, the Supreme Court denied certiorari. Justice Thomas and Justice Gorsuch dissented, stating they would have accepted the case in order to address an important circuit split. Lund v. Rowan Cnty., 863 F.3d 268 (4th Cir. 2017) *cert. denied*, 183 S. Ct. 2564 (2018) (Thomas, J., dissenting).

[241] Gundy v. City of Jacksonville, no. 21-11298, 2022 U.S. App. LEXIS 27438, at *44–45, (Sept. 30, 2022); Bormuth v. Cnty. of Jackson, 870 F.3d 494, 497 (6th Cir. 2017); *Lund*, 863 F.3d at 272 (4th Cir. 2017).

[242] Barker v. Conroy, 921 F.3d 1118, 1121 (D.C. Cir. 2019).

[243] *Id.* at 1132.

Representatives, a group of non-theists wished to give an invocation before the state legislature, but were denied because the legislature limited the practice to those who believed in a higher authority.[244] The court found the limitation to theists was not a violation of the Establishment Clause, and because legislative prayer is government speech, Free Speech and Exercise claims could not be sustained either.[245]

School boards have similarly broached the question of having prayer at their meetings. In *American Humanist Association v. McCarty*, the Fifth Circuit said that allowing students to give prayers at the start of a school board meeting did not violate the Establishment Clause, and was more similar to legislative prayer than school prayer.[246]

Unfortunately, there are still not any current cases before the Supreme Court regarding "Who can pray?." In 2017, the court denied certiorari in *American Humanist Association v. McCarty*, leaving the issue of school board prayer to the lower courts, in much the same way it had with *Lund* and *Bormuth*.[247] Because of the potential flaws in the History and Tradition test, and the questions regarding who can pray, however, it seems prudent for the Supreme Court to grant certiorari on a case regarding these issues in the near future.

VII. CONCLUSION

Establishment Clause jurisprudence has strayed far from its original roots, leaving a string of nonsensical decisions, on every topic, in its wake. *Kennedy v. Bremerton School District* can serve as the North Star, guiding courts back to a consistent standard of history and tradition, but it alone will not be sufficient. Courts should return to the original force and funds view of the framers by making actual legal coercion the cornerstone of Establishment Clause standards. This clear-cut standard would save the courts from subjectivity and help heal the fractured precedent, leaving room for reasonable and consistent application. If the Court returned to this

[244] Fields v. Speaker of the Pa. House of Representatives, 936 F.3d 142, 146 (3rd Cir. 2019).
[245] *Id.* at 163.
[246] Am. Humanist Ass'n v. McCarty, 851 F.3d 521, 523 (5th Cir. 2017).
[247] Am. Humanist Ass'n v. McCarty, 851 F.3d 521 (5th Cir. 2017), *cert. denied*, 138 S. Ct. 470 (2017).

perspective, "every acknowledgment of religion would not give rise to an Establishment Clause claim, [and] [c]ourts would not act as theological commissions, judging the meaning of religious matters."[248] Actual legal coercion could provide a predictable answer for most Establishment Clause cases, leaving individuals confident in their ability to enjoy religious liberty and freedom of conscience. The United States has been known for its freedom of religion, even when it includes a possibility of religious strife. Courts cannot allow that practice to be stifled.

[248] Van Orden v. Perry 545 U.S. 677, 697 (2005).