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August 22, 2025

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R48645

CRS REPORT
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Committees of Congress

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SUMMARY

R48645

August 22, 2025

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Establishment Clause Limits on Government Support for Religion

The first two provisions of the U.S. Constitution's First Amendment, known as the Religion Clauses, state that "Congress shall make no law respecting an *establishment* of religion or prohibiting the *free exercise* thereof." Together, the Establishment and Free Exercise Clauses require the government to be neutral toward religion, neither providing impermissible support nor demonstrating impermissible hostility.

The Supreme Court acknowledged in *Walz v. Tax Commission*, 397 U.S. 664, 668 (1970), that the Religion Clauses "are not the most precisely drawn portions of the Constitution." Over the years, the Supreme Court has employed a variety of different tests to analyze whether government support for religion violates the Establishment Clause. Among other methods of analysis, the Court employed the three-part *Lemon* test for several decades. The *Lemon* test asked courts to ensure that the challenged government action has a secular purpose, that its primary effect neither advances nor inhibits religion, and that it does not foster excessive government entanglement with religion.

In 2022, however, the Supreme Court announced that it had "long ago abandoned *Lemon*." *Kennedy v. Bremerton School District*, 597 U.S. 507, 534 (2022). Instead, the Court instructed lower courts to interpret the Establishment Clause by "reference to historical practices and understandings." *Id.* at 535. While *Kennedy* announced this new "historical practices and understandings test," it did not overrule prior decisions that applied the *Lemon* test or other types of analyses. Lower courts are still bound to follow the outcomes of any Supreme Court precedent that has direct application, even if those cases applied the *Lemon* test.

The *Kennedy* decision did not instruct courts on how to conduct an analysis by reference to historical practices and understandings, but older Supreme Court precedent contains some guidance. For example, the Court looked to Founding-era understandings and practices to invalidate state laws requiring public officials to declare a belief in the existence of God, as well as a state law requiring a specified prayer to be recited at the beginning of a school day. The Court also looked to evidence of long-standing historical practices to uphold prayers at the beginning of legislative sessions. In *Kennedy* itself, however, the Court did not look to specific historical practices similar to the challenged government action. Instead, it referenced its own prior precedent evaluating whether similar practices were coercive. *Kennedy* thus suggests some prior Supreme Court precedent that did not look to historical practices or understandings may remain good law.

After *Kennedy*, lower courts have taken different approaches to evaluating Establishment Clause claims. Many courts have attempted to apply *Kennedy*'s instruction to look to historical practices and understandings, seeking evidence of practices from the Founding era or later that are in line with the challenged government action. At the same time, lower courts have continued to apply controlling Supreme Court precedent that did not employ a historical analysis. For instance, one federal appeals court held that it was bound to follow a Supreme Court case that had applied the *Lemon* test because the facts were materially identical to the government action it was considering. Other courts have continued to follow the reasoning and analysis of Supreme Court cases that evaluated the presence of coercion or entanglement.

This unsettled state of jurisprudence can make it difficult to assess how courts might review existing federal laws or any new laws that arguably support religion. Courts might look to historical practices and understandings, but there are open questions regarding how to conduct this inquiry. Further, courts may still have to assess whether existing Supreme Court precedent has direct application to the facts before them, requiring them to rule a certain way regardless of historical practices or understandings.

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The First Amendment to the U.S. Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[1] This relatively sparse language supplies the framework for a more complicated jurisprudence.[2] While the First Amendment's text refers to "Congress," it also restricts action by the executive and judicial branches as well as the states.[3] The Establishment Clause bars the government from providing certain types of support for religion,[4] while the Free Exercise Clause prohibits government hostility to religion.[5] Together, the Religion Clauses require the government to be neutral toward religion.[6]

Government support for religious institutions can implicate both Religion Clauses, as the Supreme Court explained in the foundational 1947 case *Everson v. Board of Education*.[7] In *Everson*, a state reimbursed parents for bus fare to send their children to school, including parochial schools.[8] The Court held that the program did not violate the Establishment Clause even though it used "tax-raised funds" to help some children "get to church schools."[9] The Court observed a tension between the two Religion Clauses: the Establishment Clause prohibited the state from using public funds to support "an institution which teaches the tenets and faith of any church," while the Free Exercise Clause prohibited the state from excluding individuals from "public welfare legislation" because of their faith.[10] Balancing these two principles, the Court said that in preventing "state-established churches," it did not want to "inadvertently prohibit [the state] from extending its general state law benefits to all its citizens without regard to their religious belief."[11] *Everson* provided a blueprint for much of the Court's subsequent jurisprudence on public support for religion.

In the past few decades, Supreme Court opinions have trended toward a view of the Religion Clauses that allows more government support for religion. For example, the Supreme Court has "abandoned" two doctrines that arguably had limited the government's ability to support religion.[12] Further, starting in 2017, the Court issued a series of opinions holding that the government violated the Free Exercise Clause by excluding religious entities from public

[1] U.S. CONST. amend. I. *See generally* Cong. Rsch. Serv., *Overview of the Religion Clauses (Establishment and Free Exercise Clauses)*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-2-1/ALDE_00013267/ (last visited Aug. 22, 2025).

[2] *See* Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970) (saying "the purpose [of the Religion Clauses] was to state an objective not to write a statute").

[3] *See, e.g.*, Trump v. Hawaii, 585 U.S. 667, 699–710 (2018) (considering and ultimately rejecting on the merits an Establishment Clause challenge to a presidential proclamation); Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 445, 447 (1969) ("[T]he First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes."); Everson v. Bd. of Educ., 330 U.S. 1, 8 (1947) (saying the Religion Clauses were "made applicable to the states" by the Fourteenth Amendment).

[4] *E.g.*, *Everson*, 330 U.S. at 15–16.

[5] *E.g.*, Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 584 U.S. 617, 639–40 (2018).

[6] *E.g.*, Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 222 (1963).

[7] Cong. Rsch. Serv., *Relationship Between the Establishment and Free Exercise Clauses*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-5/ALDE_00000039/ (last visited Aug. 22, 2025).

[8] *Everson*, 330 U.S. at 3.

[9] *Id.* at 16–17.

[10] *Id.* at 16.

[11] *Id.*

[12] Agostini v. Felton, 521 U.S. 203, 223–30 (1997); Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 534 (2022). As discussed below, the doctrine deemed abandoned in *Kennedy* was a general test the Court had applied both to approve and invalidate various government actions. The *Kennedy* opinion, however, expressed concern with the way the test had been applied to suppress private religious activity. *See* 597 U.S. at 534–35.

benefits—in other words, the decisions required the government to provide benefits to religious entities in certain instances.[13] In 2025, the Supreme Court held that a state violated the Establishment Clause by excluding specific religious organizations from a tax exemption.[14]

Both Religion Clauses are relevant to evaluate government support for religion. Shifts in the Supreme Court's Establishment Clause jurisprudence have further complicated the matter, raising questions about when the government can support—or decline to support—religion. This report first describes the various tests the Supreme Court has historically used to analyze Establishment Clause challenges. It then discusses *Kennedy v. Bremerton School District*, a 2022 case instructing "that the Establishment Clause must be interpreted by 'reference to historical practices and understandings.'"[15] The report reviews cases interpreting and applying *Kennedy*, exploring open questions in Establishment Clause jurisprudence that may be of interest to Congress. While the Supreme Court has abandoned certain approaches to interpreting the Establishment Clause, it has not officially overruled some of the cases that applied those doctrines. The Establishment Clause continues to prevent the government from providing direct financial aid or certain other types of support to religious beliefs or activity.[16] Nonetheless, in light of open jurisprudential questions, lower courts have taken different approaches to reviewing Establishment Clause challenges, potentially making it more difficult to predict how courts will rule.

Overview of Establishment Clause Tests

Over the years, the Supreme Court has evaluated various types of government support for religion under the Establishment Clause, including financial aid, displays that include religious imagery, and laws requiring participation in religious practices.[17] As a historical matter, the Court has used various analyses to determine whether the government has violated the Establishment Clause in providing these and other kinds of support.[18] The Court has acknowledged that the Religion Clauses "are not the most precisely drawn portions of the Constitution."[19] While serving on the Court, Justices O'Connor and Breyer both argued that there could be no single Establishment Clause test, as different types of cases call for different analyses.[20]

[13] Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 454 (2017) (excluding "churches and other religious organizations from receiving grants under [a Missouri] playground resurfacing program"); Espinoza v. Mont. Dep't of Revenue, 591 U.S. 464, 467–68 (2020) (excluding religious schools from a Montana tax credit program benefiting parents of private school students); Carson v. Makin, 596 U.S. 767, 772–73 (2022) (excluding sectarian schools from a Maine program providing tuition assistance to a private school of the parent's choice).

[14] Cath. Charities Bureau, Inc. v. Wisc. Lab. & Indus. Rev. Comm'n, 605 U.S. 238, 241–42 (2025). Specifically, as discussed *infra* "Post-Kennedy Establishment Clause Analysis," the Court held that the state tax exemption created a denominational preference that triggered strict scrutiny.

[15] *Kennedy*, 597 U.S. at 535 (quoting Town of Greece v. Galloway, 572 U.S. 565, 576 (2014)).

[16] Cong. Rsch. Serv., *Overview of Financial Assistance to Religion*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-3-4-1/ALDE_00013074/ (last visited Aug. 22, 2025); Cong. Rsch. Serv., *Overview of Non-Financial Assistance to Religion*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-3-5-1/ALDE_00013080/ (last visited Aug. 22, 2025).

[17] *See id*.

[18] *See, e.g.*, Am. Legion v. Am. Humanist Ass'n, 588 U.S. 29, 48–50 (2019) (plurality opinion).

[19] Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970).

[20] Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 33 (2004) (O'Connor, J., concurring); *Am. Legion*, 588 U.S. at 66–67 (2019) (Breyer, J., concurring). Both Justices sometimes influenced Establishment Clause jurisprudence by providing the necessary votes to reach a judgment in cases where no single opinion commanded a majority of the Court. *E.g.*, Van Orden v. Perry, 545 U.S. 677, 698 (2005) (Breyer, J., concurring); Mitchell v. Helms, 530 U.S. 793, 836–37 (2000) (O'Connor, J., concurring).

As a general matter, the Supreme Court has long recognized that the Establishment Clause's prohibition on laws "respecting an establishment of religion" not only prevents the government from establishing an official religion, such as the Church of England, but also bars other types of support "respecting" an establishment.[21] The Supreme Court has said that "for the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity."[22] In *Everson*, rather than outlining a general test, the Supreme Court identified specific activities that would violate the Establishment Clause:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.[23]

Subsequent cases outlined more general principles to guide Establishment Clause analysis. In the 1970 case *Walz v. Tax Commission*, the Supreme Court upheld a property tax exemption for religious organizations after concluding that "the legislative purpose of tax exemption is not aimed at establishing, sponsoring, or supporting religion" and that "the end result—the effect—is not an excessive government entanglement with religion."[24] As part of its analysis of the law's effect, the Court emphasized the strong historical basis for such exemptions.[25] In the Court's view, while the "unbroken practice" alone could not establish a right to the exemption, the practice also could not be "lightly cast aside" given that "two centuries of uninterrupted freedom from taxation has [not] given the remotest sign of leading to an established church or religion."[26] Accordingly, *Walz* looked to the law's purpose and effect, judging effect in part by reference to government entanglement and history.

A year later, in *Lemon v. Kurtzman*, the Supreme Court outlined an Establishment Clause test that it said combined "the cumulative criteria developed by the Court."[27] To comply with the Establishment Clause, the Court said, "first, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion ... ; finally, the statute must not foster 'an excessive government entanglement with religion.'"[28] This three-prong *Lemon* test looking to purpose, effect, and entanglement provided the primary (but not sole) Establishment Clause test for decades following its announcement.[29]

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[21] U.S. CONST. amend. I. *See generally* Cong. Rsch. Serv., *General Principle of Government Neutrality to Religion*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-3-1/ALDE_00013071/ (last visited Aug. 22, 2025).

[22] *Walz*, 397 U.S. at 668.

[23] Everson v. Bd. of Educ., 330 U.S. 1, 15–16 (1947).

[24] *Walz*, 397 U.S. at 674.

[25] *Id.* at 676.

[26] *Id.* at 676–78.

[27] Lemon v. Kurtzman, 403 U.S. 602, 612 (1971), *abrogation recognized by*, Groff v. DeJoy, 600 U.S. 447, 460 (2023).

[28] *Id.* at 612–13 (quoting *Walz*, 397 U.S. at 674).

[29] *E.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 668 (2002) (O'Connor, J., concurring) (describing *Lemon* as "[a] (continued...)

The Supreme Court articulated additional doctrines governing the *Lemon* test's application in subsequent cases. For example, to evaluate a program's effect, the Court sometimes looked to whether a reasonable observer would view the government as endorsing religion.[30] Further, in opinions that were later overruled, the Supreme Court invalidated support to religious schools because it said the schools' pervasively sectarian character would lead to impermissible entanglement.[31]

In addition, the Supreme Court used Establishment Clause analyses that did not look to the three *Lemon* factors. In a 1982 case, for instance, the Court explained that if a law contains a "denominational preference"—that is, an express preference for one religious denomination over another—the Court must "apply strict scrutiny in adjudging its constitutionality."[32] Under this strict scrutiny test, the Supreme Court said a law would be unconstitutional unless it was "closely fitted" to advancing "a compelling governmental interest."[33] The Supreme Court has applied a strict scrutiny test in other constitutional contexts as one of the so-called "tiers of scrutiny."[34] In the realm of the Establishment Clause, however, the Court has not generally employed these familiar levels of scrutiny.[35] Strict scrutiny apparently applies only to denominational preferences.

As another example of a non-*Lemon* analysis, the Supreme Court looked for impermissible coercion in cases evaluating government support for prayer and religious teaching.[36] In a 1948 case, the Supreme Court held that it was unconstitutional to allow private religious teachers to teach religion in public schools, in part because the state was using its "compulsory public school machinery" to "provide pupils" for religious classes.[37] A 1992 case emphasized that there were "heightened concerns" with "subtle coercion" in "elementary and secondary public schools."[38] Accordingly, the Supreme Court has held that schools violate the Establishment Clause by sponsoring prayer at voluntary activities if the circumstances indirectly coerce students to

central tool" in Establishment Clause analysis); Doe v. Elmbrook Sch. Dist., 687 F.3d 840, 849 (7th Cir. 2012) (saying that *Lemon* is the prevailing test for Establishment Clause claims). For an in-depth discussion of how the Supreme Court applied the *Lemon* test to evaluate financial assistance, see CRS Report R46517, *Evaluating Federal Financial Assistance Under the Constitution's Religion Clauses*, by Valerie C. Brannon (2020).

[30] *See* Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 534, 535 n.4 (2022) (explaining this "variation" on *Lemon*); Cong. Rsch. Serv., *Endorsement Variation on Lemon*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-3-6-6/ALDE_00013089 (last visited Aug. 22, 2025).

[31] *See, e.g.*, Aguilar v. Felton, 473 U.S. 402, 412 (1985), *overruled by*, Agostini v. Felton, 521 U.S. 203 (1997); Wolman v. Walter, 433 U.S. 229, 250–51 (1977), *partially overruled by*, Mitchell v. Helms, 530 U.S. 793 (2000). *See also* Cong. Rsch. Serv., *Lemon's Effect Prong and Pervasively Sectarian Institutions*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-3-6-4/ALDE_00013086 (last visited Aug. 22, 2025).

[32] Larson v. Valente, 456 U.S. 228, 246 (1982). In *Larson*, the Supreme Court invalidated a state law imposing registration and reporting requirements on charitable organizations. *Id.* at 255. The law excluded religious organizations that received more than half of their contributions from members. *Id.* at 230. The Court explained that this provision "makes explicit and deliberate distinctions between different religious organizations." *Id.* at 246 n.23.

[33] *Id.* at 247.

[34] *See, e.g.*, CRS Report R48448, *Gender and School Sports: Federal Action and Legal Challenges to State Laws*, by Madeline W. Donley and Jared P. Cole (2025); CRS Report R47986, *Freedom of Speech: An Overview*, by Victoria L. Killion (2024).

[35] *See, e.g.*, Richard H. Fallon, Jr., *Tiers for the Establishment Clause*, 166 U. PA. L. REV. 59, 60–61 (2017).

[36] In addition to the coercion approach, the Court has also applied the *Lemon* test to evaluate religious activities in public schools. *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578, 580–81, 583 n.4 (1987) (ruling unconstitutional a state law requiring the teaching of "creation science" in certain circumstances, and saying that a "historical approach" to analyzing the Clause would not be "useful in determining the proper roles of church and state in public schools, since free public education was virtually nonexistent at the time the Constitution was adopted").

[37] Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 212 (1948).

[38] Lee v. Weisman, 505 U.S. 577, 592 (1992).

participate in worship.[39] In contrast, the Court has concluded that prayer before the meetings of legislative bodies is not impermissibly coercive where adults understand they can come and go freely and their choice to remain in the room or leave will not necessarily be understood as either endorsing or disrespecting the prayer.[40]

The Supreme Court has also looked to historical practice to evaluate whether government activities violate the Establishment Clause.[41] In the early 1960s, the Supreme Court reviewed colonial history in opinions holding that the Establishment Clause outlawed state laws requiring public officials to declare a belief in the existence of God,[42] as well as a state law requiring a specified prayer to be recited at the beginning of a school day.[43] In both cases, the Court said that although there was historical precedent for the practices, there was also growing opposition in the colonies and the Founding era demonstrating that the First Amendment outlawed the practices.[44] Decades later, the Supreme Court used a historical analysis to reject Establishment Clause challenges to state legislature and town board practices of opening their meetings with prayer.[45] In the Court's view, "[t]he opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country."[46] The Court ruled that so long as a legislative prayer practice is consistent with historical practices and not otherwise coercive, it will not violate the Establishment Clause.[47]

In summary, in the years since deciding *Everson*, the Supreme Court has applied a variety of tests to evaluate whether the government violated the Establishment Clause, including *Lemon*'s three-prong test looking to purpose, effect, and entanglement; strict scrutiny analysis; an assessment of whether the government action was coercive; and an evaluation of historical practices.

Kennedy's Adoption of Historical Practices and Understandings Test

In recent cases, the Supreme Court has said that courts should evaluate all Establishment Clause claims by looking to historical practices and understandings. In 2022's *Kennedy v. Bremerton School District*, a majority of the Supreme Court said it had "long ago abandoned *Lemon* and its

[39] *Id.* at 593 (holding "the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction"); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 312 (2000) (holding a prayer before a football game had coercive effect, where the school was involved in the selection and delivery of the prayer).

[40] Town of Greece v. Galloway, 572 U.S. 565, 590 (2014).

[41] Prior to its decision in *Lemon*, the Court's analyses sometimes looked to history to ensure laws had a secular purpose or effect. *See* McGowan v. Maryland, 366 U.S. 420, 452 (1961); Walz v. Tax Comm'n, 397 U.S. 664, 676 (1970). In *McGowan*, the Court rejected an Establishment Clause challenge to a state law prohibiting commercial activities on Sunday. 366 U.S at 433–36. The Court concluded that while initially, English and colonial laws requiring Sunday closures were intended to aid "the established church," over time, the statutes became more secular both in text and in justification. *Id.* at 433, 444, 453. *Walz* is discussed *supra* in the text accompanying notes 24 to 26. *See also* Locke v. Davey, 540 U.S. 712, 722–23 (2004) (looking to evidence from "around the time of the founding" to support a state's interest in not funding degrees for devotional theology).

[42] Torcaso v. Watkins, 367 U.S. 488, 496 (1961).

[43] Engel v. Vitale, 370 U.S. 421, 424 (1962).

[44] *Torcaso*, 367 U.S. at 490–92; *Engel*, 370 U.S. at 425–30.

[45] Marsh v. Chambers, 463 U.S. 783, 795 (1983); *Town of Greece*, 572 U.S. at 569–70.

[46] *Marsh*, 463 U.S. at 786.

[47] *Town of Greece*, 572 U.S. at 577, 587–89.

endorsement test offshoot."[48] Instead, the Court said "the Establishment Clause must be interpreted by 'reference to historical practices and understandings.'"[49] *Kennedy* suggested this analysis should focus on history and original meaning, referring to the understanding of the Founding Fathers.[50] At the same time, *Kennedy*'s own analysis only briefly referred to historical understandings, and primarily focused on whether the facts demonstrated coercion.[51]

In *Kennedy*, the Supreme Court considered whether a school would have violated the Establishment Clause by allowing a football coach to pray at the fifty-yard line immediately after games.[52] In evaluating the school's decision to stop the coach's prayer practice, the opinion analyzed whether the coach had impermissibly coerced students into praying.[53] Prior cases evaluating prayer in schools also had looked for coercion, and in *Kennedy* the Court explained that this inquiry was consistent "with a historically sensitive understanding of the Establishment Clause."[54] In the Court's view, "coercion" such as forcing citizens to engage in religious exercise "was among the foremost hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment."[55]

Unlike some of the earlier prayer cases discussed above, the *Kennedy* opinion did not review Founding-era practices.[56] Instead, to determine whether the football coach's prayer was coercive, the Court looked at the response of students and parents to his actions.[57] The Court said there was no record evidence that students felt pressured to participate apart from "hearsay."[58] Distinguishing prior cases that involved impermissible school-sponsored prayer, the Court said the coach's prayers "were not publicly broadcast or recited to a captive audience," there was "no formal school program accommodating the religious activity at issue," and "[s]tudents were not required or expected to participate."[59]

Kennedy's announcement that the Supreme Court had "abandoned" *Lemon*'s three-prong test raised a number of additional questions about Establishment Clause jurisprudence in its wake.[60] First, *Kennedy* did not overrule prior Establishment Clause cases that had applied the *Lemon*

[48] Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 534 (2022). The last time a majority opinion had applied the *Lemon* test to resolve an Establishment Clause case was in *McCreary County v. ACLU*, 545 U.S. 844, 861 (2005). A plurality of the Court applied the endorsement test in *Salazar v. Buono*, 559 U.S. 700, 720–21 (2010) (plurality opinion). In *Espinoza v. Montana Department of Revenue*, 591 U.S. 464, 474 (2020), and *Carson v. Makin*, 596 U.S. 767, 781 (2022), the Court rejected Establishment Clause challenges by citing to *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). The *Zelman* majority did not explicitly cite *Lemon* but nonetheless asked whether the challenged law had the "'purpose' or 'effect' of advancing or inhibiting religion." 536 U.S. at 648–49 (quoting Agostini v. Felton, 521 U.S. 203, 22–23 (1997)).

[49] *Kennedy*, 597 U.S. at 535 (quoting *Town of Greece*, 572 U.S. at 576).

[50] *Id.* at 536.

[51] *Id.* at 537–40.

[52] *Id.* at 512–14.

[53] *Id.* at 537.

[54] *Id.*

[55] *Id.*

[56] *Id.* at 537–42. *See also, e.g.*, Randy E. Barnett & Lawrence B. Solum, *Originalism After* Dobbs, Bruen, *and* Kennedy*: The Role of History and Tradition*, 118 NW. U. L. REV. 433, 474 (2023) (expressing the view that "Justice Gorsuch's opinion is not analytically precise about the roles that history and tradition play in the Court's reasoning").

[57] *Kennedy*, 597 U.S. at 538–42.

[58] *Id.* at 539.

[59] *Id.* at 541–42.

[60] *Id.* at 534.

test.[61] Instead, the *Kennedy* opinion itself looked to Supreme Court precedent on school coercion, rather than a review of Founding-era practices, to decide the case.[62] Further, as litigants have noted before the Supreme Court,[63] the Court evaluated Establishment Clause claims by looking to a government action's purpose, effect, and potential for entanglement in cases predating *Lemon* itself.[64] It therefore could be unclear whether the statement in *Kennedy* that "this Court long ago abandoned *Lemon* and its endorsement test offshoot"[65] also undermines cases predating *Lemon* that applied the same factors.[66]

Post-*Kennedy* Establishment Clause Analysis

Since *Kennedy*, the Supreme Court has issued one opinion resolving a case on Establishment Clause grounds: *Catholic Charities Bureau, Inc. v. Wisconsin Labor & Industry Review Commission*.[67] Despite *Kennedy*'s instruction to interpret the Establishment Clause by reference to historical practices and understandings, *Catholic Charities Bureau* did not apply a historical analysis.[68] The case involved a religious exemption from a state unemployment insurance program.[69] To determine whether religious organizations were exempt from paying unemployment taxes, the state looked to whether they engaged in religious activities such as proselytizing or limiting their services to members of their religion.[70] In a unanimous decision, the Supreme Court said the law created "a denominational preference by explicitly differentiating between religions based on theological practices": "namely, whether to proselytize or serve only co-religionists."[71] In line with its prior jurisprudence addressing express denominational preferences, the Court held that the law was subject to strict scrutiny, meaning the state had to show that it was "closely fitted" to "a compelling governmental interest."[72] The Court further

[61] *See id.*

[62] *See id.* at 536–42. *See also, e.g.*, Jusino v. Fed'n of Cath. Tchrs., Inc., 54 F.4th 95, 102 (2d Cir. 2022) (concluding "regardless of whether *Kennedy* actively overruled *Lemon* or simply recognized that *Lemon* was already a dead letter, one thing it indisputably did *not* do was overrule" a separate case the court believed remained binding).

[63] *E.g.*, Transcript of Oral Argument at 111, Cath. Charities Bureau, Inc. v. Wisc. Lab. & Indus. Rev. Comm'n, 605 U.S. 238 (2025) (No. 24-154) (claiming that "entanglement predated *Lemon*"); Brief in Opposition at 21, City of Pensacola v. Kondrat'yev, 139 S. Ct. 2772 (2019) (mem.) (No. 18-351) (claiming that "the secular purpose requirement exists independent of ... and long predates *Lemon*").

[64] *E.g.*, Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970); *see generally* Cong. Rsch. Serv., *Purpose and Effect Test Before Lemon*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-3-5-3/ALDE_00013082/ (last visited Aug. 22, 2025).

[65] *Kennedy*, 597 U.S. at 534.

[66] *Cf., e.g.*, Roake v. Brumley, 141 F.4th 614, 652 (5th Cir. 2025) (Dennis, J., concurring) (agreeing with "scholarship" arguing that "*Kennedy* repudiated only the endorsement test ... and left intact the broader framework of Establishment Clause doctrine: the requirement of a secular legislative purpose, the prohibition on policies whose primary effect advances religion, and the concern about excessive entanglement between church and state").

[67] *Cath. Charities Bureau*, 605 U.S. 238. The Court heard oral arguments in another case involving the Establishment Clause but ultimately did not issue an opinion. Okla. Statewide Charter Sch. Bd. v. Drummond *ex rel.* Oklahoma, 605 U.S. 165 (2025) (affirming the judgment by an equally divided Court). For more on *Drummond*, see CRS Legal Sidebar LSB11342, *Religious Charter Schools Remain Unlawful in Oklahoma After Supreme Court Judgment*, by Valerie C. Brannon and Whitney K. Novak (2025).

[68] *Cath. Charities Bureau*, 605 U.S. 238.

[69] *Id.* at 242.

[70] *Id.* at 249–50.

[71] *Id.* at 250.

[72] *Id.* at 252 (quoting Larson v. Valente, 456 U.S. 228, 246–47 (1982)).

concluded the state had failed to satisfy its burden.[73] The majority opinion did not cite to *Kennedy* or the historical practices and understandings test, even when it discussed an argument that involved one of the *Lemon* factors.[74] The state had claimed that its tax exemption would allow it to avoid entangling questions about religious doctrine.[75] The Court rejected this argument—not on the basis that entanglement is no longer a valid factor for states to consider, but on the basis that the law was not closely tailored to this entanglement interest.[76]

Thus, while the Supreme Court announced in *Kennedy* that courts should evaluate Establishment Clause claims by looking to historical practices and understandings, neither *Kennedy* nor *Catholic Charities Bureau* provided significant guidance on how to conduct such an inquiry. Instead, both cases cited older precedent looking for coercion or a denominational preference. This is consistent with the idea that *Kennedy* "abandoned" *Lemon*'s three-prong test but did not overrule earlier cases.[77] These cases might also be read to suggest that *Kennedy's* historical test replaces "*Lemon* and the endorsement test," but not the other types of Establishment Clause inquiries the Court previously employed.[78]

Lower courts remain bound by Supreme Court rulings that have "direct application" to a case, even if the analysis has been "rejected in some other line of decisions."[79] Only the Supreme Court can overrule its own cases.[80] Following *Kennedy*, then, lower courts remain bound to follow the rulings of any cases with similar fact patterns that have direct application. *Kennedy* and *Catholic Charities Bureau* further suggest that courts might continue to follow not only the outcomes but also the reasoning of some cases that did not primarily conduct a historical analysis.

Federal and state court opinions following *Kennedy* show that courts have applied the historical test to evaluate Establishment Clause claims. In certain cases, however, courts have followed Supreme Court precedent the courts believed remained binding, even if that precedent followed an analysis using some of the *Lemon* factors. The overview of post-*Kennedy* jurisprudence below focuses primarily on appellate court rulings, though select trial court decisions are discussed as well.

[73] *Id.* at 254.

[74] *See id.* at 253–54.

[75] *Id.*

[76] *Id.*

[77] Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 534 (2022).

[78] *Id.* at 535; *cf. id.* at 536 ("An analysis focused on original meaning and history, this Court has stressed, has long represented the rule rather than some 'exception' within the 'Court's Establishment Clause jurisprudence.'" (quoting Town of Greece v. Galloway, 572 U.S. 565, 575 (2014))).

[79] Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989).

[80] *Id.*

Historical Practices and Understandings Test

In light of Supreme Court guidance in *Kennedy*, lower courts have begun to grapple with how to apply a historical approach to the Establishment Clause. One Fourth Circuit[81] opinion identified a number of open questions about how to evaluate Establishment Clause violations under *Kennedy*'s historical test:

> What kinds of evidence are relevant? ... What kinds of evidence are the most useful? ... Which periods of history are relevant—the era of the Bill of Rights, 1791, or the era of the incorporation of the Bill of Rights, 1868—and which period is most important?[82]

In its own pre-*Kennedy* Establishment Clause rulings evaluating historical practices, the Supreme Court looked to history from the colonial era and shortly thereafter[83] and searched for evidence of longstanding, unbroken practices.[84] The federal appeals courts that have applied *Kennedy*'s historical test have seemed to focus first on Founding-era practices or understandings.[85] Beyond that, one court said that it would "look next to the 'uninterrupted practice' of a law in our nation's traditions"[86] to determine whether the practice "withstood the critical scrutiny of time and political change."[87]

As the Supreme Court observed in 1987, it may be unclear how to use a historical test to analyze practices that have arisen in modern contexts.[88] In that opinion, the Court said that a "historical approach" to analyzing the Establishment Clause would not be "useful in determining the proper roles of church and state in public schools, since free public education was virtually nonexistent at the time the Constitution was adopted."[89] Responding to this Supreme Court passage, the Third Circuit stated in *Hilsenrath* ex rel. *C.H. v. School District of Chathams* that "[h]istorical tradition can be established by analogical reasoning."[90] This may raise further questions about what historical practices are sufficiently analogous to the challenged action.

Hilsenrath seemed to take a somewhat generalized approach to looking for analogous historical practices.[91] The court was evaluating whether instructional videos about Islam shared in a World

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[81] For ease of reading, references in this report to a particular circuit (e.g., the Fourth Circuit) refer to the U.S. Court of Appeals for that particular circuit (e.g., the U.S. Court of Appeals for the Fourth Circuit).

[82] Firewalker-Fields v. Lee, 58 F.4th 104, 122 n.8 (4th Cir. 2023). In addition, different Founders and different jurisdictions had different views on religious establishments. *See generally*, *e.g.*, Carl H. Esbeck, *Uses and Abuses of Textualism and Originalism in Establishment Clause Interpretation*, 2011 UTAH L. REV. 489 (2011) (discussing disagreements over the original meaning of the Establishment Clause); Cong. Rsch. Serv., *Introduction to the Historical Background on the Religion Clauses*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-2-2-1/ALDE_00013268 (last visited Aug. 22, 2025).

[83] *See* Engel v. Vitale, 370 U.S. 421, 425–30 (1962); Torcaso v. Watkins, 367 U.S. 488, 490–92 (1961). In both of these cases, as well as in *McGowan v. Maryland*, 366 U.S. 420, 431–40 (1961), the Court concluded that the historical evidence showed shifts in practices and understandings that were critical to its analysis.

[84] Walz v. Tax Comm'n, 397 U.S. 664, 676–78 (1970); Town of Greece v. Galloway, 572 U.S. 565, 576–77 (2014).

[85] *See* Hilsenrath *ex rel.* C.H. v. Sch. Dist. of Chathams, 136 F.4th 484, 491 (3d Cir. 2025); Hunter v. U.S. Dep't of Educ., 115 F.4th 955, 965 (9th Cir. 2024); Freedom from Religion Found., Inc. v. Mack, 49 F.4th 941, 951–54 (5th Cir. 2022).

[86] *Hunter*, 115 F.4th at 965–66 (quoting Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 536 (2022)). The quotation comes from an explanatory parenthetical in *Kennedy*.

[87] *Id.* (quoting *Town of Greece*, 572 U.S. at 577).

[88] Edwards v. Aguillard, 482 U.S. 578, 583 n.4 (1987).

[89] *Id.*

[90] *Hilsenrath*, 136 F.4th at 491 (quoting Range v. Att'y Gen., 124 F.4th 218, 228 (3d Cir. 2024) (en banc)) (alteration in original).

[91] *Id.*

Cultures and Geography class violated the Establishment Clause.[92] In applying *Kennedy*'s "historical practices and understandings" test, the Third Circuit relied on a concurring opinion from Justice Gorsuch.[93] According to Justice Gorsuch, the "telling traits" of government established churches include (1) "control over the doctrine and personnel"; (2) "mandated attendance"; (3) punishment of dissenters for their religious exercise; (4) restriction of "political participation by dissenters"; (5) financial support for the established church; and (6) using the established church to carry out civil functions.[94] Under the Third Circuit's approach, the plaintiff would have to prove that the curriculum resembled one of these "hallmarks" of an established church.[95] The plaintiffs asserted the presence of "coercion" (hallmark 2) and "non-neutrality" (hallmark 5).[96] The Third Circuit concluded that the school's curriculum was not akin to mandating attendance because the videos were not coercive or proselytizing.[97] The court further held that the school was not effectively providing financial support for a preferred religion because the record did not "show favoritism" for Islam over other world religions.[98]

The Fifth Circuit disagreed with this approach in *Roake v. Brumley*, a case involving a Louisiana law requiring public schools to display the Ten Commandments.[99] That court said the *Kennedy* majority did not adopt these "historical hallmarks of religious establishments" "as the exclusive Establishment Clause test."[100] Instead, the Fifth Circuit asked whether "the permanent posting of the Ten Commandments in public school classrooms fits within, or is consistent with, a broader tradition of using the Ten Commandments in public education."[101] Given the case's procedural posture, the court accepted the plaintiff's allegations that there was "no longstanding tradition of permanently displaying the Ten Commandments in public[] school classrooms."[102]

The Fifth Circuit again looked for more specific types of historical practices in *Freedom from Religion Foundation, Inc. v. Mack*.[103] To consider whether a judge could open his court sessions with prayer, the Fifth Circuit discussed historical evidence of judicial practices.[104] The court looked to practices "around the Founding" and "the time of incorporation," but it also reviewed various practices from the 1830s and as late as 1996.[105] Ultimately, the Fifth Circuit concluded that although there was no evidence of prayer before *daily* court sessions, the scattered evidence

[92] *Id.* at 486.

[93] *Id.* at 491.

[94] *Id.* (quoting Shurtleff v. City of Boston, 596 U.S. 243, 286 (2022) (Gorsuch, J., concurring)). Justice Gorsuch drew these elements of a religious establishment from a law review article that reviewed "the period between initial settlement and ultimate disestablishment" to summarize the "ad hoc and unsystematic" laws constituting American religious establishments. Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2131 (2003).

[95] *Hilsenrath*, 136 F.4th at 491.

[96] *Id.* at 491–92.

[97] *Id.* at 493. This section of the opinion also looked to the Supreme Court's precedent on school prayer. *Id.*

[98] *Id.*

[99] Roake v. Brumley, 141 F.4th 614, 645 (5th Cir. 2025).

[100] *Id.* at 645–46.

[101] *Id.* at 646.

[102] *Id.* (alteration in original). The plaintiffs specifically asserted there was no evidence supporting the display of the Ten Commandments in public schools, discounting the government's evidence that early *religious* schools displayed the Ten Commandments. Roake v. Brumley, 756 F. Supp. 3d 93, 173–74 (M.D. La. 2024). The plaintiffs also asserted that Founding-era understandings did not support an official government version of the Ten Commandments. *Id.* at 172–73.

[103] Freedom from Religion Found., Inc. v. Mack, 49 F.4th 941, 951–54 (5th Cir. 2022).

[104] *Id.* at 951–54.

[105] *Id.*

of prayer before federal court-term openings and other judicial references to "God" were sufficiently analogous to provide a historical basis supporting the challenged practice.[106]

To evaluate the constitutionality of a religious exemption from a federal nondiscrimination law, the Ninth Circuit similarly reviewed the history of tax exemptions for religious institutions in *Hunter v. U.S. Department of Education*.[107] In the Ninth Circuit's view, tax exemptions were the closest analogy to the nondiscrimination exemption, "[g]iven the dearth of historical equivalents."[108] Although the laws had differences, the court nonetheless concluded that "the history of tax exemptions near the time of the Founding suggests that the statutory exemptions that operate as a subsidy to religious institutions do not violate the Establishment Clause according to its original meaning."[109] Additionally, the court reviewed more modern attempts to accommodate religion in various federal and state programs, saying these provisions "evince a continuous, century-long practice of governmental accommodations for religion."[110] The Ninth Circuit acknowledged that the Supreme Court had used the *Lemon* test to approve of many of these modern accommodations but said the decisions nonetheless provided evidence of historical practices and understandings.[111]

Although *Kennedy* abandoned "*Lemon* and the endorsement test,"[112] one trial court nonetheless concluded that under the historical practices and understandings test, the Establishment Clause "serves as a bulwark against government sponsorship or endorsement of religion."[113] The court concluded a city had violated the Establishment Clause by "conceiving, organizing, and implementing" a prayer vigil, impermissibly sponsoring "a religious event."[114] The court said the city's involvement with the prayer vigil was "dissimilar" to prior historical examples such as legislative prayer or national days of prayer.[115] Further, the court seemingly relied not just on historical practices but also the Founders' understandings of religious establishment.[116] While framing its analysis as an application of the historical practices and understandings test, the trial court also cited decisions that analyzed the *Lemon* factors.[117]

In some contrast, a South Carolina trial court refused to consider prior Supreme Court cases based on the *Lemon* test.[118] In that South Carolina case, a foster-care agency that contracted with the state to provide child placement services would work only with Christian foster parents who affirmed a doctrinal statement of faith.[119] A potential parent who refused to affirm these beliefs argued this requirement violated the Establishment Clause in three ways: by (1) coercing religious belief and exercise; (2) delegating government power to religious entities; and

[106] *Id.* at 955–57.

[107] Hunter v. U.S. Dep't of Educ., 115 F.4th 955, 966 (9th Cir. 2024).

[108] *Id.* at 965.

[109] *Id.*

[110] *Id.* at 966. These provisions included another exemption from nondiscrimination law but also exemptions from the draft or Social Security taxes, as well as prisoner accommodations. *Id.*

[111] *Id.*

[112] Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 535 (2022).

[113] Rojas v. City of Ocala, 739 F. Supp. 3d 1068, 1090 (M.D. Fla. 2024).

[114] *Id.* at 1088.

[115] *Id.* at 1083.

[116] *Id.* at 1084.

[117] *Id.* at 1089.

[118] Maddonna v. U.S. Dep't of Health & Hum. Servs., 696 F. Supp. 3d 176, 191 (D.S.C. 2023).

[119] *Id.* at 180–81.

(3) demonstrating governmental favoritism for the agency's religion.[120] The trial court rejected these arguments.[121] It said the plaintiff failed to show the existence of a "historically disfavored establishmentarian practice," such as proving that religious agencies had a monopoly over providing this civil service.[122] To the extent the plaintiff's arguments relied on Supreme Court cases that applied the *Lemon* test, the trial court refused to consider those claims.[123]

Other Establishment Clause Tests

In other Establishment Clause cases decided post-*Kennedy*, courts have followed controlling Supreme Court cases that were not decided using a historical practices or understandings test—and in some cases, courts have applied factors from the *Lemon* test to evaluate whether a government action violates the Establishment Clause.

Coercion

In line with *Kennedy* itself, some courts have continued to evaluate whether a challenged government action is coercive. One trial court concluded that "a historical analysis [was] not necessary" to review the constitutionality of a school program educating students on transcendental meditation.[124] The court said that "*Kennedy* ... did not overrule prior decisions" using a coercion analysis to evaluate prayer in public schools, so it applied the reasoning from those cases.[125] The Second Circuit also applied *Kennedy*'s coercion analysis to reject a photographer's argument that New York would violate the Establishment Clause if it applied its nondiscrimination laws in a way that required her to provide services to same-sex couples.[126] The appeals court concluded that the laws would "only require [her] to provide her wedding photography services."[127] The laws would not require "her active religious participation in the weddings that she photographs," particularly given that "mere presence does not equate to coerced participation in any religious activity."[128]

The Supreme Court of Oklahoma discussed cases involving coerced prayer in public schools when it held that the state could not approve a religious charter school.[129] Specifically, the court concluded "the creation of a religious public school" would violate the Establishment Clause because such a school would "requir[e] or expect[] students to participate in religious activities."[130] This ruling was appealed to the U.S. Supreme Court, which heard oral arguments in

[120] *Id.* at 188.

[121] *Id.*

[122] *Id.* at 190–91 (quoting Firewalker-Fields v. Lee, 58 F.4th 104, 122 n.7 (4th Cir. 2023)).

[123] *Id.* at 190–92.

[124] Williams v. Bd. of Educ. of City of Chicago, 673 F. Supp. 3d 910, 921 (N.D. Ill. 2023).

[125] *Id.* at 921–22. Specifically, the trial court denied both the school's and the plaintiff's motions for summary judgment, saying a reasonable jury could find in favor of either party. *Id.* at 923. *See also* Lozano v. Collier, 98 F.4th 614, 627–28 (5th Cir. 2024) (remanding case to the trial court for further consideration after concluding a plaintiff had presented evidence of potential coercion requiring inmates to take Christian-based classes).

[126] Emilee Carpenter, LLC v. James, 107 F.4th 92, 96, 111 (2d Cir. 2024).

[127] *Id.*

[128] *Id.* at 112.

[129] Drummond *ex rel.* State v. Okla. Statewide Virtual Charter Sch. Bd., 558 P.3d 1, 14 (Okla. 2024).

[130] *Id.* at 13.

April 2025.[131] The Supreme Court ultimately did not issue an opinion in the case, instead affirming the judgment below by an equally divided court.[132]

In *Freedom from Religion Foundation*, the Fifth Circuit primarily reviewed historical practices to determine whether courtroom prayer violated the Establishment Clause.[133] The court also asked, however, whether the judge's prayer practice was coercive, looking to prior Supreme Court precedent.[134] The Fifth Circuit acknowledged disagreement among various opinions on how to determine whether government action is unduly coercive, but it ultimately looked for "objective evidence that a person has been treated differently from others."[135] In the court's view, there was no such evidence that any of the plaintiffs were subject to "disfavor" because of their failure to participate in the prayer.[136] Their "subjective perception" that the judge "disliked them" was insufficient, according to the court.[137]

Precedent Applying *Lemon*

As mentioned above, one South Carolina trial court refused to rely on pre-*Kennedy* Supreme Court cases that were based on the *Lemon* test.[138] In contrast, in *Roake*, the Fifth Circuit concluded it was bound by *Stone v. Graham*—a Supreme Court opinion that applied the *Lemon* test—because *Stone* was not expressly overruled by *Kennedy*.[139] Specifically, *Roake* held that a Louisiana law requiring public schools to display the Ten Commandments was "materially identical" to a Kentucky law that *Stone* ruled unconstitutional.[140] The Fifth Circuit looked not only to the text of the laws but also to legislators' statements, determining that, as in *Stone*, those statements revealed the Louisiana law did not have any valid secular purpose.[141]

The Oklahoma Supreme Court ruling on religious charter schools mentioned above appears to have obliquely referenced cases that applied the *Lemon* test to prohibit direct government funding for religious activity.[142] In addition to its holding on coercion, the court emphasized that

[131] *See* CRS Legal Sidebar LSB11342, *Religious Charter Schools Remain Unlawful in Oklahoma After Supreme Court Judgment*, by Valerie C. Brannon and Whitney K. Novak (2025).

[132] Okla. Statewide Virtual Charter Sch. Bd. v. Drummond, 605 U.S. 165 (2025).

[133] Freedom from Religion Found., Inc. v. Mack, 49 F.4th 941, 950 (5th Cir. 2022).

[134] *Id.* at 958.

[135] *Id.* at 958–59.

[136] *Id.* at 960–61.

[137] *Id.* at 961.

[138] Maddonna v. U.S. Dep't of Health & Hum. Servs., 696 F. Supp. 3d 176, 191 (D.S.C. 2023).

[139] Roake v. Brumley, 141 F.4th 614, 642 (5th Cir. 2025). *Accord* Stinson v. Fayatteville Sch. Dist. No. 1, No. 5:25-CV-5127, 2025 WL 2231053, at *11 (W.D. Ark. Aug. 4, 2025); Nathan v. Alamo Heights Indep. Sch. Dist., No. 5:25-cv-00756, 2025 U.S. Dist. LEXIS 162056, at *70 (W.D. Tex. Aug. 20, 2025).

[140] *Roake*, 141 F.4th at 643.

[141] *Id.* at 643–45. The court explained that it did not "undertake this analysis to revive *Lemon*, but only for the limited purpose of deciding whether *Stone*'s facts and reasoning control." *Id.* at 643 n.21. Further, as discussed *supra* in the text accompanying notes 99 to 102, the Fifth Circuit also applied *Kennedy*'s historical practices and understandings test as an alternative analysis. *Id.* at 645 ("[E]ven if *Stone* were overturned tomorrow, H.B. 71 violates the Establishment Clause under *Kennedy*.").

[142] Drummond *ex rel.* State v. Okla. Statewide Virtual Charter Sch. Bd., 558 P.3d 1, 14 (Okla. 2024); *see also, e.g.*, Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 780 (1973) ("In the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid.").

approving a religious charter school would impermissibly "permit state spending in direct support of the religious curriculum and activities."[143]

Entanglement

Finally, some courts evaluating Establishment Clause claims have continued to look for impermissible entanglement between religion and government, even though this was one of the *Lemon* factors.[144] The question of entanglement came up in two cases argued during the Supreme Court's October 2024 term.[145] For instance, in the *Catholic Charities Bureau* case described above, the state court disagreed that its interpretation of a state tax exemption law would require an intrusive and entangling inquiry into religious organizations.[146] Ultimately, the Supreme Court rulings in both cases did not address the entanglement issue.[147] Nonetheless, at oral argument in the cases, Justices asked whether various outcomes would create excessive entanglement.[148] Justice Thomas was the only member of the Court to ask during *Catholic Charities Bureau* arguments whether entanglement was a permissible inquiry as a "standalone consideration," or whether instead it was part of the "hopefully defunct" *Lemon* test.[149] Responding to his question, the attorney for the state cited *Walz*, a case decided before *Lemon*, as the source for the entanglement factor.[150]

In contrast to the state court's ruling in *Catholic Charities Bureau*, some courts have concluded post-*Kennedy* that state actions did create an unconstitutional entanglement.[151] For instance, in *Does 1–11 v. Board of Regents of the University of Colorado*, the Tenth Circuit held that a

[143] *Drummond*, 558 P.3d at 14.

[144] For a discussion of some of the cases analyzing the entanglement factor, see Cong. Rsch. Serv., *Lemon's Entanglement Prong*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-3-6-5/ALDE_00013087/ (last visited Aug. 22, 2025). After *Kennedy*, one trial court rejected a plaintiff's entanglement claim on the basis that it rested "on an outdated and thus inapplicable test." Gen. Conf. of Seventh-Day Adventists v. Horton, No. 24-2866-TDC, 2025 WL 1703806, at *8 (D. Md. June 18, 2025), *appeal docketed*, No. 25-1735 (4th Cir. July 1, 2025).

[145] *See* CRS Legal Sidebar LSB11283, *Supreme Court Hears Argument on Religious Tax Exemptions*, by Valerie C. Brannon (2025); CRS Legal Sidebar LSB11342, *Religious Charter Schools Remain Unlawful in Oklahoma After Supreme Court Judgment*, by Valerie C. Brannon and Whitney K. Novak (2025).

[146] Cath. Charities Bureau, Inc. v. Lab. & Indus. Rev. Comm'n, 3 N.W.3d 666, 686–87 (Wis. 2024), *rev'd and remanded*, 605 U.S. 238 (2025). Specifically, the Wisconsin Supreme Court said that an inquiry into whether an organization both had a religious motivation and engaged in religious activities "requires minimal judicial inquiry into religion." *Id.* at 687. The inquiry was neutral and secular: courts would examine only whether the activities are religious, not (for example) whether they "are 'Catholic' enough." *Id.*

[147] *Cath. Charities Bureau*, 605 U.S. 238; Okla. Statewide Virtual Charter Sch. Bd. v. Drummond, 605 U.S. 165 (2025).

[148] *E.g.*, Transcript of Oral Argument at 70, 104, *Cath. Charities Bureau*, 605 U.S. 238 (No. 24-154); Transcript of Oral Argument at 9, *Drummond*, 605 U.S. 165 (No. 24-394).

[149] Transcript of Oral Argument at 111, *Cath. Charities Bureau*, 605 U.S. 238 (No. 24-154).

[150] *Id.*; Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970) (stating that courts must determine "that the legislative purpose of tax exemption is not aimed at establishing, sponsoring, or supporting religion" and that "the end result—the effect—is not an excessive government entanglement with religion").

[151] *E.g.*, Does 1–11 v. Bd. of Regents of Univ. of Colo., 100 F.4th 1251, 1270 (10th Cir. 2024); Tilsen v. Benson, 299 A.3d 1096, 786 (Conn. 2023). In *Tilsen*, the Connecticut Supreme Court evaluated entanglement in the context of a doctrine involving both Religion Clauses—the religious autonomy doctrine—which the court said had not been disturbed by *Kennedy*. 299 A.3d at 774 n.8. The Alabama Supreme Court applied the same doctrine in a 2024 case, although one concurring judge raised concerns about whether the majority opinion's analysis was "similar to the *Lemon* test." *Ex parte* Ala.-W. Fla. Conf. of United Methodist Church, Inc., 401 So. 3d 1123, 1133 (Ala. 2024); *id.* at 1140 (Parker, C.J., concurring in part and concurring in the result).

university's COVID-19 vaccine policy violated the Religion Clauses.[152] The university only granted a religious exemption if a person cited to "the official doctrine of an organized religion" that was "opposed to all immunizations," requiring applicants to explain in detail why their sincerely held beliefs prevented them from getting vaccines.[153] The university rejected some applicants' explanations of their own beliefs—for example, rejecting a Roman Catholic's application after concluding that it was morally acceptable for Catholics to take the COVID-19 vaccines.[154] The court concluded this policy required an "intrusive inquiry into the validity of the [plaintiffs'] religious beliefs," leading to "the sort of religious entanglement the Establishment Clause proscribes."[155] In the opinion, the Tenth Circuit did not address *Kennedy* or the fact that the entanglement analysis was part of the *Lemon* test.[156]

Evaluating Government Support for Religion

In *Kennedy*, the Supreme Court announced it had "long ago abandoned *Lemon* and its endorsement test offshoot."[157] Nonetheless, the Court did not overrule any of its prior cases that evaluated Establishment Clause challenges by looking to the government's purpose, effect, or the possibility of creating impermissible entanglement.[158] While lower courts have attempted to follow *Kennedy*'s command to interpret the Establishment Clause by reference to historical practices and understandings,[159] they have largely still considered themselves bound to follow existing Establishment Clause precedent that was not overruled by *Kennedy*.[160] Further, some opinions suggest not only that courts might remain bound by the factual outcomes of directly applicable decisions (e.g., holding a requirement to display the Ten Commandments to be unconstitutional if it matches a law previously ruled unconstitutional[161]), but also that courts might apply the reasoning of cases that did not apply a historical analysis (e.g., holding any law to be unconstitutional if it creates an impermissible entanglement with religion[162]).

This lack of clarity about the state of Establishment Clause jurisprudence can make it difficult to predict how courts will evaluate laws that provide or limit support for religious activities. Pre-*Kennedy* cases that have not been overruled may continue to bind lower courts, though there could be questions about whether the facts of those cases are sufficiently similar to control the outcome in any new disputes.

The principles governing direct financial aid to religion provide one example. In the 1973 case *Committee for Public Education & Religious Liberty v. Nyquist*, the Supreme Court ruled unconstitutional a state program that provided grants to private schools to maintain and repair

[152] *Does 1–11*, 100 F.4th at 1256–57.

[153] *Id.* at 1257.

[154] *Id.* at 1271.

[155] *Id.*

[156] *Does 1–11*'s entanglement analysis cited another Tenth Circuit case, *Colorado Christian University v. Weaver*, 534 F.3d 1245 (2008). *Colorado Christian University* said "[t]he anti-entanglement rule originated in the context of education, changing with re-interpretations of the famous doctrine of" *Lemon*. 534 F.3d at 1261. That case's analysis cited Supreme Court cases applying the *Lemon* test. *Id.* at 1261–66.

[157] Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 534 (2022).

[158] *See id.*

[159] *Id.* at 535; *see supra* "Historical Practices and Understandings Test."

[160] *See supra* "Post-Kennedy Establishment Clause Analysis."

[161] Roake v. Brumley, 141 F.4th 614, 642–43 (5th Cir. 2025).

[162] Does 1–11 v. Bd. of Regents of Univ. of Colo., 100 F.4th 1251, 1271 (10th Cir. 2024).

their facilities.[163] The state thus provided direct financial support to religious schools eligible for these grants.[164] To evaluate the program, the Supreme Court said the state law must satisfy the three *Lemon* factors—but in setting out these factors, it cited cases predating *Lemon*.[165] The Court held that the grant program was unconstitutional, observing that it authorized "direct payments to nonpublic schools, virtually all of which are Roman Catholic schools," without restricting payments "to the upkeep of facilities used exclusively for secular purposes."[166] The program therefore had "a primary effect that advances religion in that it subsidizes directly the religious activities of sectarian elementary and secondary schools."[167]

Nyquist and other cases suggest that a court would likely hold a law to be unconstitutional if it directly funds religious activities.[168] *Kennedy* did not expressly overrule *Nyquist* or the pre-*Lemon* cases cited in *Nyquist*, and courts likely remain bound by the holding that the government cannot directly fund religious activities—or, at least, cannot create a program that mirrors the specific grants in *Nyquist*.[169] Different courts, however, might take different views of the scope of this precedent. Some courts might look to the facts of *Nyquist* to see if the case is directly applicable by factual analogy.[170] For instance, the program in *Nyquist* only offered grants to certain private schools, virtually all of which were one religion.[171] If a program is more widely available to both religious and nonreligious schools, a litigant might argue it is distinguishable. A court might then decline to follow *Nyquist* and evaluate instead what types of direct financial support are permissible based on historical practices and understandings.[172] It is also possible that a court could continue to evaluate financial assistance by looking to the program's purpose, effect, or potential for entanglement, potentially by citing pre-*Lemon* cases considering such factors.[173]

Adding to the complications, the specifics of what *Nyquist* and similar cases require from governments were debated even before *Kennedy*. In *Nyquist*, the Supreme Court emphasized that the grants did not contain any provisions expressly restricting their use to secular purposes.[174] In a later case, however, the Supreme Court rejected an Establishment Clause challenge to a federal program funding adolescent health services even though the program did not expressly prevent

[163] Comm. for Pub. Educ. v. Nyquist, 413 U.S. 756, 762–64 (1973). The state also created a tuition reimbursement and tax relief program for parents. *Id.* at 764–67. These indirect aid provisions are discussed in Cong. Rsch. Serv., *Zelman and Indirect Assistance to Religion*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-3-4-5/ALDE_00013078/ (last visited Aug. 22, 2025).

[164] *See Nyquist*, 413 U.S. at 767–68.

[165] *Id.* at 773.

[166] *Id.* at 774.

[167] *Id.*

[168] *Accord* Mitchell v. Helms, 530 U.S. 793, 818–19 (2000) (plurality opinion); *id.* at 840 (O'Connor, J., concurring).

[169] *Cf., e.g.*, Carson v. Makin, 596 U.S. 767, 810 (2022) (Sotomayor, J., dissenting) (stating that although the majority opinion allows states to give money to parents through a voucher program, the state could not "contract directly with schools that teach religion").

[170] *Cf., e.g.*, Roake v. Brumley, 141 F.4th 614, 642–43 (5th Cir. 2025) (comparing the facts of the case before the court to the facts of a Supreme Court case).

[171] *See Mitchell*, 530 U.S. at 819 n.8 (noting "serious concerns about whether the payments [in *Nyquist*] were truly neutral").

[172] *Cf., e.g.*, Freedom from Religion Found., Inc. v. Mack, 49 F.4th 941, 951–54 (5th Cir. 2022) (evaluating historical evidence of "public, government-sponsored prayer").

[173] *Cf., e.g.*, Does 1–11 v. Bd. of Regents of Univ. of Colo., 100 F.4th 1251, 1270 (10th Cir. 2024) (concluding a policy created an excessive entanglement and was therefore unconstitutional).

[174] Comm. for Pub. Educ. v. Nyquist, 413 U.S. 756, 774, 777–78 (1973). *See also, e.g.*, Tilton v. Richardson, 403 U.S. 672, 683 (1971) (plurality opinion) (ruling unconstitutional a federal provision that would have allowed federally funded facilities to revert to religious purposes after twenty years); *accord id.* at 692 (Douglas, J., dissenting).

grants from being used for religious purposes.[175] While adhering to its prior cases that had invalidated programs lacking such restrictions, the Court held that this particular program did not present a risk of violating the Establishment Clause.[176] Specifically, the Court said that unlike in prior cases, the federal health grant program allowed the agency to monitor funds to ensure the statute did not have the primary effect of advancing religion.[177] Further, because the religious organizations receiving grants might not be "pervasively sectarian" in the same sense as religious schools, the Court concluded this "less intensive monitoring" did not risk excessive entanglement with religion.[178] Accordingly, while *Nyquist* has not been overruled, aspects of it have arguably been weakened by this later case.

A number of existing federal statutes expressly prohibit federal funds from being used for religious worship or instruction[179] or maintaining buildings in which religious instruction or worship occurs.[180] Today, one preliminary question in assessing these restrictions might be whether they impermissibly discriminate against religious entities, violating the Free Exercise Clause.[181] The restrictions might only be constitutionally permissible if they are required by the Establishment Clause.[182] Under *Lemon*, whether these restrictions were required by the Establishment Clause might have depended on the nature of the program, as the Supreme Court's analysis of purpose, effect, and entanglement led to different outcomes in different contexts.[183] After *Kennedy*, however, a court might not only have to assess whether the facts of a particular program are similar to one previously considered by the Supreme Court, but also resolve what test it should use to evaluate the permissibility of direct funding.

Nyquist provides one example of existing jurisprudence that may be subject to additional questions in light of recent Supreme Court cases. As the cases discussed illustrate, similar questions may arise in Establishment Clause challenges to other types of government support for religion. Ongoing litigation in lower courts may give the Supreme Court additional opportunities to clarify the doctrine in the future.

[175] Bowen v. Kendrick, 487 U.S. 589, 593, 614 (1988).

[176] *Id.* at 614–17.

[177] *Id.* at 615.

[178] *Id.* at 616–17. While some Supreme Court cases expressed particular concern about aid being provided to "pervasively sectarian" institutions like religious schools, the Court later retreated from the "presumption" that neutral nonfinancial aid would be used to inculcate religion in such schools. Agostini v. Felton, 521 U.S. 203, 224–26 (1997). *See also* Mitchell v. Helms, 530 U.S. 793, 826 (2000) (plurality opinion) (saying "the Court should regret" the period where it looked to whether a school was "pervasively sectarian").

[179] *E.g.*, 20 U.S.C. § 1011k(c); 34 U.S.C. § 12161(b)(B)(iv); 42 U.S.C. § 290kk-2; *id.* § 9920(c). *Cf.*, *e.g.*, 25 U.S.C. § 278a ("Funds appropriated ... to the Secretary of the Interior for the education of Indian children shall not be used for the education of such children in elementary and secondary education programs in sectarian schools.").

[180] *E.g.*, 20 U.S.C. § 1087-53(b)(1)(C); *id.* § 10004(c)(3); 25 U.S.C. § 1813(e); 29 U.S.C. § 3248.

[181] *See supra* note 13.

[182] *See*, *e.g.*, Carson v. Makin, 596 U.S. 767, 780–81 (2022) (holding that a state law excluding religious schools from a voucher program could not satisfy strict scrutiny where the law did not "offend the Establishment Clause").

[183] *See generally* Cong. Rsch. Serv., *Application of the Lemon Test*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-3-4-4/ALDE_00013077/ (last visited Aug. 22, 2025).

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