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SUMMARY

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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 tests to analyze whether government support for religion violates the Establishment Clause. Among these 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. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971), *abrogation recognized by Groff v. DeJoy*, 600 U.S. 447 (2023).

In 2022, however, the Supreme Court announced that it had "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.

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. *Torcaso v. Watkins*, 367 U.S. 488, 496 (1961); *Engel v. Vitale*, 370 U.S. 421, 424 (1962). The Court also looked to evidence of long-standing historical practices to uphold prayers at the beginning of legislative sessions. *Town of Greece v. Galloway*, 572 U.S. 565, 569–70 (2014). 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. Some have sought evidence of practices from the Founding era or later that are in line with the challenged government action; others have looked for evidence of certain historical hallmarks of a religious establishment. At the same time, some lower courts have continued to apply controlling Supreme Court precedent that did not employ a historical analysis. As a general principle, lower courts are still bound to follow the outcomes of any Supreme Court precedent that has direct application. *E.g.*, *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). Lower courts have reached different conclusions, however, about whether specific Supreme Court cases remain controlling after *Kennedy*. For instance, courts have disagreed about the continuing validity of Supreme Court precedent evaluating laws requiring public display of the Ten Commandments, with ongoing appeals making their way to the Supreme Court. *Compare Nathan v. Alamo Heights Indep. Sch. Dist.*, 173 F.4th 576, 590–91 (5th Cir. 2026), *petition for cert. filed*, No. 26-257 (U.S. Aug. 27, 2026), *with Stinson v. Fayetteville Sch. Dist. No. 1*, 824 F. Supp. 3d 792, 807 (W.D. Ark. 2026), *appeal docketed*, No. 26-1722 (8th Cir. Apr. 17, 2026).

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 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 potential tension between the principles of 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] The Court cautioned 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] In approving of the program, the Court clarified that under the statutory scheme, the state "contribute[d] no money to the schools."[12] *Everson* provided a blueprint for much of the Court's subsequent jurisprudence on public support for religion.

Since *Everson*, the Court's Establishment Clause jurisprudence has, according to some commentators, reflected two distinct views of the Establishment Clause that can be described as "separationist," requiring a strict separation between church and state, and "accommodationist," reflecting the need for government to accommodate religion.[13] In the past few decades, Supreme Court opinions have trended toward a view of the Religion Clauses that allows more government

[1] U.S. CONST. amend. I. *See generally* Libr. of Cong., *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 Oct. 19, 2026).

[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] Libr. of Cong., *Relationship Between the Establishment and Free Exercise Clauses*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-5/ALDE_00000039/ (last visited Oct. 19, 2026).

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

[9] *Id.* at 16–17.

[10] *Id.* at 16.

[11] *Id.*

[12] *Id.* at 18.

[13] Libr. of Cong., *Accommodationist and Separationist Theories of the Establishment Clause*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-3-2/ALDE_00013072/ (last visited Oct. 19, 2026).

support for religion. For example, the Supreme Court has "abandoned" two doctrines that arguably had limited the government's ability to support religion.[14] 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 benefits—in other words, the decisions required the government to provide benefits to religious entities in certain instances.[15] In 2025, the Supreme Court held that a state violated the Establishment Clause by excluding specific religious organizations from a tax exemption.[16]

Shifts in the Supreme Court's Religion Clauses jurisprudence have raised 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.'"[17] Next, the report reviews cases interpreting and applying *Kennedy*, and ends by 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. These Establishment Clause cases therefore might continue to prevent the government from providing direct financial aid or certain other types of support to religious beliefs or activity.[18] Nonetheless, in light of open jurisprudential questions, lower courts have taken different approaches to reviewing Establishment Clause challenges, 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.[19] As a historical matter, the Court has used several types of analyses to determine whether the government violated the Establishment Clause in providing these and other kinds of support.[20] The Court has acknowledged that the Religion Clauses "are not the most precisely drawn portions of the Constitution."[21] While serving on the

[14] 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.

[15] Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 454 (2017) (law 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) (law 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) (law excluding sectarian schools from a Maine program providing tuition assistance to a private school of the parent's choice).

[16] 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.

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

[18] Libr. of Cong., *Overview of Financial Assistance to Religion*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-3-4-1/ALDE_00013074/ (last visited Oct. 19, 2026); Libr. of Cong., *Overview of Non-Financial Assistance to Religion*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-3-5-1/ALDE_00013080/ (last visited Oct. 19, 2026).

[19] *See id*.

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

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

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.[22]

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.[23] 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."[24] 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.[25]

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."[26] As part of its inquiry into the law's effect, the Court emphasized the strong historical basis for such exemptions.[27] 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."[28] Accordingly, *Walz*'s Establishment Clause analysis 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."[29] 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 . . . ;

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[22] 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).

[23] U.S. CONST. amend. I. *See generally* Libr. of Cong., *General Principle of Government Neutrality to Religion*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-3-1/ALDE_00013071/ (last visited Oct. 19, 2026).

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

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

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

[27] *Id.* at 676.

[28] *Id.* at 676–78.

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

finally, the statute must not foster 'an excessive government entanglement with religion.'"[30] 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.[31]

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.[32] 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.[33]

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."[34] 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."[35] The Supreme Court has applied a strict scrutiny test in other constitutional contexts as one of the so-called "tiers of scrutiny."[36] In the realm of the Establishment Clause, however, the Court has not generally employed these familiar levels of scrutiny.[37] It seems that in the Establishment Clause context, the Supreme Court only applies strict scrutiny 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.[38] 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

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

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

[32] *See* Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 534, 535 n.4 (2022) (explaining this "variation" on *Lemon*); Libr. of Cong., *Endorsement Variation on Lemon*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-3-6-6/ALDE_00013089 (last visited Oct. 19, 2026).

[33] *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* Libr. of Cong., *Lemon's Effect Prong and Pervasively Sectarian Institutions*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-3-6-4/ALDE_00013086 (last visited Oct. 19, 2026).

[34] 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.

[35] *Id.* at 247.

[36] *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).

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

[38] In addition to using 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").

machinery" to "provide pupils" for religious classes.[39] A 1992 case emphasized that there were "heightened concerns" with "subtle coercion" in "elementary and secondary public schools."[40] Accordingly, the Supreme Court has held that schools violate the Establishment Clause by sponsoring prayer at voluntary activities if the circumstances coerce students to participate in worship.[41] 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.[42]

The Supreme Court has also looked to historical practice to evaluate whether government activities violate the Establishment Clause.[43] 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,[44] as well as a state law requiring a specified prayer to be recited at the beginning of a school day.[45] 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.[46] 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.[47] 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."[48] 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.[49]

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.

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

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

[41] *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).

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

[43] 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 26 to 28. *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).

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

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

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

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

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

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

# *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 endorsement test offshoot."[50] Instead, the Court said "the Establishment Clause must be interpreted by 'reference to historical practices and understandings.'"[51] *Kennedy* suggested this analysis should focus on history and original meaning, referring to the understanding of the Founding Fathers.[52] At the same time, *Kennedy*'s own analysis only briefly referred to historical understandings, and primarily focused on whether the facts demonstrated coercion.[53]

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.[54] 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.[55] 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."[56] In the Court's view, "coercion" 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."[57]

Unlike some of the earlier prayer cases discussed above, the *Kennedy* opinion did not review Founding-era practices.[58] Instead, to determine whether the football coach's prayer was coercive, the Court looked at the response of students and parents to his actions.[59] The Court said there was no record evidence that students felt pressured to participate apart from "hearsay."[60] In contrast to 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

[50] 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)).

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

[52] *Id.* at 536.

[53] *Id.* at 537–40.

[54] *Id.* at 512–14.

[55] *Id.* at 537.

[56] *Id.*

[57] *Id.*

[58] *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").

[59] *Kennedy*, 597 U.S. at 538–42.

[60] *Id.* at 539.

school program accommodating the religious activity at issue," and "[s]tudents were not required or expected to participate."[61]

*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.[62] *Kennedy* did not overrule prior Establishment Clause cases that had applied the *Lemon* test.[63] Instead, the *Kennedy* opinion itself looked to Supreme Court precedent to decide the case.[64] Further, as litigants have noted before the Supreme Court,[65] the Court evaluated Establishment Clause claims by looking to a government action's purpose, effect, and potential for entanglement in cases predating *Lemon* itself.[66] It is therefore unclear whether the statement in *Kennedy* that "this Court long ago abandoned *Lemon* and its endorsement test offshoot"[67] also undermines cases predating *Lemon* that applied the same factors.[68]

# 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*.[69] Despite *Kennedy*'s instruction to interpret the Establishment Clause by reference to historical practices and understandings, *Catholic Charities Bureau* did not apply a historical

[61] *Id.* at 541–42.

[62] *Id.* at 534.

[63] *See id.* The Court does not always use specific phrasing to overrule a prior case, and jurists have sometimes debated whether an overruling has occurred. At the same time, the Court ordinarily discusses the doctrine of *stare decisis* before it overrules a prior decision. CRS Report R45319, *The Supreme Court's Overruling of Constitutional Precedent*, by Brandon J. Murrill (2018). The Court did not conduct such an inquiry in *Kennedy*. *See* 597 U.S. at 534–36. By contrast, as one example, in the 2024 decision of *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 412 (2024), the Court held that "*Chevron* is overruled" after conducting a *stare decisis* analysis. Notwithstanding this express overruling, the Court said it did "not call into question prior cases that relied on the *Chevron* framework" because the "holdings of those cases that specific agency actions are lawful —including the Clean Air Act holding of *Chevron* itself—are still subject to statutory *stare decisis* despite our change in interpretive methodology." *Loper Bright*, 603 U.S. at 412.

[64] *Kennedy*, 597 U.S. 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).

[65] *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*").

[66] *E.g.*, Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970); *see generally* Libr. of Cong., *Purpose and Effect Test Before Lemon*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-3-5-3/ALDE_00013082/ (last visited Oct. 19, 2026).

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

[68] *E.g.*, Cave v. Jester, 829 F. Supp. 3d 582, 639 (E.D. Ark. 2026); Fitzmaurice v. City of Quincy, 284 N.E.3d 335, 346 (Mass. 2026); *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"), *vacated*, 170 F.4th 292 (5th Cir. 2026) (en banc), *petition for cert. filed*, No. 25-1360 (U.S. June 8, 2026).

[69] *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).

analysis.[70] The case involved a religious exemption from a state unemployment insurance program.[71] 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.[72] 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."[73] 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."[74] The Court further concluded the state had failed to satisfy its burden.[75] 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.[76] The state had claimed that its tax exemption would allow it to avoid entangling questions about religious doctrine.[77] 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.[78]

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 other cases.[79] The two 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.[80]

As a general principle, 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."[81] Only the Supreme Court can overrule its own cases.[82] Following *Kennedy*, then, lower courts remain bound to follow the rulings of any cases with similar fact patterns that have direct application.[83] *Kennedy* and *Catholic Charities Bureau* further suggest that courts might continue

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

[71] *Id.* at 242.

[72] *Id.* at 249–50.

[73] *Id.* at 250.

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

[75] *Id.* at 254.

[76] *See id.* at 253–54.

[77] *Id.*

[78] *Id.*

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

[80] *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))).

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

[82] *Id.*

[83] *See, e.g.*, Stinson v. Fayetteville Sch. Dist. No. 1, 824 F. Supp. 3d 792, 807 (W.D. Ark. 2026) ("This precedent has not been explicitly overturned and is binding upon all lower courts—including this one. The facts in the case at bar are identical in all material respects to the law that was deemed unconstitutional by the Supreme Court in *Stone v. Graham*."), *appeal docketed*, No. 26-1722 (8th Cir. Apr. 17, 2026). *But see, e.g.*, Nathan v. Alamo Heights Indep. Sch. (continued...)

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 practices and understandings 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.

## Historical Practices and Understandings Test

In light of *Kennedy*, lower courts have begun to grapple with how to apply a historical approach to the Establishment Clause. One Fourth Circuit[84] 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?[85]

In its own pre-*Kennedy* Establishment Clause rulings evaluating historical practices, the Supreme Court looked to history from the colonial era and shortly thereafter[86] and searched for evidence of long-standing, unbroken practices.[87] The federal appeals courts that have applied *Kennedy*'s historical test have seemed to focus first on Founding-era practices or understandings.[88] Beyond that, one court said that it would "look next to the 'uninterrupted practice' of a law in our nation's traditions"[89] to determine whether the practice "withstood the critical scrutiny of time and political change."[90]

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.[91] In that opinion, the Court said that a "historical approach" to analyzing the Establishment Clause would not be "useful in determining the proper

Dist., 173 F.4th 576, 590–91 (5th Cir. 2026) ("*Stone* is one of *Lemon*'s 'progeny' that has been 'abrogated.'" (first quoting Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 534 (2022), and then Groff v. DeJoy, 600 U.S. 447, 460 (2023))), *petition for cert. filed*, No. 26-257 (U.S. Aug. 27, 2026).

[84] 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).

[85] 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); Libr. of Cong., *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 Oct. 19, 2026).

[86] *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.

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

[88] *See, e.g.*, 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).

[89] *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*.

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

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

roles of church and state in public schools, since free public education was virtually nonexistent at the time the Constitution was adopted."[92] 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."[93] This approach may raise further questions about what historical practices are sufficiently analogous to the challenged action.

In *Hilsenrath*, the court was evaluating whether instructional videos about Islam shared in a World Cultures and Geography class violated the Establishment Clause.[94] In applying *Kennedy*'s "historical practices and understandings" test, the Third Circuit relied on a concurring opinion from Justice Gorsuch.[95] 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.[96] Under the Third Circuit's approach, the plaintiff would have to prove that the curriculum resembled one of these "hallmarks" of an established church.[97] The plaintiffs asserted the presence of "coercion" (hallmark 2) and "non-neutrality" that effectively provided financial support for a favored religion (hallmark 5).[98] The Third Circuit concluded that the school's curriculum did not resemble hallmark 2 because the record showed the videos were not proselytizing.[99] The court further held that the curriculum did not resemble hallmark 5 because the record did not "show favoritism" for Islam over other world religions.[100]

The Fifth Circuit initially declined to apply this six-factor "hallmarks" approach in two opinions following *Kennedy*.[101] In a later opinion, however, it looked to these six hallmarks as "helpful analytical signposts" to evaluate a Texas law requiring public schools to display the Ten Commandments.[102] In that case, *Nathan v. Alamo Heights Independent School District*, the Fifth Circuit concluded Texas's law did not violate the Establishment Clause, saying (among other aspects of its analysis) "[i]f students disagree with the Commandments or ignore them or laugh at them, S.B. 10 imposes neither penalty nor sanction, formal or informal."[103] Although the law contemplated the use of "public funds to procure displays," the court said "it neither requires such

[92] *Id.*

[93] *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).

[94] *Id.* at 486.

[95] *Id.* at 491.

[96] *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).

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

[98] *Id.* at 491–92.

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

[100] *Id.*

[101] Roake v. Brumley, 141 F.4th 614, 645–46 (5th Cir. 2025) (saying these "historical hallmarks" are not "the exclusive Establishment Clause test"), *vacated*, 170 F.4th 292 (5th Cir. 2026) (en banc), *petition for cert. filed*, No. 25-1360 (U.S. June 8, 2026); Freedom from Religion Found., Inc. v. Mack, 49 F.4th 941, 951–54 (5th Cir. 2022) (reviewing historical evidence and not discussing these factors).

[102] Nathan v. Alamo Heights Indep. Sch. Dist., 173 F.4th 576, 601 (5th Cir. 2026), *petition for cert. filed*, No. 26-257 (U.S. Aug. 27, 2026).

[103] *Id*. at 601.

funding nor compels anyone to pay for the displays."[104] The court ruled that "merely displaying religious text in a classroom" was "worlds apart" from "the way that founding-era establishments coerced dissenters."[105] The Fifth Circuit's opinion in *Nathan* rejected the plaintiffs' argument that the law was unconstitutional "because there is insufficient evidence of a tradition of public schools using the Ten Commandments or displaying them in a classroom."[106] The court described the idea that a modern practice must be "supported by a founding-era tradition" as "bizarre," saying that instead of looking to tradition, the "correct analysis . . . is to ask whether a challenged law shares the 'hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment.'"[107]

Before *Nathan*, the Fifth Circuit had employed a different analysis in *Freedom from Religion Foundation, Inc. v. Mack*.[108] Rather than looking to the six hallmarks above, the court looked for more specific types of analogous historical practices.[109] To consider whether a judge could open his court sessions with prayer, the Fifth Circuit said it would "ask whether courtroom prayer is consistent with a broader tradition of public, government-sponsored prayer."[110] The court looked to judicial practices "around the Founding" and "the time of incorporation," but it also reviewed various practices from the 1830s and as late as 1996.[111] Ultimately, the Fifth Circuit concluded that although there was no evidence of prayer before *daily* court sessions, the scattered evidence 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.[112]

Other courts have also taken an approach that evaluates historical analogues that are similar to the specific facts of the plaintiffs' Establishment Clause claim.[113] For instance, to evaluate the constitutionality of a religious exemption from a federal nondiscrimination law, the Ninth Circuit reviewed the history of tax exemptions for religious institutions in *Hunter v. U.S. Department of Education*.[114] In the Ninth Circuit's view, tax exemptions were the closest analogy to the nondiscrimination exemption, "[g]iven the dearth of historical equivalents."[115] 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."[116] 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

[104] *Id.* at 602.

[105] *Id.*

[106] *Id.* at 606.

[107] *Id.* at 606–07 (quoting Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 536 (2022)).

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

[109] *Id.*

[110] *Id.* at 951.

[111] *Id.* at 951–54.

[112] *Id.* at 955–57.

[113] *E.g.*, Cave v. Jester, 829 F. Supp. 3d 582, 650 (E.D. Ark. 2026) ("The record before the Court does not show that there is a historical foundation for the specific practice at issue in this case [a law requiring "the placement of a new, stand-alone monument on State Capitol grounds specifying the exact text of the Ten Commandments"] in order for it to be permitted under the Establishment Clause."). The Fourth Circuit arguably has also adopted an approach that looks for evidence of a specific historical tradition that qualifies as an establishment, rather than more general hallmarks. *See* Roberts v. Engelke, 180 F.4th 634, 648 (4th Cir. 2026); Firewalker-Fields v. Lee, 58 F.4th 104, 122 n.7 (4th Cir. 2023).

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

[115] *Id.* at 965.

[116] *Id.*

governmental accommodations for religion."[117] 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.[118]

As least one trial court suggested that although *Kennedy* abandoned "*Lemon* and the endorsement test,"[119] aspects of the *Lemon* inquiry might nonetheless form part of the historical practices and understandings analysis.[120] The trial court concluded a city had violated the Establishment Clause by "conceiving, organizing, and implementing" a prayer vigil, impermissibly sponsoring "a religious event."[121] The court said the city's involvement with the prayer vigil was "dissimilar" to prior historical examples of government support for prayer, such as legislative prayer or national days of prayer.[122] In assessing the similarity of the prayer vigil to these other practices, the court emphasized the different purposes of the events: while the purpose of legislative prayer is "to solemnize and prepare for the main event of government business," the "only purpose" of the prayer vigil was prayer.[123] 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.[124]

In some contrast, a South Carolina trial court refused to consider prior Supreme Court cases based on the *Lemon* test, saying that after *Kennedy* the plaintiff could not "rely on these authorities that apply" the *Lemon* test.[125] 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.[126] 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 (3) demonstrating governmental favoritism for the agency's religion.[127] The trial court rejected these arguments.[128] 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.[129] Instead, the court 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.[130]

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

[118] *Id.*

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

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

[121] *Id.* at 1088.

[122] *Id.* at 1083.

[123] *Id.* at 1090.

[124] *Id.* at 1089. In a decision with some parallels, the Supreme Judicial Court of Massachusetts concluded that a pre-*Kennedy* case interpreting its state constitution survived the overruling of *Lemon* because that state case was "neither limited to, nor dependent upon, a 'mechanistic' application of the *Lemon* factors." Fitzmaurice v. City of Quincy, 284 N.E.3d 335, 346 (Mass. 2026). Instead, the state court said its state test "properly focuses on constitutional text, history, purpose, and factors" that include "consideration of the purposes of the contested practice, its primary effects, and its potential for divisiveness." *Id.* at 347.

[125] Maddonna v. U.S. Dep't of Health & Hum. Servs., 696 F. Supp. 3d 176, 190–91 (D.S.C. 2023).

[126] *Id.* at 180–81.

[127] *Id.* at 188.

[128] *Id.*

[129] *Id.* at 190–92.

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

## 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.[131] One trial court concluded that "a historical analysis [was] not necessary" to review the constitutionality of a school program educating students on transcendental meditation.[132] 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.[133] 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.[134] The appeals court concluded that the laws would "only require [her] to provide her wedding photography services."[135] 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."[136]

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.[137] 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."[138] This ruling was appealed to the U.S. Supreme Court, which heard oral arguments in April 2025.[139] The Supreme Court ultimately did not issue an opinion in the case, instead affirming the judgment below by an equally divided court.[140]

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[131] Coercion has also been considered as part of the historical practices and understandings test, as discussed *supra* "Historical Practices and Understandings Test." This section discusses cases that apply the Supreme Court's precedent evaluating whether prayer is coercive under the circumstances, as compared to the facts of other cases.

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

[133] *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).

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

[135] *Id.*

[136] *Id.* at 112.

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

[138] *Id.* at 13.

[139] *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).

[140] Okla. Statewide Virtual Charter Sch. Bd. v. Drummond, 605 U.S. 165 (2025). In a later case, an Oklahoma trial court concluded that a proposed charter school was not a government entity or engaged in state action, therefore presenting distinct Establishment Clause issues. Nat'l Ben Gamla Jewish Charter Sch. Found., Inc. v. Shellem, No. CIV-26-582-R, 2026 WL 2882202, at *7 (W.D. Okla. Sept. 24, 2026); *see also id.* at *3 n.5 (concluding the *Drummond* ruling was not entitled to precedential weight).

In *Freedom from Religion Foundation*, the Fifth Circuit primarily reviewed historical practices to determine whether courtroom prayer violated the Establishment Clause.[141] The court also asked, however, whether the judge's prayer practice was coercive, looking to prior Supreme Court precedent.[142] 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."[143] 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.[144] Their "subjective perception" that the judge "disliked them" was insufficient, according to the court.[145]

## Denominational Preference

Lower courts have also adhered to the principle, stated by the Supreme Court, that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."[146] As discussed, after *Kennedy*, the Supreme Court concluded a state unemployment insurance program contained an unconstitutional denominational preference in *Catholic Charities Bureau*.[147] In a 2025 ruling, a Maryland trial court concluded a state law did not run afoul of this principle.[148] The Maryland law generally prohibited employment discrimination based on protected characteristics, but contained an exemption for a religious entity to employ "individuals of a particular religion . . . to perform work connected with the activities of the religious entity."[149] The plaintiffs argued this exemption treated "religious institutions whose beliefs require its employees to share their faith at work unfavorably as compared to those that do not have such a belief."[150] The trial court rejected this argument, saying "unlike in *Catholic Charities Bureau*," the exemption in the state law "does not draw distinctions based on 'inherently religious choices,' because it can apply regardless of whether the entity's mission is religious or secular."[151]

Courts have also considered the denominational preferences test in cases challenging laws requiring the display of the Ten Commandments. The Fifth Circuit's *Nathan* opinion held that this test "has no application to government use of religious language or symbolism."[152] The *Nathan* plaintiffs argued that a Texas law engaged in "denominational discrimination" by requiring specific religious text—"the 'Protestant version' of the Ten Commandments"—to be displayed in public schools.[153] The Fifth Circuit rejected this argument, holding that the denominational

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

[142] *Id.* at 958. An Arkansas trial court also conducted an inquiry into both historical practices and coercion in *Cave v. Jester*, 829 F. Supp. 3d 582, 663–64 (E.D. Ark. 2026), and concluded that a state law requiring the display of the Ten Commandments was likely unconstitutional under either test, along with other Establishment Clause tests.

[143] *Freedom from Religion Found.*, 49 F.4th at 958–59.

[144] *Id.* at 960–61.

[145] *Id.* at 961.

[146] Does 1–11 v. Bd. of Regents of Univ. of Colo., 100 F.4th 1251, 1270 (10th Cir. 2024) (quoting Larson v. Valente, 456 U.S. 228, 246 (1982)).

[147] Cath. Charities Bureau, Inc. v. Wisc. Lab. & Indus. Rev. Comm'n, 605 U.S. 238, 250 (2025).

[148] Gen. Conf. of Seventh-Day Adventists v. Horton, 787 F. Supp. 3d 99, 126 (D. Md. 2025).

[149] *Id.* at 108–09 (quoting MD. CODE ANN., STATE GOV'T § 20-604(2) (West 2026)).

[150] *Id.* at 125.

[151] *Id.* at 126 (quoting *Catholic Charities Bureau*, 605 U.S. at 250).

[152] Nathan v. Alamo Heights Indep. Sch. Dist., 173 F.4th 576, 604 (5th Cir. 2026), *petition for cert. filed*, No. 26-257 (U.S. Aug. 27, 2026).

[153] *Id.* at 603.

preference test applies only "when imposing burdens or granting benefits," but not when displaying "religious language or symbolism."[154] In contrast, an Arkansas trial court concluded that a state law requiring the state capitol to display a Ten Commandments monument impermissibly "favored Christianity."[155]

## 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.[156] In *Nathan*, the Fifth Circuit similarly concluded it was not bound by *Stone v. Graham*—a Supreme Court opinion that applied the *Lemon* test.[157] The Fifth Circuit determined that in *Kennedy*, not only was the *Lemon* test "abandoned," but "*Lemon* and its progeny" were "abrogated."[158] Concluding "*Stone* depended entirely on *Lemon*," the Fifth Circuit held "that *Stone* is one of *Lemon*'s 'progeny' that has been 'abrogated.'"[159] Accordingly, the court did not consider *Stone*'s applicability to the law before it, instead conducting a "historical analysis."[160]

In contrast, other courts have said "unless and until expressly overruled," other Supreme Court Establishment Clause rulings remain good law even if they were decided under *Lemon*.[161] An Arkansas trial court specifically ruled that *Stone* "has not been explicitly overturned and is binding upon all lower courts."[162] This led the trial court to conclude that a state law "mandating the posting of the Ten Commandments in public schools" was unconstitutional.[163] In that trial court's view, because the *Kennedy* opinion "cited favorably" to two other Supreme Court cases that "had relied on *Lemon*," there was "no reason to think the Supreme Court has thrown the baby out with the bathwater."[164] Specifically, the trial court said the Supreme Court had not reversed

[154] *Id.* at 604.

[155] Cave v. Jester, 829 F. Supp. 3d 582, 677 (E.D. Ark. 2026) (considering this Establishment Clause principle in the context of an Equal Protection Clause claim).

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

[157] *Nathan*, 173 F.4th at 590.

[158] *Id.* (first quoting Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 534 (2022), and then Groff v. DeJoy, 600 U.S. 447, 460 (2023)). Specifically, the Supreme Court said in *Kennedy* that the school district "relied on *Lemon* and its progeny" in justifying its actions, and then said, "this Court long ago abandoned *Lemon* and its endorsement test offshoot." 597 U.S. at 534. In *Groff*, a case interpreting Title VII of the Civil Rights Act of 1964, the Court described Establishment Clause jurisprudence in 1972 as including the "(now abrogated) decision in *Lemon*." 600 U.S. at 460.

[159] *Nathan*, 173 F.4th at 590–91 (first quoting *Kennedy*, 597 U.S. at 534, and then *Groff*, 600 U.S. at 460).

[160] *Id.* at 593–94.

[161] *E.g.*, Childs v. Webster, 168 F.4th 1020, 1030 (7th Cir. 2026) ("If the Supreme Court were to decide *Cutter* today, its reasoning could look very different. Nevertheless, *Cutter*'s rule remains good law."); Cave v. Jester, 829 F. Supp. 3d 582, 639 (E.D. Ark. 2026) ("It is for the United States Supreme Court to say whether an abrogation of *Lemon* in the context of the *Kennedy* decision, as recognized by *Groff*, equates to an express overruling of *Lemon* in all contexts."). The Fifth Circuit had originally concluded that "*Kennedy* did not overrule *Stone*," but later vacated that opinion and reached a contrary conclusion in *Nathan*. Roake v. Brumley, 141 F.4th 614, 642 (5th Cir. 2025), *vacated*, 170 F.4th 292 (5th Cir. 2026) (en banc), *petition for cert. filed*, No. 25-1360 (U.S. June 8, 2026); *Nathan*, 173 F.4th at 591. In a different context, the Fourth Circuit concluded a decision involving both the Religion Clauses had not been abrogated by a different line of Supreme Court cases under the Free Exercise Clause. Hall v. Fleming, 175 F.4th 510, 516 (4th Cir. 2026) ([W]e . . . hold that the Supreme Court has yet to either overrule or abandon its decision in *Locke* through *Trinity Lutheran*, *Espinoza*, or *Carson*.").

[162] Stinson v. Fayetteville Sch. Dist. No. 1, 824 F. Supp. 3d 792, 807 (W.D. Ark. 2026), *appeal docketed*, No. 26-1722 (8th Cir. Apr. 17, 2026).

[163] *Id.* at 806–07.

[164] *Id.* at 807.

any "public-school Establishment-Clause case involving *school-wide* dissemination of religious speech."[165]

While not addressing the issue as directly, the Oklahoma Supreme Court ruling on religious charter schools mentioned above appears to have obliquely referenced pre-*Kennedy* cases that applied the *Lemon* test to prohibit direct government funding for religious activity.[166] In addition to its holding on coercion, the Oklahoma court emphasized that approving a religious charter school would impermissibly "permit state spending in direct support of the religious curriculum and activities."[167]

## 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.[168] The question of entanglement came up in two cases argued during the Supreme Court's October 2024 term.[169] For instance, in the *Catholic Charities Bureau* case described above, the state court concluded its interpretation of a state tax exemption law would not require an intrusive and entangling inquiry into religious organizations.[170] Ultimately, the Supreme Court rulings in both cases did not address the entanglement issue.[171] Nonetheless, at oral argument in the cases, Justices asked whether various outcomes would create excessive entanglement.[172] 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.[173] Responding to his question,

[165] *Id.*

[166] 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.").

[167] *Drummond*, 558 P.3d at 14. *But see* Nat'l Ben Gamla Jewish Charter Sch. Found., Inc. v. Shellem, No. CIV-26-582-R, 2026 WL 2882202, at *13 (W.D. Okla. Sept. 24, 2026) (concluding that approving of a religious charter school would not violate the Establishment Clause).

[168] For a discussion of some of the cases analyzing the entanglement factor, see Libr. of Cong., *Lemon's Entanglement Prong*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-3-6-5/ALDE_00013087/ (last visited Oct. 19, 2026). In contrast, 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, 787 F. Supp. 3d 99, 116 (D. Md. 2025), *appeal docketed*, No. 25-1735 (4th Cir. July 1, 2025).

[169] *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).

[170] 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. In the court's view, the inquiry was neutral and secular: courts would examine only whether the activities are religious, not (for example) whether they "are 'Catholic' enough." *Id.*

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

[172] *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).

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

the attorney for the state cited *Walz*, a case decided before *Lemon*, as the source for the entanglement factor.[174]

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.[175] For instance, in *Does 1–11 v. Board of Regents of the University of Colorado*, the Tenth Circuit held that a university's COVID-19 vaccine policy violated the Religion Clauses.[176] 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.[177] 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.[178] The court concluded the university's policy required an "intrusive inquiry into the validity of the [plaintiffs'] religious beliefs," leading to "the sort of religious entanglement the Establishment Clause proscribes."[179] In the opinion, the Tenth Circuit did not address *Kennedy* or the fact that the entanglement analysis was part of the *Lemon* test.[180]

# Evaluating Government Support for Religion

As explained, in *Kennedy*, the Supreme Court announced it had "abandoned *Lemon* and its endorsement test offshoot," but did not expressly overrule any of its cases that resolved Establishment Clause claims by looking to the government's purpose, effect, or the possibility of creating impermissible entanglement.[181] In addition to the cases that expressly applied the *Lemon* or endorsement test over the years, there are also Supreme Court cases that cited these three factors before *Lemon*,[182] and later cases that referenced these factors without expressly citing

[174] *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").

[175] *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; *see also* McRaney v. N. Am. Mission Bd. of the S. Baptist Convention, Inc., 157 F.4th 627, 650 (5th Cir. 2025) (citing entanglement concerns while applying this doctrine). 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); *see also Ex parte* Ala.-W. Fla. Conf. of United Methodist Church, Inc., No. SC-2025-0347, 2026 WL 629584, at *9 (Ala. Mar. 6, 2026) (Mendheim, J., dissenting) (arguing the court cannot resolve the dispute "without entangling the courts in matters that are best left to the moral judgments of the parties involved").

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

[177] *Id.* at 1257.

[178] *Id.* at 1271.

[179] *Id.*

[180] *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.

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

[182] *E.g.*, Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970).

*Lemon* itself.[183] *Kennedy* left open questions about Establishment Clause jurisprudence that make it difficult to predict how courts will evaluate laws that support religious activities.

Lower courts have attempted to follow *Kennedy*'s command to interpret the Establishment Clause by reference to historical practices and understandings.[184] At the same time, some have considered themselves bound to follow existing Establishment Clause precedent that was not expressly overruled by *Kennedy*.[185] 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[186]), 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[187]). Courts might disagree about whether the facts of a pre-*Kennedy* case are sufficiently similar to control the outcome in any new disputes. Courts could also disagree about whether a specific Supreme Court case remains good law, as the litigation over state laws requiring the display of the Ten Commandments has shown.[188]

The principles governing direct financial aid to religion provide one example of the unsettled state of the jurisprudence. As a general principle, in *Everson*, the Supreme Court reviewed historical understandings of the Establishment Clause and stated that, among other principles, "[n]o 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."[189] 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 their facilities.[190] The program thus provided direct financial support to religious schools receiving these grants.[191] To evaluate the program, the Supreme Court said the state law must satisfy the three *Lemon* factors—although in setting out these factors, it cited cases predating *Lemon*.[192] 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."[193] The program therefore had "a primary effect that advances religion in that it subsidizes directly the religious activities of sectarian elementary and secondary schools."[194]

[183] *E.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 648–49 (2002).

[184] *Kennedy*, 597 U.S. at 535; *see supra* "Historical Practices and Understandings Test."

[185] *See supra* "Post-Kennedy Establishment Clause Analysis." *But see, e.g.*, Nathan v. Alamo Heights Indep. Sch. Dist., 173 F.4th 576, 590–91 (5th Cir. 2026), *petition for cert. filed*, No. 26-257 (U.S. Aug. 27, 2026).

[186] Stinson v. Fayetteville Sch. Dist. No. 1, 824 F. Supp. 3d 792, 807 (W.D. Ark. 2026), *appeal docketed*, No. 26-1722 (8th Cir. Apr. 17, 2026).

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

[188] *Compare Nathan*, 173 F.4th at 590–91, *with Stinson*, 824 F. Supp. 3d at 807.

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

[190] 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 Libr. of Cong., *Zelman and Indirect Assistance to Religion*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-3-4-5/ALDE_00013078/ (last visited Oct. 19, 2026).

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

[192] *Id.* at 773.

[193] *Id.* at 774.

[194] *Id.*

*Nyquist* and other Supreme Court cases suggest that a law is likely unconstitutional if it directly funds religious activities.[195] *Kennedy* did not expressly overrule *Nyquist* or the pre-*Lemon* cases cited in *Nyquist*, and courts might therefore remain bound by the holding that the government cannot directly fund religious activities.[196] As one example of the general principle, the Seventh Circuit concluded in a 2026 decision that "[r]equiring states to purchase religious items" would violate "prior Establishment Clause decisions," rejecting a prisoner's claim that prison staff were required to purchase and provide him with a prayer schedule.[197] The Seventh Circuit held that although the Establishment Clause precedent it relied on was "grounded in the now-abrogated *Lemon* approach," that precedent nonetheless remained binding "[u]nless and until expressly overruled" by the Supreme Court.[198] A court taking the same approach as this Seventh Circuit opinion might look to the specific facts of *Nyquist* to see if the case is directly applicable by factual analogy and only follow the case if it is.[199] For instance, the program in *Nyquist* only offered grants to certain private schools, virtually all of which were one religion.[200] 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.[201]

Different courts, however, might take different views of the continuing validity and scope of this precedent on direct funding of religious activity. The Fifth Circuit, in *Nathan*, suggested the Supreme Court abrogated not only *Lemon* but any case whose reasoning depended on *Lemon*'s three-part test.[202] As discussed, in *Nathan*, the Fifth Circuit concluded it was not bound by *Stone v. Graham*, in which the Supreme Court invalidated a law that mandated posting the Ten Commandments in public schools, because *Stone* applied "the '*Lemon* test.'"[203] Any court following *Nathan*'s reasoning might conclude *Nyquist* is no longer good law since its analysis looked to the program's effect. *Nyquist* cited non-*Lemon* cases to justify considering the program's effect,[204] but the Fifth Circuit rejected a similar argument relating to the validity of *Stone*. The Fifth Circuit said although *Stone* "relied on other precedents" that predated *Lemon*, the

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

[196] *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").

[197] Childs v. Webster, 168 F.4th 1020, 1030 (7th Cir. 2026).

[198] *Id.* at 1029–30. *Cf.* Nat'l Ben Gamla Jewish Charter Sch. Found., Inc. v. Shellem, No. CIV-26-582-R, 2026 WL 2882202, at *13 (W.D. Okla. Sept. 24, 2026) (concluding that state approval of a religious charter school would not violate the Establishment Clause, saying "the link between the state and the public funds that flow to a charter school is primarily the result of private choices by both the applicant and the families that choose to enroll their children at a charter school").

[199] *Cf., e.g.*, Hall v. Fleming, 175 F.4th 510, 516 (4th Cir. 2026) ("The Supreme Court's decision in *Locke* is directly analogous to this case."); Stinson v. Fayetteville Sch. Dist. No. 1, 824 F. Supp. 3d 792, 807 (W.D. Ark. 2026) ("The facts in the case at bar are identical in all material respects to the law that was deemed unconstitutional by the Supreme Court in *Stone v. Graham*."), *appeal docketed*, No. 26-1722 (8th Cir. Apr. 17, 2026).

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

[201] *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").

[202] Nathan v. Alamo Heights Indep. Sch. Dist., 173 F.4th 576, 591 (5th Cir. 2026), *petition for cert. filed*, No. 26-257 (U.S. Aug. 27, 2026).

[203] *Id.* at 583; *Stone v. Graham*, 449 U.S. 39, 41 (1980) (per curiam).

[204] Comm. for Pub. Educ. v. Nyquist, 413 U.S. 756, 773 (1973) (citing McGowan v. Maryland, 366 U.S. 420, 453 (1961); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 222 (1963)).

decision's analysis was nonetheless "*Lemon* all the way down."[205] Alternatively, a court could disagree with the Fifth Circuit's interpretation of *Kennedy*'s effects and 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.[206]

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.[207] 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 grants from being used for religious purposes.[208] 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.[209] 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.[210] 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.[211] Accordingly, while *Nyquist* has not been overruled, aspects of it were arguably weakened by this later case, even prior to *Kennedy*.

[205] *Nathan*, 173 F.4th at 591. Specifically, *Nathan* reasoned that, although *Stone* relied in part on *Schempp* (cited in the prior footnote), this reliance was "only to support its secular-purpose holding," the first prong of *Lemon*. 173 F.4th at 591. Further, *Nathan* emphasized that *Stone*'s concluding sentence said the challenged law violated *Lemon*. 173 F.4th at 591. Similarly to *Stone*, *Nyquist* cited *Schempp* as support for looking to the challenged law's effect, one of the prongs of the *Lemon* test, and cited *Lemon* elsewhere in the opinion—but in contrast, *Nyquist*'s conclusion did not expressly rely on *Lemon* itself. 413 U.S. at 773–80.

[206] *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).

[207] *Nyquist*, 413 U.S. at 774, 777–78. *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).

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

[209] *Id.* at 614–17.

[210] *Id.* at 615.

[211] *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").

A number of existing federal statutes expressly prohibit federal funds from being used for religious worship or instruction[212] or maintaining buildings in which religious worship or instruction occurs.[213] Today, one preliminary question in assessing these restrictions might be whether they impermissibly discriminate against religious entities, violating the Free Exercise Clause.[214] The restrictions might only be constitutionally permissible if they are required by the Establishment Clause.[215] 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.[216] After *Kennedy*, however, it is uncertain what test a court might use, as discussed above.

*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 may give the Supreme Court additional opportunities to clarify the doctrine in the future.

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[212] *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.").

[213] *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.

[214] *See supra* note 15. In 2026, the Department of Justice's Office of Legal Counsel took the position that certain provisions in three statutes restricting the use of federal funds "violate the Free Exercise Clause." Constitutionality of Religious Restrictions on the Use of Federal Funds, 50 Op. O.L.C. (Aug. 25, 2026) (slip op. at 33). Specifically, the opinion referenced "the Personal Responsibility and Work Opportunity Act of 1996 . . . , 42 U.S.C. § 604a(j); the Public Health Service Act . . . , *id.* §§ 290kk-2, 300x-65(i); and the Child Care and Development Block Grant Act of 1990 . . . , *id.* §§ 9858k(a), 9858l(a)(4)." *Id.* at 1. Looking to certain "historical hallmarks of a religious establishment," the opinion concluded: "The government may engage religious institutions to deliver civil services on neutral terms, and may pay them for doing so, without creating a religious establishment." *Id.* at 18.

[215] *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").

[216] *See generally* Libr. of Cong., *Application of the Lemon Test*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-3-4-4/ALDE_00013077/ (last visited Oct. 19, 2026).

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