Supplication and Separation: The Establishment Clause After *Kennedy*

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INTRODUCTION

For decades, the Supreme Court has treated communal prayer at public events as constitutionally suspect. That approach was grounded in the test articulated in *Lemon v. Kurtzman*,[1] in which the Court held that a government action violates the Establishment Clause unless it (1) has a secular purpose, (2) does not have the primary effect of advancing or inhibiting religion, and (3) does not result in "excessive government entanglement with religion."[2] This reasoning shaped a series of landmark decisions. In *Engel v. Vitale*,[3] the Court struck down a school-sponsored prayer, even though it was voluntary and nonsectarian.[4] In *Wallace v. Jaffree*,[5] the Court rejected a moment-of-silence statute because its purpose was explicitly tied to promoting prayer.[6] *Lee v. Weisman*[7] extended the doctrine further, holding that an indirectly coercive, clergy-led invocation

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1 403 U.S. 602 (1971).
2 *Id.* at 612–13.
3 370 U.S. 421 (1962).
4 *Id.* at 430, 436.
5 472 U.S. 38 (1985).
6 *Id.* at 40, 61.
7 505 U.S. 577 (1992).

at a public-school graduation still violated the First Amendment.[8] Finally, and most important for this Essay's purposes, in *Santa Fe v. Doe*,[9] the Court prohibited student-led prayer over a loudspeaker at football games, emphasizing the risk of perceived government endorsement.[10] Together, these cases prioritized a strict separationist approach that left little room to accommodate voluntary or individual religious expression, subordinating Free Exercise concerns to institutional neutrality.

Although Supreme Court decisions have often restricted prayer at state-sponsored events, public prayer has hardly vanished and litigation over it has not abated. Cue *Kennedy v. Bremerton School District*,[11] the case that rewrote the Establishment Clause script. There, the Court jettisoned the *Lemon* test and announced a new Establishment Clause approach grounded in "historical practices and understandings."[12] Although *Kennedy* revolutionized Establishment Clause jurisprudence, it provided only a skeletal outline of the new method.[13] It referenced history and tradition without defining the operative inquiry, leaving lower courts to guess: Should they apply a coercion test? Identify analogues to Founding-era establishments? Use a checklist? Interpret silence?

This Essay addresses the uncertainty left in *Kennedy*'s wake. Drawing on the historical practices emphasized in Justice Gorsuch's concurrence in *Shurtleff v. City of Boston*,[14] it proposes a framework that combines the six traditional "hallmarks" of religious establishments[15] with a broader, independent historical inquiry. This framework explains that the Supreme Court's *Kennedy* decision did not simply replace the *Lemon* test with a rule focused solely on coercion. Instead, it adopted an approach grounded in historical analysis, beginning with six factors from *Shurtleff* that identify traditional hallmarks of a government establishment of religion. If any hallmark is present—such as state control of church leadership or financial favoritism toward one faith[16]—the action is presumed unconstitutional and that presumption can be rebutted only with strong historical parallels. Conversely, if none are present, the action is presumed constitutional, and it is subject to a more deferential review that looks for "relevantly similar" historical support.[17] This framework balances tradition and judicial

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8 *Id.* at 595, 599.
9 530 U.S. 290 (2000).
10 *Id.* at 294, 316–17.
11 597 U.S. 507 (2022).
12 *Id.* at 535.
13 *See infra* notes 33–34 and accompanying text.
14 596 U.S. 243 (2022).
15 *Id.* at 285–86 (Gorsuch, J., concurring).
16 *Id.*
17 *See* United States v. Rahimi, 602 U.S. 680, 692 (2024); *infra* notes 65–66.

restraint, offering a clear method for evaluating Establishment Clause claims rooted in original meaning rather than abstract tests.

To apply this test, this Essay looks at a case currently awaiting Supreme Court review: *Cambridge Christian School, Inc. v. Florida High School Athletic Ass'n*.[18] In that case, two Christian schools sought to open their state championship football game with a joint prayer broadcast over the stadium loudspeaker.[19] The Florida High School Athletic Association ("FHSAA"), a state actor, denied the request, citing Establishment Clause concerns due to the use of a public facility and its role as event organizer.[20] Cambridge Christian sued, arguing that the "prayer ban" violated its rights under the Free Exercise and Free Speech Clauses of the First Amendment.[21] The Eleventh Circuit disagreed, holding that because the speech over the public address system was considered government speech, it did not violate the First Amendment.[22] The case now awaits review by the Supreme Court, providing the Court an opportunity to clarify its Establishment Clause jurisprudence.[23]

In the wake of *Kennedy*, communal prayer cases like *Cambridge Christian* deserve fresh scrutiny. The Court's new approach invites lower courts to ask not whether religious speech is publicly visible or government-facilitated, but whether it bears the historical markers of an established religion.[24] As this Essay will show, communal prayer—particularly when voluntary and free from government compulsion—has long been part of the American civic tradition.[25] When measured against the *Shurtleff* hallmarks and supported by historical practice, such prayer does not violate the Establishment Clause. On the contrary, suppressing it may itself create constitutional tensions under the Free Exercise Clause.

I. THE *KENNEDY* REVOLUTION

The Court's decision in *Kennedy* restored a historical understanding of the Establishment Clause—one that does not prohibit voluntary prayer over a loudspeaker. There, high school football coach Joseph Kennedy engaged

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18 115 F.4th 1266 (11th Cir. 2024).

19 *Id.* at 1277–78.

20 *Id.* at 1278.

21 *Id.* at 1278–79, 1281.

22 *Id.* at 1295–96.

23 *See* Petition for a Writ of Certiorari, Cambridge Christian Sch., Inc. v. Fla. High Sch. Athletic Ass'n, No. 24-1261 (U.S. June 6, 2025).

24 *See* Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 535 (2022); Shurtleff v. City of Boston, 596 U.S. 243, 285–86 (2022) (Gorsuch, J., concurring).

25 *Infra* Section II.B.

in brief, personal prayers at midfield after football games.[26] The Supreme Court held that Kennedy's prayers were protected by both the Free Exercise and Free Speech Clauses.[27] The Court explained that a private act of religious expression did not transform into government speech simply because it occurred in public.[28] In rejecting a strained reading of the Establishment Clause, the Court did more than resolve the case—it laid *Lemon* to rest.[29]

But, as the Fourth Circuit observed, "With *Lemon* finally dead, the question is what comes next."[30] Without much detail, the Court said, "In place of *Lemon* and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by 'reference to historical practices and understandings.'"[31] "The line that courts and governments must draw between the permissible and the impermissible has to accord with history and faithfully reflect the understanding of the Founding Fathers."[32]

That principle, although important, lacks detailed guidance on how the new framework should operate in practice. Indeed, not even the *Kennedy* Court clearly applied the historical test it invoked.[33] Instead, the Court sought to dismiss concerns about coercion, and it attempted to harmonize the Religion Clauses.[34] Beyond this, we hear only crickets about how the test works. This has led to a spirited scholarly debate.

Some say there is no test. For example, Richard Epstein claims the Court overruled *Lemon* "without developing a different test, beyond making a now-fashionable bow toward the 'original meaning and history' of constitutional language in [its] interpreting of the Establishment Clause."[35] Others contend that *Kennedy* has simply replaced *Lemon* with

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26 *Kennedy*, 597 U.S. at 514–15, 518–19 (describing the activity that ultimately led to the adverse employment action).

27 *Id.* at 543–44.

28 *Id.* at 531.

29 *Id.* at 534.

30 Firewalker-Fields v. Lee, 58 F.4th 104, 121 (4th Cir. 2023).

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

32 *Id.* at 535–36 (quoting *Town of Greece*, 572 U.S. at 577) (citation modified).

33 *See id.* at 536, 541–42 (merely stating that there is "a long constitutional tradition" of tolerating religious expression and that there is "no historically sound understanding of the Establishment Clause" that necessitates hostility towards religion).

34 *Id.* at 537–40, 542–43.

35 Richard A. Epstein, *Unnecessary Church-State Confusion*, HOOVER INST.: DEFINING IDEAS (July 25, 2022), https://www.hoover.org/research/unnecessary-church-state-confusion [https://perma.cc/DE2X-RGSR].

some type of blanket coercion test.[36] Still others suggest that taking *Kennedy*'s historical methodology to its logical conclusion leads to an anti-incorporation view since the Founders understood the Establishment Clause as a structural constraint on federal authority, not as a guarantee of individual rights enforceable against the states.[37] Finally, some have read the signals in *Kennedy* as endorsing a hybrid approach grounded in the traditional indicia of an establishment.

Stephanie Barclay, for example, claims "the Court appears to be adopting an approach that gives distinct meaning to a variety of historical hallmarks relevant to what was viewed as an established religion at the founding."[38] She points to a footnote in *Kennedy* where the Court emphasized that a paradigmatic example of an established religion is one in which the government coerces individuals into religious observance under threat of legal punishment.[39] The *Kennedy* Court explained that such coercion is "*among* the foremost hallmarks of religious establishments the Framers sought to prohibit when they adopted the First Amendment."[40] But as Barclay notes, that is not the only circumstance that can give rise to an Establishment Clause violation.[41]

Barclay observes that the *Kennedy* Court cited Justice Gorsuch's concurring opinion in *Shurtleff*, which cited scholarship by Professor Michael McConnell identifying several distinct "hallmarks" of established religion.[42] Justice Gorsuch's *Shurtleff* opinion offers a concise summary of those hallmarks:

> Beyond a formal declaration that a religious denomination was in fact the established church, it seems that founding-era religious establishments often bore certain other telling traits. *First*, the government exerted control over the doctrine and personnel of the established church. *Second*, the government mandated attendance in the established church and punished people for failing to

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36 *See* Noah Feldman, *Supreme Court Is Eroding the Wall Between Church and State*, BLOOMBERG (June 27, 2022, 12:05 PM), https://www.bloomberg.com/opinion/articles/2022-06-27/supreme-court-upends-church-state-law-in-case-of-praying-coach [https://perma.cc/7F7C-5U23].

37 Tyler Ashman, *The Establishment of Originalism in* Kennedy v. Bremerton Sch. Dist., U. CHI. L. REV. ONLINE 5–6 (Apr. 9, 2024), https://lawreview.uchicago.edu/online-archive/establishment-originalism-kennedy-v-bremerton-school-district [https://perma.cc/6E77-MNMN]; *see also* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 50 (2004) (Thomas, J., concurring).

38 Stephanie H. Barclay, *The Religion Clauses After* Kennedy v. Bremerton School District, 108 IOWA L. REV. 2097, 2104 (2023).

39 *Id.*

40 Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 537 (2022) (emphasis added).

41 Barclay, *supra* note 38, at 2105.

42 *Id.* at 2104–05.

> participate. *Third*, the government punished dissenting churches and individuals for their religious exercise. *Fourth*, the government restricted political participation by dissenters. *Fifth*, the government provided financial support for the established church, often in a way that preferred the established denomination over other churches. And *sixth*, the government used the established church to carry out certain civil functions, often by giving the established church a monopoly over a specific function.[43]

Barclay suggests, "in future cases when the Court is identifying whether a government practice constitutes a violation of the Establishment Clause, it will likely look to whether, at a low level of abstraction, the challenged practice resembles one of these hallmarks in important respects."[44] She further claims, "the Court will likely apply different types of doctrinal tests, depending on the relevant historical hallmark."[45]

Although each theory has its own doctrinal merits, ultimately, the future of Establishment Clause jurisprudence remains uncertain. This has left lower courts guessing and sharply divided. Some have attempted to sidestep the issue entirely, while others have embraced conflicting analytical frameworks.[46] Among the courts that do engage with *Kennedy*, the approaches fall (roughly) into four camps, with numerous permutations emerging between them.

Some circuits apply a bare coercion test, focusing solely on whether government action compels religious observance.[47] Others follow Barclay's lead, weighing potential Establishment Clause violations against the six hallmarks.[48] Still other circuits continue to rely on pre-*Kennedy* precedent, effectively declining to embrace the Court's new framework.[49] Finally, some circuits have no framework. The Ninth Circuit, for instance, has applied *Kennedy* in three different ways within a single year. In *Hunter v.*

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43 Shurtleff v. City of Boston, 596 U.S. 243, 285–86 (2022) (Gorsuch, J., concurring in the judgment) (citation omitted) (emphasis added).

44 Barclay, *supra* note 38, at 2105.

45 *Id.*

46 *See, e.g.*, Firewalker-Fields v. Lee, 58 F.4th 104, 122–23 (4th Cir. 2023) (remanding the Establishment Clause issue to the district court to apply *Kennedy* in the first instance).

47 *See, e.g.*, Lozano v. Collier, 98 F.4th 614, 627–28 (5th Cir. 2024) (focusing its Establishment Clause analysis on whether participation in religious instruction was coerced or optional and remanding for further factfinding on that issue).

48 *See, e.g.*, Hilsenrath *ex rel.* C.H. v. Sch. Dist. of the Chathams, 136 F.4th 484, 491 (3d Cir. 2025).

49 *See Firewalker-Fields*, 58 F.4th at 122; Gundy v. City of Jacksonville, 50 F.4th 60, 70–75 (11th Cir. 2022).

United States Department of Education,[50] the court interpreted *Kennedy* as prescribing a two-part test: first, apply *Town of Greece v. Galloway*[51] to determine whether the practice was accepted by the Framers and long enduring; if not, the state must show historical analogues.[52] Just months later in *Loffman v. California Department of Education*,[53] the same circuit grafted *Kennedy*'s history-based analysis into strict scrutiny review.[54] Finally, in *Markel v. Union of Orthodox Jewish Congregations of America*,[55] the Ninth Circuit glossed over *Kennedy* altogether, applying instead a general coercion test that required "actual legal coercion" to demonstrate an establishment.[56] Three cases, three frameworks, one circuit—all within twelve months. There must be another way.

II. A NEW PATH FORWARD

Faced with this analytical uncertainty, this Essay proposes supplementing the *Shurtleff* six-factor analysis[57] with the analogous historical evidence inquiry adopted in the Supreme Court's most recent Second Amendment case, *United States v. Rahimi*.[58] A close reading of *Kennedy* reveals that the Court did not merely swap one abstract test (*Lemon*) for another based solely on coercion.[59] Instead, it embraced an approach rooted in individualized historical inquiry.[60] This analysis should begin with the six factors identified in *Shurtleff*, specifically assessing whether the government's actions amount to an establishment of religion. As noted above, the hallmarks of religious establishments include government actions, such as: (1) controlling church doctrine and leadership; (2) mandating church attendance under threat of punishment; (3) punishing religious practices by dissenting churches or individuals; (4) restricting religious dissenters from participating in politics; (5) providing financial support to one church over others; and (6) assigning

50 115 F.4th 955 (9th Cir. 2024).

51 572 U.S. 565 (2014).

52 *Hunter*, 115 F.4th at 965 .

53 119 F.4th 1147 (9th Cir. 2024).

54 *Id.* at 1171.

55 124 F.4th 796 (9th Cir. 2024).

56 *Id.* at 808–09. Remarkably, this panel did cite an opinion from *Kennedy*—a dissent from the Ninth Circuit's denial of rehearing en banc, rather than the Court's opinion. *Id.* at 808.

57 *See supra* note 43 and accompanying text.

58 602 U.S. 680, 692 (2024).

59 *See supra* Part I.

60 *See supra* notes 39–41 and accompanying text.

civil functions to a church, often by granting it a monopoly over certain duties.[61]

Under this framework, if any one of these hallmarks is present, government interference is presumed to violate the Establishment Clause.[62] Theoretically, if none are present, the action may be presumed constitutional.[63] But the analysis cannot end there. The Court's repeated emphasis on history and tradition cannot mean that judges simply compare modern practices to a checklist buried in a footnote to a concurrence without engaging in a tailored historical analysis of the specific actions at hand.[64] Courts should still conduct an independent historical inquiry to confirm or rebut that presumption, ensuring that the outcome aligns with the original meaning of the Establishment Clause.

When a government action is presumed constitutional, the supporting historical evidence need not be an exact match; rather, it must be "relevantly similar" to the current practice.[65] The Court applied this approach in *United States v. Rahimi* when evaluating 18 U.S.C. § 922(g)(8), a statute prohibiting individuals subject to certain domestic violence restraining orders from possessing firearms.[66] Writing for the majority, Chief Justice Roberts rejected the notion that modern laws must have a precise "historical twin" from 1791.[67] He reasoned that such a rigid requirement would absurdly confine the Second Amendment to "muskets and sabers"—an interpretation clearly at odds with its intended scope.[68]

Instead, Chief Justice Roberts emphasized that contemporary regulations must reflect the underlying principles of the Second Amendment.[69] He noted that § 922(g)(8) fits within a longstanding tradition of laws designed to prevent dangerous individuals from misusing firearms.[70] For instance, he pointed to historical surety laws and other legal mechanisms aimed at curbing threats to public safety without infringing upon the core right of self-defense.[71] Chief Justice Roberts further supported this view by citing English laws from the 1600s that barred

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61 Shurtleff v. City of Boston, 596 U.S. 243, 285–86 (2022) (Gorsuch, J., concurring).

62 *See id.* at 286–87.

63 *See id.*

64 *See* Town of Greece v. Galloway, 572 U.S. 565, 576 (2014) ("[T]he Establishment Clause must be interpreted 'by reference to historical practices and understandings.'" (quoting County of Allegheny v. ACLU, 492 U.S. 573, 670 (1989))).

65 *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 29 (2021).

66 United States v. Rahimi, 602 U.S. 680, 693 (2024).

67 *Id.* at 691–92, 700–01.

68 *Id*. at 691–92.

69 *See id.* at 692.

70 *Id.* at 690.

71 *Id.* at 695–98.

individuals from carrying weapons to terrorize the public or threaten the King's peace.[72] According to the Court, these traditions validate the statute's purpose: to disarm those who pose a credible threat to others.[73] This context, he concluded, affirms the government's authority to regulate firearm possession in service of public safety.[74] In doing so, the Court endorsed a flexible approach—one that does not require a perfect historical match, but a tradition that reflects the same principles or purposes.[75]

This approach is similar to rational basis review, the most deferential form of constitutional scrutiny, where courts presume a law is valid and place the burden on the challenger to show it violates the Constitution.[76] *Rahimi* established a similar threshold in the Second Amendment context, holding that a regulation need not have a historical twin to survive constitutional scrutiny.[77] Instead, the Court suggested that the presumption of constitutionality is overcome only by a complete lack of historical support.[78] The same should be true here. When the *Shurtleff* hallmarks are absent, there is no indicia of an establishment and therefore no Establishment Clause violation. Thus, the historical inquiry should be highly deferential, not requiring the government to painstakingly scour the annals of history in search of identical governmental action.[79]

Take, for example, the historical investigation conducted in *Town of Greece*.[80] There, the practice at issue involved prayer at town board meetings.[81] Unlike in state legislatures or Congress where prayers were

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72 *Id.* at 693–95.

73 *Id.* at 698.

74 *See id.* at 698–99.

75 However, the Justices are divided on how exacting the historical analogue must be when interpreting the Constitution through the lens of Founding-era practices. Justice Thomas, the lone dissenter, advocated for a stricter standard, emphasizing that historical comparisons must be closely aligned to avoid approving laws the Founders would have rejected. *Id.* at 775 (Thomas, J., dissenting). He cautioned that straying too far from historical precedent risks legitimizing legal outliers that would have been unrecognizable—or unacceptable—to the Founders. *Id.* at 761. The majority, however, sided with Chief Justice Roberts's more flexible approach, which Justice Barrett endorsed as striking "just the right level of generality." *Id.* at 740 (Barrett, J., concurring).

76 *See* FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313–14 (1993) ("Where there are 'plausible reasons' for Congress' action, 'our inquiry is at an end.'" (quoting U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980))).

77 *See Rahimi*, 602 U.S. at 692 ("[W]hen a challenged regulation does not precisely match its historical precursors, 'it still may be analogous enough to pass constitutional muster.' The law must comport with the principles underlying the Second Amendment, but it need not be a 'dead ringer' or a 'historical twin.'" (quoting N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 30 (2021)) (citations omitted)).

78 *See id.* at 692–93.

79 *See supra* note 65 and accompanying text.

80 572 U.S. 565 (2014).

81 *Id.* at 570–71.

traditionally directed at legislators, this was a local municipal setting where citizens appeared to petition the municipality.[82] One could argue that prayer in such a setting might cause citizens to feel pressured to participate in prayer while, for example, seeking a zoning approval or permit—which could create a greater danger of coercion.[83] But notwithstanding these distinctions, the Court upheld the town's practice, noting that congressional prayer has been used since the First Congress and does not violate the Establishment Clause simply because it is religious in nature.[84] Even though the context differed meaningfully from the original historical practice, the Court applied a flexible interpretation of "history and tradition."[85] Thus, "when a challenged government regulation does not precisely match its historical precursors, 'it still may be analogous enough to pass constitutional muster'" so long as the actions do not conflict with the core historical understandings of what the Second Amendment prohibits—similarly embodied in the *Shurtleff* hallmarks regarding the Establishment Clause.[86]

The analysis changes when a government action bears one of the hallmarks of a religious establishment. In those cases, the action is presumed to be unconstitutional.[87] To overcome that presumption, the government must present strong historical evidence showing the practice falls within a well-established and accepted tradition.[88] Here, the historical analogue must be especially similar—closer to a "twin" than a "cousin."[89] This approach mirrors broader First Amendment protections such as when a law affects a fundamental right, particularly one involving speech. In instances where freedom of speech is impacted, courts presume such actions are unconstitutional, thus requiring the government to meet a high burden, usually under strict scrutiny, to rebut this presumption.[90] Similarly, if a government action resembles one of the historical examples of an establishment, it should be presumed unconstitutional, rebutted only by

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82 *Id.* at 586.

83 *Id.*

84 *Id*. at 576–77.

85 *See id.* at 587.

86 United States v. Rahimi, 602 U.S. 680, 692 (2024); *see also* Shurtleff v. City of Boston, 596 U.S. 243, 285–86 (2022) (Gorsuch, J., concurring).

87 *Shurtleff*, 596 U.S. at 286–87 (Gorsuch, J., concurring).

88 *See id.* at 283–84.

89 United States v. Rahimi, 602 U.S. 680, 739 (2024) (Barrett, J., concurring).

90 *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid."); United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 817 (2000) ("'Content-based regulations are presumptively invalid,' and the Government bears the burden to rebut that presumption." (quoting *R.A.V.*, 505 U.S. at 382)).

specific historical instances of equivalent conduct, a burden comparable to the exacting justification demanded under strict scrutiny.

This framework offers a method for evaluating Establishment Clause claims that is rooted in genuine historical investigation. It avoids both abstract balancing tests and mechanical checklists, instead anchoring the analysis to the original understanding of the Clause and Founding-era analogies. With this approach in hand, courts have a functional, yet tradition-based, means to assess whether a challenged government action reflects an establishment of religion. This Essay now turns to that task, applying this framework to *Cambridge Christian School, Inc. v. Florida High School Athletic Ass'n*.[91]

A. None of the Hallmarks of an Establishment are Present in Cambridge Christian

As established above, the proposed framework begins with the hallmarks outlined in *Shurtleff*.[92] The Court has not yet decided whether all six are required or whether some combination is sufficient. But that question need not be resolved here. None are present in *Cambridge Christian*.

The government exerted no control over church doctrines or personnel, mandated no religious attendance, provided no financial support, and delegated no civil authority to any religious institution.[93] That alone removes hallmarks one, two, five, and six from consideration.[94] Hallmarks three and four—punishment of dissenters and exclusion from political participation—warrant closer scrutiny.[95] But here too, the record is clear: No individual was penalized for nonparticipation, and no religious belief stood as a barrier to civic life.[96] In this case, the schools participating in the game merely requested the opportunity to pray.[97] They did not seek to compel a government agent or any official intermediary to offer the prayer. Rather, they simply wished to express their faith in accordance with their religious beliefs. No player, parent, or citizen was punished for choosing not to participate.

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91 115 F.4th 1266 (11th Cir. 2024).

92 *See* Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 537 n.5 (2022).

93 Cambridge Christian Sch., Inc. v. Fla. High Sch. Athletic Ass'n, 115 F.4th 1266, 1277–78 (11th Cir. 2024).

94 *See* Shurtleff v. City of Boston, 596 U.S. 243, 285–86 (2022) (Gorsuch, J., concurring in the judgment).

95 *See id.*

96 *See Cambridge Christian*, 115 F.4th at 1277–78.

97 *Id.* at 1274.

From an Establishment Clause standpoint, this case presents even less constitutional concern than *Town of Greece v. Galloway*[98] or *Marsh v. Chambers*.[99] In both cases, the government arranged the prayers and directed them to public bodies, yet the Court found no constitutional violations. Here, by contrast, two private teams voluntarily agreed to offer a prayer over a loudspeaker.[100] That shared decision—free from coercion, compulsion, or official endorsement—places the conduct well within constitutional bounds. Thus, prayer over a government loudspeaker should be presumed to be constitutional. Moving forward, this Essay examines whether "relevantly similar" historical evidence exists to justify the allowance of prayer over government loudspeakers and arrives at a helpful conclusion: such historical evidence does exist.

B. Relevant History Cannot Overcome the Presumption of Constitutionality

Because none of the hallmarks of an establishment are present, Cambridge's prayer over the loudspeaker is presumed to be constitutional. As stated above, the government can rebut that presumption only by showing that such a practice lacks any "relevantly similar" historical analogue.[101] But the history is not only relevantly similar—it is foundational.

This nation's constitutional tradition was born, quite literally, in prayer. On September 7, 1774, the First Continental Congress opened its first full session not with debate, but with supplication.[102] At the urging of Samuel Adams, the Congress invited Jacob Duchè, an Anglican minister, to lead them in prayer. He began by reading the Thirty-Fifth Psalm, then delivered an extemporaneous prayer so "elegant and sublime" that, as John Adams recounted, it "filled the Bosom of every Man present."[103] Not even Dr. Samuel Cooper—the most celebrated preacher of the day—had ever prayed "with such fervour, such Ardor, such Earnestness and Pathos."[104] If prayer can precede the birth of a nation, surely it can precede a football game without violating the Constitution.

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98 572 U.S. 565, 591–92 (2014) (upholding sectarian prayer before town board meetings).

99 463 U.S. 783, 795 (1983) (upholding legislative prayers offered by publicly funded chaplain).

100 *See Cambridge Christian*, 115 F.4th at 1276–77.

101 *See supra* note 65 and accompanying text.

102 Letter from John Adams to Abigail Adams (Sept. 16, 1774), https://founders.archives.gov/documents/Adams/04-01-02-0101 [https://perma.cc/GJT3-94ZV].

103 *Id.*

104 *Id.*

The historical role of prayer extends beyond Congress. Just as prayer was present at the Nation's founding, it was also part of the early development of American public education. For instance, when the cornerstone of the University of North Carolina at Chapel Hill—the first public university in the United States—was laid in 1793, it began with "short [] animated prayers."[105] The practice continued once students entered the classroom. One student who refused to join in daily prayers was promptly told: "If he could not hold with Prayers, the University could not hold with him."[106] And when the Class of 1894 took their seats at commencement, the program began, as it always had, with prayer.[107]

This custom was not unique to Chapel Hill. Historical records from public universities across the country show that it was common for major academic events, including commencements and convocations, to begin with prayer. At the University of Georgia, nineteenth-century commencement programs regularly opened with invocations, often led by local clergy or university chaplains.[108] Similarly, records from the early 1800s at the Universities of Vermont and Tennessee show that public prayer was a customary and expected element of academic ceremonies.[109] Many other historical records say the same.[110] This widespread and

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105 1 KEMP P. BATTLE, HISTORY OF THE UNIVERSITY OF NORTH CAROLINA 40 (1907).

106 *Id.* at 222. The author of this account took a somewhat dim view of this confrontation, however, which happened "[w]ithout deigning to discuss" the Free Exercise Clause. *See id.*

107 UNIV. OF N.C., NINETY-NINTH ANNUAL COMMENCEMENT (1894), https://lib.digitalnc.org/record/35609 [https://perma.cc/F6Q7-S7PR].

108 1 THOMAS WALTER REED, HISTORY OF THE UNIVERSITY OF GEORGIA 62 (1949), https://dlg.usg.edu/record/dlg_huga_harg1662-007-001-002 [https://perma.cc/R8CX-HALQ] (explaining that beginning as early as 1804, "[t]he commencement exercises were opened with prayer . . . .").

109 UNIV. OF VT., UNIVERSITY OF VERMONT, BURLINGTON COMMENCEMENT EXERCISES (1813), https://digitalvermont.org/items/show/4799 [https://perma.cc/HD6M-G56A] (opening with "Sacred Musick" and prayer); UNIV. OF TENN., EAST TENNESSEE UNIVERSITY ORDER OF EXERCISES FOR COMMENCEMENT (1841), https://digital.lib.utk.edu/collections/islandora/object/utkcomm%3A10015 [https://perma.cc/A622-N6AL] (opening with prayer).

110 *See, e.g.*, UNIV. OF MD., MARYLAND AGRICULTURAL COLLEGE ANNUAL COMMENCEMENT (1863), https://hdl.handle.net/1903.1/5994 [https://perma.cc/663D-4ZW8] (opening with prayer); STATE UNIV. OF N.Y. CORTLAND, STATE NORMAL AND TRAINING SCHOOL COMMENCEMENT 2 (1870), https://digitalcommons.cortland.edu/cgi/viewcontent.cgi?article=1000&context=commencements_programs [https://perma.cc/EY6E-BA7G] (same); UNIV. OF ALBANY, STATE NORMAL SCHOOL TWENTY-FIFTH TERM (1857), https://archives.albany.edu/concern/daos/348501160 [https://perma.cc/53WN-2SWF] (same); UNIV. OF N. IOWA, IOWA STATE NORMAL SCHOOL, ADDRESSES OF GRADUATES, CLASS '92, DECEMBER SECTION (1892), https://scholarworks.uni.edu/cgi/viewcontent.cgi?article=1299&context=commencement_programs [https://perma.cc/SB3Y-XSKX] (opening with an invocation); CENT. WASH. UNIV., FIRST ANNUAL COMMENCEMENT OF WASHINGTON STATE NORMAL SCHOOL (1892),

consistent practice underscores how deeply integrated prayer was in the fabric of American public education during the eighteenth and nineteenth centuries. Far from being isolated instances, these examples reflect a national tradition of acknowledging the divine in public life—a tradition that persisted for generations and provides a strong historical grounding for the constitutionality of voluntary prayer at public events today.

As the evidence shows, prayer at major public events is a practice with historical roots stretching to the early days of the Republic. These records show a close analogue to the practice of opening other public events with prayer. In the absence of any evidence of a religious establishment, the presumption of constitutionality should stand. The Establishment Clause does not require the government to suppress religious expression merely because it provides neutral or incidental support. That version of "neutrality" is not neutrality at all—it is religious discrimination that not only misconstrues the Establishment Clause but also gives rise to a serious Free Exercise violation.

CONCLUSION

The Establishment Clause, as clarified in *Kennedy*, does not forbid prayer in public settings merely because it occurs on government property. The proposed framework—grounded in the hallmarks of historical establishments and informed by a flexible yet principled historical inquiry—offers courts a clearer path forward. It balances fidelity to the Constitution's original meaning with the practical realities of modern religious expression. Applied here, it confirms that Cambridge Christian's prayer does not violate the Establishment Clause. If anything, suppressing such expression creates greater constitutional concerns than permitting it. Hopefully, the Supreme Court will take this opportunity to provide much-needed clarity and confirm that *Kennedy*'s historical test protects, rather than prohibits, such long-standing traditions.

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https://digitalcommons.cwu.edu/cgi/viewcontent.cgi?article=1002&context=cwu_commencement_programs [https://perma.cc/4NY9-BZ94] (same); S.D. STATE UNIV., STATE AGRICULTURAL COLLEGE OF SOUTH DAKOTA COMMENCEMENT PROGRAM (1892), https://openprairie.sdstate.edu/cgi/viewcontent.cgi?article=1195&context=registrar_commencement [https://perma.cc/7FZY-RAQ6] (same); ILL. STATE UNIV., ILLINOIS STATE NORMAL UNIVERSITY FIRST COMMENCEMENT (1860), https://ir.library.illinoisstate.edu/cgi/viewcontent.cgi?article=1000&context=commencement [https://perma.cc/46DL-YKNT] (opening with "The Lord's Prayer").