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# Religious Liberty as a Judicial Autoimmune Disorder: The Supreme Court Repudiates Its Own Authority in *Kennedy v. Bremerton School District*

ANDREW KOPPELMAN<sup>†</sup>

*Today's Supreme Court is so predisposed to find discrimination against religion that it declared it to be present in a case where the discriminator was obeying the Court's own commands. In Kennedy v. Bremerton School District, the defendant school district and the lower federal courts had faithfully followed Supreme Court authority. The Court had, until then, consistently insisted that lower courts are bound by Supreme Court precedent. In Kennedy, the Court attacked the basis of its own authority.*

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## TABLE OF CONTENTS

INTRODUCTION .....	1753
I. THE COURT'S AUTHORITY .....	1753
II. THE STATUS OF <i>LEMON</i> .....	1755
III. LAW AS DISCRIMINATION.....	1758

## INTRODUCTION

Today's Supreme Court is unusually hospitable to religious claimants,<sup>1</sup> and unusually likely to find that such claimants have somehow been discriminated against.<sup>2</sup> The Court is also disinclined to find that any state action violates the Establishment Clause. In *Kennedy v. Bremerton School District*,<sup>3</sup> the Court recently overruled the prevailing rule implementing the Clause and replaced it with a test so vague that nothing can confidently be said to violate it.<sup>4</sup>

The Court is so predisposed to find discrimination against religion that it declared it to be present in a case where the discriminator was obeying the Court's own commands.<sup>5</sup> In *Kennedy*, the defendant school district and lower federal courts had both faithfully followed Supreme Court authority. The Court had, until then, consistently insisted that lower courts are bound by Supreme Court precedent. Then in *Kennedy*, the Court attacked the basis of its own authority.

## I. THE COURT'S AUTHORITY

The Court has repeatedly made it clear that its decisions are binding unless and until it expressly overrules them: “[I]t is this Court’s prerogative alone to overrule one of its precedents. . . . Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality.”<sup>6</sup> Thus, the Court repudiated a lower court’s determination that the Supreme Court had “*implicitly overruled*” one of its precedents, quoting that phrase with the emphasis pointedly added.<sup>7</sup> The cited passage from *Rodriguez de Quijas v. Shearson/American Express, Inc.* says: “If

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1. One survey found that of all the Justices who have sat on cases since 1953, those who voted most often for the religious side belonged to the current conservative bloc on the Court: Brett Kavanaugh (100%), Neil Gorsuch (88%), Clarence Thomas (91%), John Roberts (88%), and Samuel Alito (88%). Lee Epstein and Eric A. Posner, *The Roberts Court and the Transformation of Constitutional Protections for Religion: A Statistical Portrait*, 2021 SUP. CT. REV. 315, 328. This data was compiled before Amy Coney Barrett joined the Court.

2. See generally Andrew Koppelman, *The Increasingly Dangerous Variants of the “Most-Favored-Nation” Theory of Religious Liberty*, 108 IOWA L. REV. 2237 (2023).

3. 142 S. Ct. 2407 (2022).

4. The Court wrote that “the Establishment Clause must be interpreted by ‘reference to historical practices and understandings.’” *Id.* at 2428. It demands “analysis focused on original meaning and history.” *Id.* The law must “accord with history and faithfully reflect the understanding of the Founding Fathers.” *Id.* None of this gives any lower court any guidance as to how to decide any case.

5. It has also sometimes done so in cases where there was no evidentiary record and it had no legal authority to issue an emergency injunction. Andrew Koppelman, *Religion and the Lawbreaking Supreme Court*, THE HILL (Mar. 6, 2023, 10:00 AM), <https://thehill.com/opinion/judiciary/3884226-religion-and-the-lawbreaking-supreme-court/>.

6. *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016) (quoting *United States v. Hatter*, 532 U.S. 557, 567 (2001) (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (internal quotation marks omitted)); *Hohn v. United States*, 524 U.S. 236, 252–53 (1998)).

7. *Id.* (emphasis added) (quoting *Conover v. State*, 933 P.2d 904, 920 (Okla. 1997)).

a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”<sup>8</sup> Again, in *Agnostini v. Felton*: “We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent.”<sup>9</sup>

This is true even where a Supreme Court precedent contains many “infirmities” and rests upon “wobbly, moth-eaten foundations.”<sup>10</sup> These words, quoted with approval by the Court in *State Oil Co. v. Khan*, are from a Seventh Circuit opinion by Judge Richard Posner. Posner had observed that “the Supreme Court has told the lower federal courts, in increasingly emphatic, even strident, terms, not to anticipate an overruling of a decision by the Court; we are to leave the overruling to the Court itself.”<sup>11</sup> He declared that the pertinent precedent “was unsound when decided, and is inconsistent with later decisions by the Supreme Court. It should be overruled. Someday, we expect, it will be.”<sup>12</sup> He then stated:

But all this is an aside. We have been told by our judicial superiors not to read the sibylline leaves of the *U.S. Reports* for prophetic clues to overruling. It is not our place to overrule [the pertinent Supreme Court decision]; and [that decision] cannot fairly be distinguished from this case.<sup>13</sup>

The Supreme Court declared that Posner was “correct in applying [stare decisis] despite disagreement[,] . . . for it is th[e] Court’s prerogative alone to overrule one of its precedents.”<sup>14</sup> It then took up Posner’s invitation and overruled the precedent.

As Justice Brett Kavanaugh observed when he was a judge on the D.C. Circuit,

the goal for a lower court . . . is not to speculate or predict how a *future* Supreme Court might decide a case. The goal is to determine how the principles set forth by the Supreme Court in a *prior* decision would apply to the current case facing the lower court.<sup>15</sup>

And the leading treatise on Supreme Court practice warns that “where the court of appeals deliberately refuses to follow the applicable Supreme Court decisions in the belief that such decisions may be overruled or that the current personnel

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8. 490 U.S. 477, 484 (1989).

9. 521 U.S. 203, 237 (1997).

10. *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (quoting *Khan v. State Oil Co.*, 93 F.3d 1358, 1363 (7th Cir. 1996)).

11. *Khan v. State Oil Co.*, 93 F.3d 1358, 1363 (7th Cir. 1996).

12. *Id.*

13. *Id.* at 1364.

14. *Khan*, 522 U.S. at 20.

15. *United States v. Duvall*, 740 F.3d 604, 611 n.1 (D.C. Cir. 2013) (Kavanaugh, J., concurring).

of the Court might change the trend of the decisions, certiorari is likely to be granted.”<sup>16</sup>

## II. THE STATUS OF *LEMON*

Since 1971, the test for an Establishment Clause violation has been that laid down in *Lemon v. Kurtzman*<sup>17</sup>: in order to withstand challenge, “[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive governmental entanglement with religion.”<sup>18</sup> To specify what *Lemon* required, the Court developed, and then repeatedly cited and relied on, the so-called “endorsement test,” which holds that the Establishment Clause prohibits state action “endorsing religion or a particular religious practice.”<sup>19</sup> Justice O’Connor, who devised the test and eventually assembled a majority for it, explained: “Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.”<sup>20</sup> The Court adopted her test when it cited “the prohibition against governmental endorsement of religion”<sup>21</sup> and declared that the Establishment Clause “prohibits government from appearing to take a position on questions of religious belief.”<sup>22</sup>

Until *Kennedy*, *Lemon* and the endorsement test’s interpretation of it were still binding. As one treatise explains:

Although there have been many instances where the Court decided Establishment Clause cases without applying this test, it has been frequently used. While several Justices have criticized the test and called for it to be overruled, this has not occurred. Indeed, Justice Scalia, the primary advocate for overruling the *Lemon* test, colorfully lamented its survival . . . .<sup>23</sup>

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16. STEPHEN M. SHAPIRO, KENNETH S. GELLER, TIMOTHY S. BISHOP, EDWARD A. HARTNETT & DAN HIMMELFARB, *SUPREME COURT PRACTICE* 45 (11th ed. 2019).

17. 403 U.S. 602 (1971).

18. *Id.* at 612–13 (citation and internal quotation marks omitted).

19. *Wallace v. Jaffree*, 472 U.S. 38, 69 (1985) (O’Connor, J., concurring).

20. *Lynch v. Donnelly*, 465 U.S. 668, 687–88 (1984) (O’Connor, J., concurring). I have defended the use of the test, although on different grounds than those cited by O’Connor. *See generally* Andrew Koppelman, *Endorsing the Endorsement Test*, 7 CHARLESTON L. REV. 719 (2013).

21. *County of Allegheny v. ACLU*, 492 U.S. 573, 593 (1989).

22. *Id.* at 594. On the test’s repeated appearance in opinions of the Court, see generally Mark Strasser, *The Endorsement Test Is Alive and Well: A Cause for Celebration and Sorrow*, 39 PEPPERDINE L. REV. 1273 (2013).

23. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* § 12.2.3 (6th ed. 2019) (footnotes omitted); *see also* WILLIAM J. RICH, 1 *MODERN CONSTITUTIONAL LAW* § 10:11, Westlaw (database updated Dec. 2021) (“Application of [the *Lemon*] test has not been easy, and some Justices have called for its

*Kennedy* involved a football coach who insisted on praying on the fifty-yard line after games.<sup>24</sup> The school would not permit him to do that, citing its obligation to avoid creating the impression of endorsement of religion.<sup>25</sup> The district court and court of appeals both applied the endorsement test and upheld the disciplining of the coach.<sup>26</sup> The Supreme Court disagreed.

Justice Gorsuch's opinion berated both the defendant and the lower courts for treating *Lemon* as good law. He declared that "given the apparent 'shortcomings' associated with *Lemon*'s 'ambitiou[s],' abstract, and ahistorical approach to the Establishment Clause[,] this Court long ago abandoned *Lemon*."<sup>27</sup>

The quotations in this passage come from the plurality opinion in *American Legion v. American Humanist Association*.<sup>28</sup> Justice Alito, writing for himself and three other judges (he lost his majority for this part), described a pattern of earlier decisions as "a testament to the *Lemon* test's shortcomings. As Establishment Clause cases involving a great array of laws and practices came to the Court, it became more and more apparent that the *Lemon* test could not resolve them."<sup>29</sup> He also wrote: "While the *Lemon* Court ambitiously attempted to find a grand unified theory of the Establishment Clause, in later cases, we have taken a more modest approach that focuses on the particular issue at hand and looks to history for guidance."<sup>30</sup> It is embarrassing to have to say that a precedent cannot be overruled by a plurality opinion.

Gorsuch also offered a revealing discussion of the status of *Lemon* in his concurrence in the judgment in *Shurtleff v. City of Boston*.<sup>31</sup> He found it puzzling that the defendant city had relied on that decision:

To be fair, at least some of the blame belongs here and traces back to *Lemon v. Kurtzman*. Issued during a "bygone era" when this Court took a more freewheeling approach to interpreting legal texts, *Lemon* sought to devise a one-size-fits-all test for resolving Establishment Clause disputes. That project bypassed any inquiry into the Clause's original meaning. It ignored longstanding precedents. And instead of bringing clarity to the area, *Lemon* produced only chaos. In time, this Court came to recognize these problems, abandoned *Lemon*, and returned to a more humble jurisprudence centered on

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demise. Instead of abandoning the test, however, the Justices have modified their interpretation of it over time, and they have adjusted to circumstances by developing additional guides to either assist or substitute for the traditional approach.").

24. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2416 (2022).

25. *Id.* at 2417.

26. *Id.* at 2419.

27. *Id.* at 2427.

28. 139 S. Ct. 2067 (2019) (plurality opinion).

29. *Id.* at 2080.

30. *Id.* at 2087.

31. 142 S. Ct. 1583 (2022). This case was decided in May 2022, a month before *Kennedy*.

the Constitution's original meaning. Yet in this case, the city chose to follow *Lemon* anyway.<sup>32</sup>

Reviewing the history, Gorsuch declared that “*Lemon* has long since been exposed as an anomaly and a mistake.”<sup>33</sup> He observed that the pattern of decisions “in time led Justice after Justice to conclude that *Lemon* was ‘flawed in its fundamentals,’ ‘unworkable in practice,’ and ‘inconsistent with our history and our precedents.’”<sup>34</sup>

To this he appended a footnote, listing many concurring and dissenting opinions—but never a majority—criticizing *Lemon*.<sup>35</sup> Then he wrote: “Recognizing *Lemon*’s flaws, this Court has not applied its test for nearly two decades.”<sup>36</sup> He cited cases with facts to which “[the Court] expressly refused to apply *Lemon*.”<sup>37</sup>

None of these cases claim that the decision had been formally overruled. Yet he asked:

With all these messages directing and redirecting the inquiry to original meaning as illuminated by history, why did Boston still follow *Lemon* in this case? Why do other localities and lower courts sometimes do the same thing, allowing *Lemon* even now to “si[t] up in its grave and shuffl[e] abroad”? There may be other contributing factors, but let me address two.

First, it’s hard not to wonder whether some simply prefer the policy outcomes *Lemon* can be manipulated to produce. . . . Second, it seems that *Lemon* may occasionally shuffle from its grave for another and more prosaic reason. By demanding a careful examination of the Constitution’s original meaning, a proper application of the Establishment Clause no doubt requires serious work and can pose its challenges. *Lemon*’s abstract three-part test may seem a simpler and tempting alternative to busy local officials and lower courts.<sup>38</sup>

The picture is one of lawless officeholders reaching for an excuse to harm religious claimants.

There is, however, another possible explanation for the continuing vitality of *Lemon* that Gorsuch did not mention: it was never expressly overruled by the

32. *Id.* at 1603 (Gorsuch, J., concurring) (citations omitted).

33. *Id.* at 1606.

34. *Id.* at 1607 (quoting *County of Allegheny v. ACLU*, 492 U.S. 573, 669 (1989) (Kennedy, J., concurring in part and dissenting in part)).

35. *Id.* at 1607 n.9 (citing *Salazar v. Buono*, 559 U.S. 700, 720–21 (2010) (plurality opinion); *Van Orden v. Perry*, 545 U.S. 677, 699–700 (2005) (Breyer, J., concurring); *Van Orden*, 545 U.S. at 692–93 (Thomas, J., concurring); *McCreary County v. ACLU*, 545 U.S. 844, 890 (2005) (Scalia, J., dissenting); *Bd. of Educ. v. Grumet*, 512 U.S. 687, 720 (1994) (O’Connor, J., concurring); *Comm. for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting)).

36. *Id.* at 1607.

37. *Id.*

38. *Id.* at 1608–09 (citations omitted).



Court and so remained binding. In the Ninth Circuit, concurring in the denial of en banc review in *Kennedy*, Judge Milan Smith observed: “Cabining Supreme Court precedent is a job for the Supreme Court—not a three-judge or en banc panel of our court.”<sup>39</sup> A suggestion that the Ninth Circuit develop a new framework for similar cases “would ostensibly conflict with the Supreme Court’s decisions that already prescribe how courts should evaluate prayer in schools. [The courts of appeals] are not at liberty to make such a change.”<sup>40</sup> Even a judge who dissented from the en banc denial conceded that *Lemon* was “not formally overruled.”<sup>41</sup>

### III. LAW AS DISCRIMINATION

When he wrote the majority opinion in *Kennedy*, Gorsuch did not assert the contrary. Instead, he wrote:

What the District and the Ninth Circuit overlooked, however, is that the “shortcomings” associated with this “ambitiou[s],” abstract, and ahistorical approach to the Establishment Clause became so “apparent” that this Court long ago abandoned *Lemon* and its endorsement test offshoot.<sup>42</sup>

Abandoned, not overruled. Gorsuch could not bring himself to say that. The Court “abandoned” it in the sense that it decided many cases without relying on it, and carved out increasingly numerous categories of cases to which it did not apply. “In the last two decades, this Court has often criticized or ignored *Lemon* and its endorsement test variation.”<sup>43</sup> The error of the parties and the lower courts that Gorsuch denounced in *Shurtleff* and deemed improper in *Kennedy* was that they treated *Lemon* as authoritative, despite the fact that subsequent cases had raised doubts about its continuing vitality. But, once more,

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39. *Kennedy v. Bremerton Sch. Dist.*, 4 F.4th 910, 924 (9th Cir. 2021) (Smith, J., concurring in denial of rehearing en banc).

40. *Id.*

41. *Id.* at 947 (Nelson, J., dissenting from denial of rehearing en banc).

42. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2427 (2022).

43. *Id.* at 2428 n.4. He also cited with approval the Ninth Circuit judges who dissented from en banc rehearing, including one “collecting lower court cases from ‘around the country’ that ‘have recognized *Lemon*’s demise.”” *Id.* (citing *Kennedy*, 4 F.4th at 947 n.3 (Nelson, J., dissenting from denial of rehearing en banc)). The lower court cases in that collection did not, however, say that *Lemon* had been overruled. Rather, they simply observed that the Court has limited its application in cases that, like the monument in *American Legion*, involved longstanding public displays or long-settled practices. See *Woodring v. Jackson County*, 986 F.3d 979, 981 (7th Cir. 2021) (nativity scene); *Perrier-Bilbo v. United States*, 954 F.3d 413, 425 (1st Cir. 2020) (“so help me God” in naturalization oath); *Kondrat’yev v. City of Pensacola*, 949 F.3d 1319, 1321 (11th Cir. 2020) (cross on public land); *Freedom from Religion Found., Inc. v. County of Lehigh*, 933 F.3d 275, 280–81 (3d Cir. 2019) (county seal). The closest was *Williams v. Kingdom Hall of Jehovah’s Witnesses*, vacating and remanding dismissal of an intentional infliction of emotional distress case. 491 P.3d 852 (Utah 2021). It declared that the Supreme Court “has now largely discarded” *Lemon*. *Id.* at 856. But it also held that the facts before it did not “involve the circumstances that were at issue in *Lemon*,” thereby distinguishing *Lemon* and so acknowledging its continuing authority. *Id.* at 857 n.37.

a Supreme Court precedent remains binding until overruled, even if it is “often criticized or ignored” in subsequent decisions. Gorsuch pointed to these critical passages and declared that “[t]he District and the Ninth Circuit erred by failing to heed this guidance.”<sup>44</sup> That is, they erred by giving this guidance the limited weight that the Supreme Court had repeatedly required.<sup>45</sup>

This could raise large questions about the continued vitality of the rule of Supreme Court precedent I described at the beginning of this Essay. But lower courts would be rash to so conclude. It is more probable that this is one more instance of a pattern in which the Court is predisposed to see antireligious discrimination everywhere, with no implications for the authority of Supreme Court precedent in any cases that are unaffected by this predisposition.

Gorsuch acknowledged that “the District argues that its suspension of Mr. Kennedy was essential to avoid a violation of the Establishment Clause.”<sup>46</sup> Yet he concluded that by doing so it had badly misunderstood its legal obligations:

Because a reasonable observer could (mistakenly) infer that by allowing the prayer the District endorsed Mr. Kennedy’s message, the District felt it had to act, even if that meant suppressing otherwise protected First Amendment activities. In this way, the District effectively created its own “vise between the Establishment Clause on one side and the Free Speech and Free Exercise Clauses on the other,” placed itself in the middle, and then chose its preferred way out of its self-imposed trap.<sup>47</sup>

Reliance on the *Lemon* rule triggered strict scrutiny because “the District failed to act pursuant to a neutral and generally applicable rule.”<sup>48</sup> Its action “discriminate[d] on its face.”<sup>49</sup> “The Constitution neither mandates nor tolerates that kind of discrimination.”<sup>50</sup>

To support that conclusion, Gorsuch repeatedly cited *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, in which the Court invalidated a ban on animal sacrifice.<sup>51</sup> The Court had previously held that there was no right to religious exemptions from neutral laws.<sup>52</sup> But the law in *Lukumi* wasn’t neutral.

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44. *Kennedy*, 142 S. Ct. at 2428.

45. The same logic is detectable in the COVID-19 cases, in which the Court repeatedly issued emergency writs of injunction to block state restrictions on religious liberty grounds. Stephen Vladeck observes that the Court proceeded in a procedurally extraordinary way “by explicitly changing the law and chiding lower courts for not detecting the implicit change sooner.” Stephen I. Vladeck, *The Most-Favored Right: COVID, the Supreme Court, and the (New) Free Exercise Clause*, 15 N.Y.U. J.L. & LIBERTY 699, 734 (2022).

46. *Kennedy*, 142 S. Ct. at 2426.

47. *Id.* at 2427 (quoting *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 768 (1995) (plurality opinion)).

48. *Id.* at 2422.

49. *Id.* (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993)).

50. *Id.* at 2433.

51. 508 U.S. 520 (1993).

52. *Emp. Div., Dep’t of Hum. Res. v. Smith*, 494 U.S. 872, 878–79 (1990).

It targeted an unpopular religion of Caribbean immigrants. The law, the Court concluded, was “drafted with care to forbid few killings but those occasioned by animal sacrifice.”<sup>53</sup>

In *Kennedy*, Gorsuch writes:

Nor does anyone question that, in forbidding Mr. Kennedy’s brief prayer, the District failed to act pursuant to a neutral and generally applicable rule. A government policy will not qualify as neutral if it is “specifically directed at . . . religious practice.” A policy can fail this test if it “discriminate[s] on its face,” or if a religious exercise is otherwise its “object.”<sup>54</sup>

As the Court later explained, the question in *Lukumi* was whether a law “had the object of stifling or punishing free exercise.”<sup>55</sup> But the government’s undisputed object in *Kennedy* was to obey the law as declared by the Supreme Court. If there was a “trap,” it was not “self-imposed”: it had been imposed by the Court. *Lukumi* concluded that the record of the enactment of the law at issue “disclose[d] animosity to Santeria adherents and their religious practices.”<sup>56</sup> But does obeying the law, when doing so disadvantages a religious claimant, disclose animosity toward religion?<sup>57</sup>

The Court has offered a number of doctrinal innovations, all of which have led to victory for religious claimants with remarkable consistency. The pattern has become so stark that some longtime advocates of religious liberty are horrified.<sup>58</sup> The innovation described here, though, is in a class of its own. The

53. *Lukumi*, 508 U.S. at 543.

54. *Kennedy*, 142 S. Ct. at 2422 (quoting *Smith*, 494 U.S. at 878; *Lukumi*, 508 U.S. at 533).

55. *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997).

56. *Lukumi*, 508 U.S. at 542.

57. Another example of the same strange inference is Justice Alito’s dissent in *Yeshiva University v. YU Pride Alliance*, 143 S. Ct. 1 (2022). There, he protested the denial of expedited relief to an Orthodox Jewish university that had been required by state antidiscrimination law to recognize an LGBTQ student group. Alito observed that the statute “treats a vast category of secular groups more favorably than religious schools like Yeshiva.” *Id.* at 2 (Alito, J., dissenting). Private clubs were exempted by the statute, including “large groups like the American Legion and the Loyal Order of Moose.” *Id.* at 2–3. Alito thought that this triggered strict scrutiny and so required exemption because “there ha[d] been no showing that granting an exemption to Yeshiva would undermine the policy goals of the [antidiscrimination statute] to a greater extent than the exemptions afforded to hundreds of diverse secular groups.” *Id.* at 3. The private club exception, however, is constitutionally required. The First Amendment protects freedom of association, see *CHEMERINSKY*, *supra* note 23, § 11.5, and this exception forbids the state from requiring private clubs to accept members they do not want absent a compelling interest. If the discretionary character of exemptions is troubling, then this one should not be because it was not discretionary.

58. Douglas Laycock, *What’s the Law on Vaccine Exemptions? A Religious Liberty Expert Explains*, THE CONVERSATION (Sept. 15, 2021, 8:15 AM), <https://theconversation.com/whats-the-law-on-vaccine-exemptions-a-religious-liberty-expert-explains-166934>; Andrew Koppelman, *How Religious Liberty Was Distorted in the Age of COVID-19*, THE HILL (Nov. 21, 2021, 8:00 AM), <https://thehill.com/opinion/judiciary/582478-how-religious-liberty-was-distorted-in-the-age-of-covid-19/> (interview with Laycock); Ira C. Lupu & Robert W. Tuttle, *The Radical Uncertainty of Free Exercise Principles: A Comment on Fulton v. City of Philadelphia*, 2020–2021 AM. CONST. SOC’Y SUP. CT. REV., no. 5, 2021, at 221, 227; Ira Lupu & Robert Tuttle, *Kennedy v.*

Court is so eager to find discrimination against religion that in order to do so, it is prepared to undermine its own authority. In this area, it displays a kind of autoimmune disorder, in which the body attacks itself.

Why did it do this? It might have discarded *Lemon* without disparaging the school district or the lower courts, by acknowledging that they were obeying the law as it stood. That is what it did in *Khan*.<sup>59</sup> One hypothesis, consistent with the data, is that these judges are so captivated by a narrative of religious persecution of conservative Christians that they are predisposed to see it everywhere, and that this so distorts their perception that they blindly steamroll over long-established rule of law.<sup>60</sup> Is there an alternative explanation?

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Bremerton School District – *A Sledgehammer to the Bedrock of Nonestablishment*, AM. CONST. SOC'Y (June 28, 2022), <https://www.acslaw.org/expertforum/kennedy-v-bremerton-school-district-a-sledgehammer-to-the-bedrock-of-nonestablishment/>. See generally Koppelman, *supra* note 2.

59. It could have even ruled in favor of the religious claimant and rejected the interpretation of the Establishment Clause claim that the lower courts had sustained, without accusing anyone of discrimination against religion. See, e.g., *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 845–46 (1995) (holding that a selective refusal to fund religious student publications “would *risk* fostering a pervasive bias or hostility to religion” (emphasis added)).

60. Another possibility is that, by finding facial discrimination, the Court could order summary judgment for the football coach. Had it remanded the case for trial under its newly announced standard, the discipline against the coach might have been sustained on the basis of his insubordination and disruption of the school’s activities. See Andrew Koppelman, *The Emerging First Amendment Right to Mistreat Students*, 73 CASE WESTERN L. REV. (forthcoming 2023).

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