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Not Child's Play: A Constitutional Game of Pass the Story in *Dobbs, Shurtleff, and Kennedy*

John V. Orth

University of North Carolina School of Law, jvorth@email.unc.edu

Paul T. Babie

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Not Child’s Play: A Constitutional Game of Pass the Story in *Dobbs*, *Shurtleff*, and *Kennedy*

John V. Orth* and Paul T. Babie**

ABSTRACT

This Article suggests that in the effort to find fixed standards for rights, working with vague, indeterminate, silent text, the Supreme Court engages in a constitutional game of pass the story. No one outcome concludes the story; it merely adds another chapter, to which the next set of judges will add their own installment. The quest for standards never ends. The Court’s decisions in *Dobbs v. Jackson Women’s Health Organization*, *Shurtleff v. City of Boston*, and *Kennedy v. Bremerton School District* are merely the latest installments in stories that began with the founding. And as with any such story, what happens next cannot be predicted at the outset. This ongoing quest, though, comes with a cost: certainty. Adding to a story might be a good literary device to keep a listener or reader interested, but it is of little use in a system that at least pays lip service to stare decisis and the rule of law.

Table of Contents

I. INTRODUCTION	51
II. PASSING “UNENUMERATED RIGHTS” FROM <i>ROE</i> TO <i>DOBBS</i>	55
A. Blackstone’s <i>Commentaries</i>	57
B. The Court’s Use of the <i>Commentaries</i>	58
1. Right to Life	58
2. Homicide	60
C. Blackstone on Law and the Constitution	63
1. Law	63
2. Constitution	64
III. PASSING “ENTANGLEMENT” FROM <i>LEMON</i> TO <i>SHURTLEFF</i> AND <i>KENNEDY</i>	65
A. Grand Unified Theory Invites Chaos and Produces Needless Litigation	66
1. Citizens as Reasonable Observers	68
2. Judges Applying the Standard	69
B. Exchanging Policy for Original Meaning as Found in History and Tradition	73

*William Rand Kenan Jr. Professor of Law Emeritus, UNC School of Law, The University of North Carolina at Chapel Hill.

**Bonython Chair in Law and Professor of Law, Adelaide Law School, The University of Adelaide.

IV. CONCLUSION	76
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I. INTRODUCTION

Written constitutions contain vague language impervious to ease or simplicity of change.¹ These twin, yet unremarkable, facts carry with them the necessity for someone or some entity to interpret what the vague language means when disagreements arise and changing the formal text itself proves difficult (which it always does).² Many actors must wrestle with difficult text containing “these great silences of the Constitution”:³ lawyers, policymakers, legislators, in a word, citizens.⁴ Each, using their own idiosyncratic “image of the [C]onstitution,”⁵ must choose a particular course of action, knowing that they have little guidance from the words of the Constitution itself.

Almost always, the efforts of the many actors who must choose a constitutional meaning make their way to the courts, to judges, who assume the final, ultimate responsibility to validate those choices, to give meaning to the vague, silent words.⁶ And what the judges must do is search for, as much as can be possible given the indeterminacy of the primary text given them, a “fixed standard”⁷ for use in applying its vague words to actual disputes between a government and its citizens. Faced with vague and indeterminate text, judges must “struggle for standards.”⁸

What can judges do? “Constitutional analysis must begin with the language of the instrument, . . . which offers a ‘fixed standard’ for ascertaining what [the] founding document means.”⁹ This takes on

1. See Stephen L. Carter, *Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle*, 94 YALE L.J. 821, 821 (1985).

2. See John V. Orth, John Gava, Arvind P. Bhanu & Paul T. Babie, *No Amendment? No Problem: Judges, “Informal Amendment,” and the Evolution of Constitutional Meaning in the Federal Democracies of Australia, Canada, India, and the United States*, 48 PEPP. L. REV. 341, 344–45 (2021).

3. *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 535 (1949); see LAURENCE H. TRIBE, *CONSTITUTIONAL CHOICES* 29–44 (1985).

4. See generally BRUCE ACKERMAN, *WE THE PEOPLE, VOLUME 1: FOUNDATIONS* (1993); BRUCE ACKERMAN, *WE THE PEOPLE, VOLUME 2: TRANSFORMATIONS* (2000); BRUCE ACKERMAN, *WE THE PEOPLE, VOLUME 3: THE CIVIL RIGHTS REVOLUTION* (2018).

5. See generally WILLIAM E. CONKLIN, *IMAGES OF A CONSTITUTION* (1989).

6. See generally REXFORD G. TUGWELL, *THE EMERGING CONSTITUTION* (1974).

7. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 399 (1798) (Iredell, J., concurring).

8. LESLIE ZINES, *THE HIGH COURT AND THE CONSTITUTION* 1 (1997); J. Bruce McDonald, *The Struggle for Standards*, U.S. DEP’T OF JUST. (Apr. 1, 2004), <https://bit.ly/3z5H5Lx>.

9. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2244–45 (2022) (citations and internal quotation marks omitted); see 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 399 (1833) (“Let us, then, endeavour to ascertain, what are the true rules of interpretation applicable to the [C]onstitution; so that we may have some fixed standard, by which to measure its powers, and limit its prohibitions, and guard its obligations, and enforce its securities of our rights and

even greater importance when rights are involved. As Justice James Iredell argued, “[t]he ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject”;¹⁰ only the text, Iredell insisted, provided the necessary “fixed standard.”¹¹ With a text, judges can “identify the contents of . . . constitutional commitments, and the fact that the Constitution and its amendments become authoritative through a formal process enables [judges] to put the text in historical context.”¹² Unlike an unwritten constitution, the text of a written constitution makes clear that when the text is silent on a matter, any meaning which might be ascribed to it only becomes so when the judges say the rights are there.

What seems less well-understood by many, though, is that any one interpretation of vague constitutional language fails ever to complete the “story” of that constitution, which begins with its promulgation.¹³ The doctrine of precedent is another way of describing this storytelling process. And added to that is the doctrine of *stare decisis*, that a precedent, once set, should not be undone. But is that really true? The story, of course, does not end with the writing of the text; it does not end with the many actors that have a role in its interpretation over time, each of whom adds their own parts to that story, sentence by sentence, paragraph by paragraph, chapter by chapter, until that process of interpretation itself becomes a part of the ongoing story. Adding to the story means that any interpretation, at any moment in the history (the story) of a constitution, simply represents the meaning of a particular clause or term *for the time being*. The story never ends. Any future court, or group of judges on that court, can, and frequently does, change the story which a previous generation thought settled. It is a continuing process by which the Constitution continues to emerge over time.¹⁴

We can see this process of adding to the story another way. It is an elaborate, and never-ending, form of the child’s game of pass the story, or build the story—an interactive storytelling game where one person begins a story and “passes” it to the next person to add a part, and so on. Assuming the children playing kept their interest in it, the game could theoretically go on forever. And that is precisely what happens with a written constitution. The various actors and judges never lose their interest, and so continue to add their parts to the story before passing it on to the next generation.

liberties.”).

10. *Calder*, 3 U.S. (3 Dall.) at 399 (Iredell, J., concurring).

11. A modern biographer attributes Justice Iredell’s rejection of “natural-law theory” to his “passion for certainty.” See WILLIS P. WICHARD, *JUSTICE JAMES IREDELL* 131–35 (2000).

12. Amy Coney Barrett, *Showcase Panel II: Why, or Why Not, Be an Originalist?*, FED. SOC’Y (Nov. 14, 2019), <https://bit.ly/3ePdYp>.

13. See AKHIL REED AMAR, *THE WORDS THAT MADE US: AMERICA’S CONSTITUTIONAL CONVERSATION, 1760-1840*, at ix–xiv (2021).

14. See generally TUGWELL, *supra* note 6.

At the end of the 2021 Term, two long-standing precedents became the latest chapters in the story that the Supreme Court began a half-century ago: the first, *Roe v. Wade*,¹⁵ established a constitutional, albeit unenumerated, right to an abortion; while the second, *Lemon v. Kurtzman*,¹⁶ established a test used in assessing purported violations of the First Amendment Establishment Clause. One could view their fate many ways. Overdue correction. Sage reassessment of both the text in which the rights are found and the principles underlying the earlier decisions interpreting it. Unduly harsh critique of judicial predecessors. Egregious violation of long-standing rights. There is no doubt that the movement from *Roe* to *Dobbs v. Jackson Women's Health Organization*,¹⁷ and from *Lemon* to *Shurtleff v. City of Boston*¹⁸ and *Kennedy v. Bremerton School District*,¹⁹ shows the Court engaged in the struggle for standards. While one's view of the Court's rejection of what was thought to be settled precedent depends largely on political commitment, Justice Thomas' view that the outcome in *Dobbs* means that "in future cases, [the Court] should reconsider all of [its] substantive due process precedents"²⁰ is gravely concerning, particularly when the earlier precedents that he identifies establish important protections for many citizens.²¹ Yet we prefer to see the Court's treatment of *Roe* in *Dobbs*, and of *Lemon* in *Shurtleff* and *Kennedy*,²² as part of an ongoing story, as the latest installments or chapters in a game of constitutional pass the story. We might not feel good about these recent outcomes; we might hold grave concerns for the rights which have been lost, and which might be lost in the future should further precedents be rejected. But we find ourselves unable to deny the reality of what has happened: this is part of an ongoing process of constitutional pass the story. It is equally possible that the next chapters will be ones that restore rights lost in previous stages, and which add new ones, too.

Of course, by likening these outcomes to a game of pass the story, we in no way seek to make light of the importance of the Court's work and the serious implications of that work for all Americans. But in seeing what the Court did as part of a long process, one extending into the past before any of us were here and into the future after those of us here now are gone, we can see that drawing the conclusion about this

15. *Roe v. Wade*, 410 U.S. 113 (1973).

16. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

17. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

18. *Shurtleff v. City of Boston*, 142 S. Ct. 1583 (2022).

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

20. *Dobbs*, 142 S. Ct. at 2301 (Thomas, J., concurring).

21. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (right of married couples to contraception); *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015) (right to same-sex marriage).

22. A third case in the 2021 Term, *Carson v. Makin*, 142 S. Ct. 1987 (2022), dealt directly with religion, but because it did not address *Lemon*, we do not consider it here.

being a constitutional game of pass the story has equally important implications both for those who perceive themselves to be the “losers” in what transpired, *and* for those who consider themselves to have “won.” Neither group is right. The winners have won, but only for now; the losers have lost, but only for now. For the Court’s current interpretations are nothing more than that: the latest additions to the story begun in the Philadelphia summer of 1787, which we see playing out before us today, and which will go on long after we are gone. The Court’s pronouncements on reproductive rights and religion are not the final outcome; they are merely the latest chapters of the story, which will go on, passed on to the next group of actors and judges playing this constitutional game of pass the story.

This Article contains our somewhat eclectic reflections on the Court’s latest additions to the ongoing story, the struggle for standards, in reproductive rights and Establishment Clause cases. We aim not for comprehensiveness, but to highlight the way in which the Court rejected an earlier set of standards for what is claimed to be a more faithful reading of the vague, indeterminate, silent text. What we hope to demonstrate, though, is that this is not the end of the story, but part of the ongoing struggle for standards, the attempt to find a fixed standard. And that quest goes on. *Dobbs*, *Shurtleff*, and *Kennedy* are merely the latest installments in this serial. We also want to suggest, though, that while playing pass the story with constitutional precedent may be inevitable—continuing the story—it comes at a cost: the flexibility of endlessly morphing meaning is a loss of predictability.²³ As with any conversation, or a story that develops over time, what happens next cannot be predicted from the outset. While that might be a good literary device to keep a listener or reader interested in a story, it is of little use in a system that at least pays lip service to the rule of law.

The Article contains three parts. First, we consider the Court’s treatment of unenumerated rights in *Dobbs*’ rejection of *Roe*. Our focus is the use of Sir William Blackstone’s *Commentaries on the Laws of England* in the Court’s opinion. We pick up on Blackstone’s distinction between written and unwritten constitutions and go on to consider Justice Alito’s use of the key Blackstone quotation on this point. Second, we consider the rejection of the *Lemon* test, and especially the entanglement standard, in *Shurtleff* and *Kennedy*. We suggest that the grounds for the Court’s rejection of this long-standing precedent, and its replacement with a “history and tradition” test, may not be as obvious as the Court would have us believe. The third part concludes.

23. See *The Supreme Court Has Weakened Legal Predictability in America*, FIN. TIMES (July 12, 2022), <https://on.ft.com/3SILS29>.

II. PASSING “UNENUMERATED RIGHTS” FROM *ROE* TO *DOBBS*

Before the Revolution, American colonists looked to their royal charters for the arrangement of offices and the distribution of power. For their civil rights, they looked to the common law as developed by judges. After the Revolution and the adoption of written constitutions with embedded bills of rights, Americans continued to look to judges for the protection of their civil rights, many of which were now codified (“enumerated”) in the Constitution. Other rights, not expressly mentioned in the Constitution (“unenumerated”), were identified over the years by judges in their decisions in individual cases.²⁴ How to recognize such rights while maintaining faith to the constitutional text, ever receding into the past, has been the subject of intense debate.

In *Dobbs*, the Court determined to locate a fixed standard for identifying unenumerated rights: it would recognize only those that were “deeply rooted in this Nation’s history and tradition.”²⁵ As to any right claimed to be implicit in the Fourteenth Amendment, “the most important historical fact” was how it was regarded “when the Fourteenth Amendment was adopted.”²⁶ To recover that history, the Court examined the state of the law on abortion as established by “eminent common-law authorities” like Bracton, Coke, Hale, and Blackstone.²⁷ To Henry de Bracton, a thirteenth-century English judge, is ascribed the earliest general survey of English law, *De Legibus et Consuetudinibus Angliae* (“On the Laws and Customs of England”).²⁸ Sir Edward Coke, one of the most important figures in English legal history, was a seventeenth-century judge, author, and political leader against Stuart absolutism. The four volumes of his *Institutes of the Laws of England* were devoted to property law,²⁹ statutes, criminal law (pleas of the Crown), and the jurisdiction of the courts. Sir Mathew Hale, an important seventeenth-century judge, authored an early work

24. See John V. Orth, *The Enumeration of Rights: ‘Let Me Count the Ways,’* 9 U. PA. J. CONST. L. 281, 288–89 (2006).

25. *Dobbs*, 142 S. Ct. at 2242 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)). In addition to the requirement of being “deeply rooted in this Nation’s history and tradition,” there is an added requirement of being “implicit in the concept of ordered liberty,” *id.* (quoting *Glucksberg*, 521 U.S. at 721), but the latter requirement was not discussed in *Dobbs*.

26. *Id.* at 2267.

27. See *id.* at 2249; see also *id.* at 2254 (referring to “great common-law authorities like Bracton, Coke, Hale, and Blackstone”). Because English common law formed the basis of American law, the Court in *Dobbs* relied on English judges and scholars for “this Nation’s history and tradition.”

28. Bracton’s authorship of *De Legibus* has been questioned. See S.E. Thorne, *Translator’s Introduction* to 3 HENRY DE BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND, at xxx–lii (S.E. Thorne trans., 1977).

29. Volume one of the *Institutes* is Cokes’ COMMENTARY ON SIR THOMAS LITTLETON’S FIFTEENTH-CENTURY TREATISE ON TENURES, a short summary of English land law, written in Law French, a legacy of the Norman Conquest. Coke’s English translation and extensive annotations made COKE ON LITTLETON the foundational book of English property law.

of legal history, *The History of the Pleas of the Crown*, which influenced Blackstone. Sir William Blackstone was successively a pioneering law teacher, member of Parliament, and judge, but his enduring fame rests on his four-volume *Commentaries on the Laws of England*, the single most important book in the history of the common law.³⁰

This Part focuses on the Supreme Court's reliance in *Dobbs* on Blackstone's *Commentaries* for information on the "history and tradition" of abortion. Blackstone is singled out not only because he conveniently summarizes the views of Bracton, Coke, and Hale, but also because the Court has previously accepted his *Commentaries* as "the preeminent authority on English law for the founding generation."³¹ After a close study of the Court's use of quotations from the *Commentaries*, this Article argues that Blackstone's account is more nuanced than appears from the opinion of the Court, but essentially supports the Court's conclusion that the framers and ratifiers of the Fourteenth Amendment could hardly have contemplated a constitutional right to an abortion.³² After the textual analysis, Blackstone's general views on law and historical development are contrasted with the constitutionalism that developed in America after the Revolution.

We conclude with the observation that the disagreement between the majority and the dissenting Justices in *Dobbs* was not about the historical record at all. The dissenters conceded that "[i]n 1868, there was no nationwide right to end a pregnancy, and no thought that the Fourteenth Amendment provided one."³³ On that, all nine Justices agreed. Instead, the disagreement between the majority and the dissenters was about the proper way to identify constitutional rights not expressly mentioned in the text. While the majority would limit unenumerated rights to those supported by history and tradition at the date of the adoption of the Constitution and its amendments, the dissenters would recognize additional rights that the Court developed over time by the application of the traditional common law method: reasoning from "successive judicial precedents—each looking to the last and each seeking to apply the Constitution's most fundamental commitments to new conditions."³⁴

30. See John V. Orth, *Blackstone*, in *THE OXFORD HANDBOOK OF LEGAL HISTORY* 359 (Marcus D. Dubber & Christopher Tomlins eds., 2018).

31. *Alden v. Maine*, 527 U.S. 706, 715 (1999); see also *District of Columbia v. Heller*, 554 U.S. 570, 593–94 (2008) (quoting *Alden*, 527 U.S. at 715).

32. Bracton, Coke, Hale, and Blackstone are most relevant for the historical context of the Bill of Rights, but the incorporation of the Bill of Rights in the Due Process Clause of the Fourteenth Amendment connects the two provisions, and there is no evidence of a significant change in the legal position on abortion between 1791 and 1868.

33. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2323 (2022) (Breyer, J., dissenting).

34. *Id.* at 2326.

A. *Blackstone's Commentaries*

Sir William Blackstone's *Commentaries on the Laws of England*, the product of lectures delivered to Oxford undergraduates beginning in 1753, were published in four volumes between 1765 and 1769. Blackstone's plan for his book was simple, by modern standards simplistic. In words at least as old as Cicero, he defined law as "a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong."³⁵ Around this distinction between right and wrong, the four volumes of the *Commentaries* are arranged: the first two devoted to rights, the final two to wrongs. Volume one, on the "rights of persons," contains what to modern readers appears an ill-assorted collection of topics. Constitutional law in the broadest sense is discussed under the headings of the rights of king, lords, and commons. Private rights based on personal relationships—husband and wife, parent and child, guardian and ward, master and servant—cover disparate topics today known as domestic relations, fiduciary obligations, and employment law. The second volume, on the "rights of things," is misnamed—things have no rights—but treats of the rights of persons with respect to things, principally land; that is, it is devoted to what is now known as property law. The last two volumes of the *Commentaries* are concerned with wrongs and their remedies: volume three, on "private wrongs," that is, torts and civil procedure; volume four, on "public wrongs," that is, crimes and criminal procedure.

Blackstone was an indefatigable editor, constantly revising his text for greater clarity and accuracy. The *Commentaries* evolved over eight editions published during his lifetime,³⁶ at the time of his death in 1780, he was still at work. A posthumous edition, the ninth, advertised as including Blackstone's final corrections, was published in 1783 with marginal notes by Richard Burn.³⁷ Two further editions appeared until, in 1793, Edward Christian published a twelfth edition of the *Commentaries*, indicating that "the pages of the former editions are preserved in the margin."³⁸ Each subsequent edition indicated the standard pagination either in the margin or with an asterisk ("the star

35. 1 WILLIAM BLACKSTONE, COMMENTARIES *44.

36. There are first editions of each of the four volumes of the COMMENTARIES: volume one (1765), volume two (1766), volume three (1768), and volume four (1769). Blackstone published a second edition of volume one in 1766 and a third edition of volume one in 1768. In 1767, he published a second edition of volume two; in 1768, a third edition of volume two. In 1769, when volume four was published, the four volumes were issued as a set and labelled the "fourth edition." There was no second or third edition of volumes three and four.

37. 1 WILLIAM BLACKSTONE, COMMENTARIES, at xi (Richard Burn ed., 1783) ("ADVERTISEMENT concerning this ninth edition.").

38. 1 WILLIAM BLACKSTONE, COMMENTARIES, at ix (Edward Christian ed., 1793). In fact, as Frederick Pollock explained in a note, Christian preserved the paging of the tenth edition (1787), "which corresponds nearly but not quite with that of the ninth edition." Frederick Pollock, *Executor's Right to Appointed Land*, 50 SOLICITORS' J. 800, 800 (1906).

edition”). When the star page is cited, legal editorial practice dictates the omission of the date and edition, unless the citation is to material added by a particular editor.³⁹

B. *The Court’s Use of the Commentaries*

The Court in *Dobbs* relied on two passages from the *Commentaries*: the first from volume one on the “rights of persons” (right to life), the second from volume four on “public wrongs,” that is, crimes (homicide). Rather than follow the standard legal system of citation, however, the Court cites the seventh edition, published in 1775, describing it as written “near the time of the adoption of our Constitution.”⁴⁰ Here, we quote each reference to the *Commentaries* in *Dobbs*, followed by the corresponding passage in the seventh edition of the *Commentaries*. Variations among successive editions of the *Commentaries* are then noted.⁴¹ We conclude this Part with a comment on the Court’s use of Blackstone.

1. Right to Life

Volume one of the *Commentaries* is devoted to the Rights of Persons. Cataloging the “absolute rights” of Englishmen as life, liberty, and property, Blackstone examines each right successively.⁴² Addressing the beginning of life, he includes a discussion of abortion as a violation of the right to life. Later, in Volume four on Public Wrongs, he considers abortion as a crime (homicide). Relying upon Blackstone, Justice Alito wrote: “And writing near the time of the adoption of our Constitution, William Blackstone explained that abortion of a ‘quick’ child was ‘by the ancient law homicide or manslaughter’ . . . and at least a very ‘heinous misdemeanor’”⁴³ Justice Alito cited the seventh edition of Blackstone’s *Commentaries*, which stated:

For if a woman is quick with child, and by a potion, or otherwise, killeth it in her womb; or if anyone beat her, whereby the child dieth in her body, and she is delivered of a dead child; this, though not murder, was

39. See THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 15.8(b), at 153–54 (Columbia L. Rev. Ass’n et al. eds., 21st ed. 2020). For modern developments complicating citations of the COMMENTARIES, see John V. Orth, “Catch a Falling Star”: *The Bluebook and Citing Blackstone’s Commentaries*, 2020 U. ILL. L. REV. ONLINE 125, 126–28 (2020).

40. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2249 (2022). While the seventh edition was published near the time of the adoption of the American Declaration of Independence, the ninth edition (1783) was nearer the time of the adoption of the United States Constitution.

41. The Oxford Edition of Blackstone prints the first edition of each volume and notes in the rear all changes (“*varia*”) Blackstone made in later editions. See generally WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (Wilfrid Prest ed., 2016).

42. See 1 BLACKSTONE, *supra* note 35, at *129–40.

43. *Dobbs*, 142 S. Ct. at 2249 (citations omitted).

by the antient [sic] law homicide or manslaughter. But sir Edward Coke doth not look upon this offense in quite so atrocious a light, but merely as a heinous misdemesnor [sic].⁴⁴

This quotation, in turn, contained a footnote quoting Bracton:

Si aliquis mulierem praegnantem percusserit, vel ei venenum dederit, per quod fecerit abortivam; su puerperium, jam formatum fuerit animatum, facit homicidium. [If anyone strikes a pregnant woman, or administer poison to her by which abortion shall ensue, if the child shall be already formed, and particularly if it be alive, that person is guilty of manslaughter.]⁴⁵

One finds three variations among editions of the *Commentaries*. In the first edition of the *Commentaries*,⁴⁶ the first sentence is the same as that found in the seventh edition cited by the Court. The second sentence, however, reads: “But at present it is not looked upon in so atrocious a light, though it remains a very heinous misdemesnor [sic].”⁴⁷ In Blackstone’s second through eighth editions, again, the second sentence differs: “But sir Edward Coke doth not look upon this offense in quite so atrocious a light, but merely as a heinous misdemesnor [sic].”⁴⁸ The second sentence has been changed again in the *Commentaries*’ ninth edition: “But the modern law doth not look upon this offense in quite so atrocious a light, but merely as a heinous misdemesnor [sic].”⁴⁹

Over all editions, Blackstone traced the changing legal treatment of abortion, from the medieval view (“antient [sic] law”) that intentionally aborting a quick child was “homicide or manslaughter,” to the later law that it was a “heinous misdemesnor [sic].” Although in the first edition he described abortion as “a very heinous misdemesnor [sic],” in the second edition one year later, and in subsequent editions until 1778, he referenced Sir Edward Coke as looking upon it “merely as a heinous misdemesnor [sic].”⁵⁰ In the final edition, he describes

44. 1 BLACKSTONE, *supra* note 35, at *129–30.

45. *Id.* (citation omitted).

46. The pagination of the first edition varies from the pagination of later editions because of material added by Blackstone after the first edition.

47. 1 BLACKSTONE, *supra* note 35, at *125–26.

48. *Id.* at *129–30. Blackstone corrected the erroneous citation to COKE’S INSTITUTES in the first edition.

49. *Id.*

50. Coke did not use the phrase “heinous misdemesnor,” but instead referred to the offense as a “great misprison.” See 3 EDWARD COKE, INSTITUTES 50 (“If a woman be quick with childe, and by a potion or otherwise, killeth it in her wombe; or if a man beat her, whereby the childe dieth in her body, and she is delivered of a dead childe; this is a great misprison, and no murder . . .”).

this as “the modern law.”

Having quoted the seventh edition, Justice Alito cited St. George Tucker and concluded that “[i]n this country, the historical record is similar. The ‘most important early American edition of Blackstone’s Commentaries,’ . . . reported Blackstone’s statement that abortion of a quick child was at least ‘a heinous misdemeanor’”⁵¹ St. George Tucker was Professor of Law and Police at the College of William and Mary from 1790 to 1804. Because he based his book, *Blackstone’s Commentaries: With Notes of Reference to the Constitution and Laws, of the Federal Government of the United States, and of the Commonwealth of Virginia*, on a posthumous edition of the *Commentaries*, the second sentence appears as: “But the modern law doth not look upon this offense in quite so atrocious a light, but merely as a heinous misdemesnor [sic].”⁵² Tucker appended a note to the sentence, citing Coke’s *Institutes*: “But if the child be born alive, and afterwards die in consequence of the potion, or beating, it will be murder But quere [sic], how shall this be proved?”⁵³

2. Homicide

The Court cited Blackstone on homicide in three instances. In the first, Justice Alito wrote:

Hale and Blackstone explained a way in which a pre-quickenning abortion could rise to the level of a homicide. Hale wrote that if a physician gave a woman “with child” a “potion” to cause an abortion, and the woman died, it was “murder” because the potion was given “unlawfully to destroy her child within her” As Blackstone explained, to be “murder” a killing had to be done with “malice aforethought, . . . either express or implied” In the case of an abortionist, Blackstone wrote, “the law will imply [malice]” for the same reason that it would imply malice if a person who intended to kill one person accidentally killed a different person:

[I]f one shoots at A and misses him, but kills B, this is murder; because of the previous felonious intent, which the law transfers from one to the other. The same is the case, where one lays poison for A; and B, against whom the prisoner had no malicious

51. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2251 (2022) (citing 2 ST. GEORGE TUCKER, *BLACKSTONE’S COMMENTARIES* 129–30 (1803)).

52. 2 TUCKER, *supra* note 51, at 129–30.

53. *Id.* (citation omitted).

intent, takes it, and it kills him; this is likewise murder. *So also*, if one gives *a woman with child* a medicine to procure abortion, and it operates so violently as to kill the woman, *this is murder* in the person who gave it.⁵⁴

The passage from the seventh edition of the *Commentaries* reads: “Lastly, the killing must be committed *with malice aforethought*, to make it the crime of murder. This is the grand criterion which now distinguishes murder from other killing . . . [I]t may be either *express* or *implied* in law.”⁵⁵

Two variations can be found among the editions. In Blackstone’s seventh edition, one finds the second part of the quote above: “If one shoots at A . . .”⁵⁶ The first through sixth editions, however, lack the final sentence concerning abortion, which first appeared in the seventh edition and was repeated in all subsequent editions. Blackstone did not use the word “abortionist,” which did not appear until the nineteenth century and is used especially to refer to one who performs illegal abortions.⁵⁷

The situation in which a pre-quickening abortion “could rise to the level of a homicide” is if “the medicine to procure abortion” results in the death of the woman. That is, the law transfers the intent to kill the child to the woman. It appears that the intent to kill the child is “felonius,” although there is no mention of a penalty for killing the child. The Court emphasized that the sentence is not limited to the case of a quick child: “Notably, Blackstone, like Hale, did not state that this proto-felony-murder rule required that the woman be ‘with quick child’—only that she be ‘with child.’”⁵⁸

The second instance in which the Court relied upon Blackstone for the meaning of homicide is this:

And it is revealing that Hale and Blackstone treated abortionists differently from other physicians or surgeons who caused the death of a patient “without any intent of doing [the patient] any bodily hurt” . . . These other physicians—even if “unlicensed”—would not be “guilty of murder or manslaughter” . . . But a physician

54. *Dobbs*, 142 S. Ct. at 2250 (emphasis removed) (citations omitted).

55. 4 BLACKSTONE, *supra* note 35, at *198 (emphasis added).

56. *Id.* at *200–01.

57. See *Abortionist*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“[A]bortionist, *n.* (1844) *Pejorative*. A person who performs abortions, esp[ecially] illegal ones.”).

58. *Dobbs*, 142 S. Ct. at 2250 (citation omitted).

performing an abortion would, precisely because his aim was an “unlawful” one.⁵⁹

The seventh edition of Blackstone’s *Commentaries* reads:

If a physician or surgeon gives his patient a potion or plaister [sic] to cure him, which contrary to expectation kills him, this is neither murder, nor manslaughter, but misadventure; and he shall not be punished criminally, however liable he might formerly have been to a civil action for neglect or ignorance; but it hath been holden that if he be not a *regular* physician or surgeon, who administers the medicine or performs the operation, it is manslaughter at least. Yet sir Matthew Hale very justly questions the law of this determination since physic and salves were in use before licensed physicians and surgeons; wherefore he treats this doctrine as apocryphal, and fitted only to gratify and flatter licentiates and doctors in physic; though it may be of use to make people cautious and wary, how they meddle too much is so dangerous an employment.⁶⁰

And one variation exists among the editions, found in the *Commentaries*’ eighth edition, which omits this final clause:

[S]ince physic and salves were in use before licensed physicians and surgeons; wherefore he treats this doctrine as apocryphal, and fitted only to gratify and flatter licentiates and doctors in physic; though it may be of use to make people cautious and wary, how they meddle too much is so dangerous an employment.⁶¹

The point of this passage is to distinguish between a death caused by “a *regular* physician or surgeon” and one caused by others who undertake to cure a person. Blackstone comments that Sir Matthew Hale “very justly” criticized this distinction because “physic and salves were in use before licensed physicians and surgeons,” and the distinction was maintained “only to gratify and flatter” the latter.⁶²

59. *Id.* (emphasis removed) (citations omitted).

60. 4 BLACKSTONE, *supra* note 35, at *197 (emphasis added).

61. *Id.*

62. Hale explained that “if that opinion should obtain, that if one not licensed a physician should be guilty of felony, if his patient miscarry, we should have many of the poorer sort of people, especially remote from *London*, die for want of help, lest their intended helpers might miscarry.” 1 MATTHEW HALE, HISTORY OF THE PLEAS OF THE CROWN 430 (1736).

The Court's third and final use of Blackstone is this: "In this country, the historical record is similar . . . [St. George Tucker's *Blackstone's Commentaries*] included Blackstone's discussion of the proto-felony-murder rule."⁶³ Because he based his edition on a posthumous edition of the *Commentaries*, Tucker does not include Hale's explanation why he questioned the distinction between licensed medical practitioners and others.

C. *Blackstone on Law and the Constitution*

1. Law

In seeking a fixed standard for determining whether a right to abortion was established by history and tradition at the time of American Independence, the Court turned to Sir William Blackstone. The seventh edition of his *Commentaries on the Laws of England*—like all editions before and after—characterized abortion not as a right but as a wrong: "a heinous misdemeanour [sic]." Blackstone addressed it first in volume one (rights of persons) as a violation of the right to life, and then in volume four (public wrongs) as a crime. Consistent with his project not just to state the laws but also "to deduce their history,"⁶⁴ Blackstone recognized that over time the law's treatment of abortion lessened in severity: from felony to misdemeanor. His coverage of abortion in each edition of the *Commentaries* began with the "antient [sic] law," which regarded abortion as homicide or manslaughter, and continued through the time of Sir Edward Coke to "modern law." At first, Blackstone characterized abortion in his day as a "very heinous misdemeanour [sic]," but within a year he moderated that to "merely" a heinous misdemeanor.

Like the Court in *Dobbs*, Blackstone in his *Commentaries* was careful to insist on the importance of maintaining a distinction between law and the personal opinions of judges. If judges could decide cases based on their private views, it would "make every judge a legislator, and introduce most infinite confusion; as there would then be almost as many different rules of action laid down in our courts, as there are differences of capacity and sentiment in the human mind."⁶⁵ Blackstone's unease with judicial discretion and preference for hard-and-fast rules influenced his actions as a judge.⁶⁶ In his most famous decision, he warned against "vague discretionary law."⁶⁷

The court in *Dobbs* sought to restrain judicial discretion by

63. *Dobbs*, 142 S. Ct. at 2251 (citing 2 TUCKER, *supra* note 51, at 129–30).

64. See 12 WILLIAM S. HOLDSWORTH, HISTORY OF ENGLISH LAW 745–46 (1938).

65. 1 BLACKSTONE, *supra* note 35, at *62 (referring to the distinction between law and equity).

66. See Orth, *supra* note 30, at 373–74.

67. 1 A COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND 489, 491, 496 (Francis Hargrave ed., 1787) (discussing Blackstone's 1770 decision in *Perrin v. Blake*, reaffirming the rule in *Shelley's Case*).

imposing a fixed standard for the recognition of unenumerated rights based on history and tradition. Ironically in the context of *Dobbs*, Blackstone located that restraint in the doctrine of precedent: “what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments.”⁶⁸ In defense of *Roe*, the dissenters in *Dobbs* cited Blackstone in support of stare decisis: “Blackstone called it the ‘established rule to abide by former precedents’ And as Blackstone said . . . : It ‘keep[s] the scale of justice even and steady, and not liable to waver with every new judge’s opinion.’”⁶⁹ However, as might be expected, Blackstone added the (unquoted) qualification: “Yet this rule admits of exception, where the former determination is most evidently contrary to reason; much more if it be clearly contrary to the divine law.”⁷⁰

2. Constitution

Near the beginning of the *Commentaries*, Blackstone described the common law as *lex non scripta*, or unwritten law.⁷¹ By this, he meant that the common law was not found in a single authoritative written source such as a code or a statute. Like the common law, the English Constitution in Blackstone’s day was unwritten. It still is. “Although the United Kingdom does not have a single document entitled ‘The Constitution,’” explained Britain’s highest court in 2019, “it nevertheless possesses a Constitution, established over the course of our history by common law, statutes, conventions and practices.”⁷² And because it has never been codified, the judges continued, “it has developed pragmatically, and remains sufficiently flexible to be capable of further development.”⁷³ Blackstone would have agreed. He recognized that the law—both common and constitutional—continued to develop over time. Indeed, he summarized this ideal in a final chapter entitled “Of the Rise, Progress, and Gradual Improvements, of the Laws of England.”⁷⁴

For the majority in *Dobbs*, Blackstone was a convenient source for “history and tradition.” And Blackstone would have sympathized with their insistence on the need for a fixed standard to curb judicial discretion. But he would have been uncomfortable with an approach that denied any potential for further development beyond a certain

68. 1 BLACKSTONE, *supra* note 35, at *69. Concerning the role of the judge, Blackstone explained: “he being sworn to determine not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one.” *Id.*

69. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2333 (2022) (Breyer, J., dissenting).

70. 1 BLACKSTONE, *supra* note 35, at *69–70. In the eighth (and subsequent) editions, Blackstone qualified “contrary to the divine law” with the adjective “clearly.”

71. *Id.* at *63.

72. *R (Miller) v. Prime Minister*, [2019] UKSC 41, at ¶ 39.

73. *Id.*

74. *See* 4 BLACKSTONE, *supra* note 35, at *407.

point in the past. Whatever he would have thought of the result in *Roe*, Blackstone would have understood the process by which it was reached: “successive judicial precedents—each looking to the last,” as the dissenting Justices expressed it.⁷⁵ In the end, the dispute in *Dobbs* was not about history. It was about whether to develop constitutional protections the “common law way”—reasoning from case to case—or to treat the constitutional text itself as a fixed standard. In Part III, we consider the way in which the Court, rather than using this “common law way” of reasoning from case to case, rejected established precedent in *Lemon* for “history and tradition.”

III. PASSING “ENTANGLEMENT” FROM *LEMON* TO *SHURTLEFF* AND *KENNEDY*

The *Lemon* test represented a refinement of the “purpose and effect” test in *Everson v. Board of Education*,⁷⁶ as modified by the addition of the “excessive government entanglement” prong in *Walz v. Tax Commission*.⁷⁷ Writing for the Court in *Lemon*, Chief Justice Burger enunciated a three-prong test for assessing purported Establishment Clause violations: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster ‘an excessive government entanglement with religion.’”⁷⁸ While *Lemon* can be seen as part of a long search for a fixed standard, controversy swirled around its test for over half a century, some broadly supportive,⁷⁹ others less so.⁸⁰ Much-maligned, in *Shurtleff v. City of Boston*⁸¹ and *Kennedy v. Bremerton School District*,⁸² the Court seemingly overruled the *Lemon* test.⁸³

75. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2326 (2022) (Breyer, J., dissenting).

76. *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

77. *Walz v. Tax Comm’n*, 397 U.S. 664, 674 (1970).

78. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (citing *Bd. of Educ. v. Allen*, 392 U.S. 236, 243 (1968); *Walz*, 397 U.S. at 674).

79. See, e.g., Stephanie H. Barclay, *Untangling Entanglement*, 97 WASH. U. L. REV. 1701, 1720–22 (2020); ROBERT S. ALLEY, *THE CONSTITUTION & RELIGION: LEADING SUPREME COURT CASES ON CHURCH AND STATE* 82–96 (1999); Herbert M. Kritzer & Mark J. Richards, *Jurisprudential Regimes and Supreme Court Decisionmaking: The Lemon Regime and Establishment Clause Cases*, 37 L. & SOC. REV. 827, 835–39 (2003).

80. See, e.g., William E. Thro & Charles J. Russo, *Lemon v. Kurtzman: Reflections on a Constitutional Catastrophe*, CANOPY F. (Nov. 1, 2021), <https://bit.ly/3Dt45qF>; Nicholas Tomaino, *The Conservative Supreme Court Has Arrived*, WALL ST. J. (July 1, 2022, 4:28 PM ET), <https://on.wsj.com/3sfJUFU>.

81. *Shurtleff v. City of Boston*, 142 S. Ct. 1583 (2022).

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

83. Given that there were no Establishment Clause claims in either *Shurtleff* or *Kennedy*, in a technical sense, the whole of the opinions as they concern *Lemon* may be obiter dictum. See Josh Blackman, *Why Didn’t Kennedy Formally Overrule Lemon?*, VOLOKH CONSPIRACY (July 3, 2022, 1:44 AM), <https://bit.ly/3SDwILz> [hereinafter Blackman, *Formally Overrule*]; Josh Blackman, *SCOTUS Eliminates the Lemon Defense, and Smokes Joints with Play*, VOLOKH CONSPIRACY (July 3, 2022, 1:03 PM), <https://bit.ly/3TDH0GK> [hereinafter Blackman, *SCOTUS Eliminates*].

Both *Shurtleff* and *Kennedy* raised free exercise concerns, which triggered possible Establishment Clause violations. In the former, Harold Shurtleff sought to fly a “Christian flag” in City Hall Plaza in front of Boston City Hall, a public space often used for events held by third parties. The commissioner of Boston’s Property Management Department worried this act could violate the Establishment Clause.⁸⁴ In the latter, Joseph Kennedy, a high school football coach in the Bremerton School District, knelt at midfield after games to offer a personal prayer; by allowing the prayer, it was suggested that the school district could be seen to be endorsing religious views, potentially violating the Establishment Clause.⁸⁵

In a technical sense, because the Establishment Clause was not directly raised in either *Shurtleff* or *Kennedy*, and because no party in either case sought its rejection, any treatment of *Lemon*, both in the majority opinions and certainly in the dissenting or concurring opinions, is nothing more than obiter dictum and not a precedential statement of law.⁸⁶ Nonetheless, one would be hard-pressed to rely on this technical dismissal of *Shurtleff*’s and *Kennedy*’s effect on *Lemon*. Far greater “revolutions” in the development of law, both constitutional and common, arrive through the back door of dictum, not least the very power of judicial review itself in *Marbury v. Madison*,⁸⁷ and the tort of negligence for faulty goods in the landmark English case of *Donoghue v. Stevenson*.⁸⁸ We assume here, then, that *Lemon* was properly engaged.

Justice Gorsuch provided the only sustained treatment of *Lemon* in a concurrence in *Shurtleff* and writing for the Court in *Kennedy*. The only other member of the Court to give *Lemon* any attention was Justice Sotomayor in her *Kennedy* dissent. It seems clear that Justice Gorsuch intended his detailed critique of *Lemon* in the *Shurtleff* concurrence as a prologue to *Kennedy*’s full-frontal attack. We organize our reflections here around two common themes that form the core of Justice Gorsuch’s critique: the rejection of the “entanglement” test and its replacement with the “history and tradition” test.

A. *Grand Unified Theory Invites Chaos and Produces Needless Litigation*

In *Lemon*, Justice Gorsuch wrote, “this Court attempted a ‘grand unified theory’ for assessing Establishment Clause claims.”⁸⁹ The

84. See *Shurtleff*, 142 S. Ct. at 1588.

85. See *Kennedy*, 142 S. Ct. at 2415–16.

86. See Blackman, *Formally Overrule*, *supra* note 83; Blackman, *SCOTUS Eliminates*, *supra* note 83.

87. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

88. *Donoghue v. Stevenson*, [1932] AC 562 (HL).

89. *Kennedy*, 142 S. Ct. at 2427.

product of a bygone era, this one-size-fits-all “neat checklist” approach to Establishment Clause claims asked more questions than it answered, including

[h]ow much religion-promoting purpose is too much? Are laws that serve both religious and secular purposes problematic? How much of a religion-advancing effect is tolerable? What does “excessive entanglement” even mean, and what (if anything) does it add to the analysis? Putting it all together, too, what is a court to do when *Lemon*'s three inquiries point in conflicting directions?⁹⁰

For Gorsuch, the fact that additional inquiries accompanied the application of the test “‘invited chaos’ in lower courts, led to ‘differing results’ in materially identical cases, . . . created a ‘minefield’ for legislators,”⁹¹ and produced a garble of results. This, in turn, according to Justice Gorsuch, produced “needless litigation.”⁹²

In a misguided effort to overcome these apparent flaws, Justice Gorsuch argued, the Court modified the effects test so as “to ask whether a ‘reasonable observer’ would consider the government’s challenged action to be an ‘endorsement’ of religion.”⁹³ This, though, according to Justice Gorsuch, merely compounded the problems, as “some argued that any reasonable observer worthy of the name would consider all the relevant facts and law, just as a judge or jury must Others suggested that a reasonable observer could make mistakes about the law or fail to consider all the facts.”⁹⁴ Such mistakes only raised further questions for Justice Gorsuch about “just how mistake-prone might an observer be and still qualify as reasonable?”⁹⁵ Three examples demonstrate the anomalous results in materially identical cases: (i) “May a State or local government display a Christmas nativity scene? Some courts said yes, others no”;⁹⁶ (ii) “How about a menorah? Again, the answers ran both ways”;⁹⁷ (iii) “What about a

90. *Shurtleff v. City of Boston*, 142 S. Ct. 1583, 1604 (2022) (Gorsuch, J., concurring).

91. *Kennedy*, 142 S. Ct. at 2427 (citation omitted).

92. *Shurtleff*, 142 S. Ct. at 1605 n.4 (Gorsuch, J., concurring).

93. *Id.* at 1604; see also *Kennedy*, 142 S. Ct. at 2427.

94. *Shurtleff*, 142 S. Ct. at 1605 (Gorsuch, J., concurring).

95. *Id.*

96. *Id.* at 1604. In footnote one, Justice Gorsuch cited *Lynch v. Donnelly*, 465 U.S. 668, 671–72 (1984) (yes); *Am. C.L. Union of Ky. v. Wilkinson*, 895 F.2d 1098, 1099–1100, 1104 (6th Cir. 1990) (yes); *Cnty. of Allegheny v. Am. C.L. Union*, 492 U.S. 573, 578–79 (1989) (no); *Smith v. Cnty. of Albemarle*, 895 F.2d 953, 955, 958–60 (4th Cir. 1990) (no).

97. *Shurtleff*, 142 S. Ct. at 1604 (Gorsuch, J., concurring). In footnote two, Justice Gorsuch cites *Allegheny*, 492 U.S. at 578–81 (yes); *Skoros v. New York*, 437 F.3d 1, 3–4 (2d Cir. 2006) (yes); *Kaplan v. Burlington*, 891 F.2d 1024, 1025–26, 1030–31 (2d Cir. 1989) (no).

city seal that features a cross? Good luck.”⁹⁸

Justice Gorsuch’s treatment of the *Lemon* test seems, at best, disingenuous, at worst, deliberately misleading. It consists of two related criticisms of the reasonable observer component of the excessive government entanglement prong. The first concern raised by Justice Gorsuch is that citizens find it confusing and difficult to apply the reasonable observer standard when called upon to decide whether a given course of conduct might amount to endorsement of religion, thus running afoul of the Establishment Clause. Justice Gorsuch puts it this way:

Faced with such a malleable test, risk-averse local officials found themselves in an ironic bind. To avoid Establishment Clause liability, they sometimes felt they had to discriminate against religious speech and suppress religious exercises. But those actions, in turn, only invited liability under other provisions of the First Amendment. The hard truth is, *Lemon*’s abstract and ahistoric test put “[p]olicymakers . . . in a vise between the Establishment Clause on one side and the Free Speech and Free Exercise Clauses on the other.”⁹⁹

And, related to this, Justice Gorsuch suggested that the standard required of the reasonable observer—one of a “checklist” of elements among which a judge can pick and choose—is one which judges find difficult to apply, leading in turn to anomalous results in materially similar cases. We consider both of these criticisms in turn.

1. Citizens as Reasonable Observers

All citizens interact constantly with law, placing each of us in Justice Gorsuch’s vise, at least in the sense that, every day, we must choose a course of conduct from multiple competing possibilities. In doing so, very few citizens have a full grasp of the dizzying array of laws which must be complied with in order to navigate daily activities. And yet, Justice Gorsuch seems to suggest that whatever test is applied, it ought to be one that every person, and certainly every person charged with making decisions about establishment, will be readily familiar with.

Surely, though, to suggest that every citizen has at their fingertips the state of the various bodies of law that govern their conduct, which will answer definitively the questions facing them as they decide on a

98. *Shurtleff*, 142 S. Ct. at 1604 (Gorsuch, J., concurring). In footnote three, Justice Gorsuch cites *Murray v. Austin*, 947 F.2d 147, 149 (5th Cir. 1991) (yes); *Harris v. Zion*, 927 F.2d 1401, 1402 (7th Cir. 1991) (no).

99. *Shurtleff*, 142 S. Ct. at 1605 (Gorsuch, J., concurring) (citation omitted).

course of conduct, borders on absurdity. What *Lemon* required was really no more than what any test requires: that those charged with acting according to the test carefully examine the facts of each case so as to determine whether the test controls a given dispute. True, a court may later assess that conduct as part of litigation, but that is no more and no less burdensome than any of the myriad decisions that we make each day concerning how to conduct ourselves. No standard provides a certain answer for citizens about to embark on a course of conduct.¹⁰⁰

2. Judges Applying the Standard

Justice Gorsuch's concerns with the judicial application of *Lemon* seem to be, as one commentator puts it, that "[u]ltimately, excessive entanglement is in the eye of the beholder."¹⁰¹ But is that really what is happening? Common law courts have long used the very sorts of standards established in *Lemon* to assess a wide range of conduct, in both the public and private spheres. And in so doing, when applied to a novel set of facts, even those cases that seem very similar may, given slight variations, produce different outcomes, with some coming out on one side of a standard, some on the other. Certainty of outcome cannot be assured; indeed, it is the very nature of law that outcomes will differ based upon very subtle factual differences. Every case will and must turn on its own facts, with cases that *seem* to deal with the same facts nonetheless producing different results because, on closer analysis, distinguishing factors exist.¹⁰² Yet if different results follow in cases otherwise indistinguishable, senior appellate courts exist to resolve them, to standardize results, and, if the tests or standards set by lower or earlier courts are the culprits in producing such outcomes, to modify or clarify those tests.

If the "reasonable observer" standard causes problems, the obvious solution is to *define* the reasonable observer. It may not be possible to do that in one decision, but over time, the test's meaning and application would be refined and clarified. And in doing so, courts would make use of a standard with which they are already familiar: reasonableness. Consider the tort of negligence. Throughout the common law world, for a very long time, the standard of care in negligence "adopt[s] an abstract formula, that of the 'reasonable person,' and has left to the jury, or to a judge in their stead, the task of concreting and applying the standard in individual cases,"¹⁰³ which "convert[s] the problem of conduct into an abstraction sufficiently intelligible to guide [the jury] on the legal considerations which they

100. See DUNCAN KENNEDY, *SEXY DRESSING ETC.: ESSAYS ON THE POWER AND POLITICS OF CULTURAL IDENTITY* 90–91 (1993).

101. Richard L. Pacelle, Jr., *Lemon Test*, *FIRST AMEND. ENCYCLOPEDIA* (2009), <https://bit.ly/3MSVvV0>.

102. On the importance of reading cases in chronological order so as to determine legal rules and the lines they draw, see generally KARL N. LLEWELLYN, *THE BRAMBLE BUSH: THE CLASSIC LECTURES ON THE LAW AND LAW SCHOOL* (2008).

103. JOHN G. FLEMING, *THE LAW OF TORTS* 117 (9th ed. 1998).

ought to apply in assessing the quality of the defendant's conduct."¹⁰⁴ While few citizens either know or can explain the standard to be achieved by the reasonable person, all are expected to conduct themselves in their daily activities according to it, and are judged *ex post facto* by it.

Yet Justice Gorsuch seems to suggest that the standard of the reasonable observer in establishment cases is entirely novel for most judges. Is that really so? As Justice Sotomayor noted in dissent, "for decades, the Court has recognized that, in determining whether a school has violated the Establishment Clause, 'one of the relevant questions is whether an objective observer, acquainted with the text, legislative history, and implementation of the [practice], would perceive it as a state endorsement of prayer in public schools.'"¹⁰⁵ Still, Justice Gorsuch asks

[w]ould the assigned judge's imagined "reasonable observer" bother to learn about [a] generous policy for secular groups? Would this observer take the trouble to consult the long tradition in this country allowing comparable displays? Or would he turn out to be an uninformed passerby offended by the seeming incongruity of a new flag flying beside those of the city, State, and Nation? Who could tell.¹⁰⁶

In fact, yes, the reasonable observer, as found in the common law, would do all of that, or at the very least, could be told to do so by a court. In objectifying the reasonableness standards for negligence, common law courts everywhere provide the biography of the hypothetical "person of ordinary prudence"—in the United Kingdom this has become "the passenger on the Clapham omnibus";¹⁰⁷ in Australia, that person rides the Bondi tram;¹⁰⁸ in Hong Kong, the Shauiwan tram;¹⁰⁹ in the United States the standard is contained in the celebrated "Hand Formula."¹¹⁰ Whatever the label that is applied, "the reasonable person is the embodiment of all qualities we demand of the good citizen: and if not exactly a model of perfection, yet

104. *Id.* at 118.

105. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2447 (2022) (Sotomayor, J., dissenting).

106. *Shurtleff v. City of Boston*, 142 S. Ct. 1583, 1605 (2022) (Gorsuch, J., concurring).

107. FLEMING, *supra* note 103, at 118 (citing *Vaughan v. Menlove* (1837) 132 Eng. Rep. 490 (CP); *Blyth v. Birmingham Waterworks Co.* (1856) 156 Eng. Rep. 1047 (EC)). *Blyth* has been cited with approval in the United States. See ROBERT E. KEETON, LEWIS D. SARGENTICH & GREGORY C. KEATING, *TORT AND ACCIDENT LAW: CASES AND MATERIALS* 13 (4th ed. 2004).

108. See *Re Sortirios Pandos & Commw. of Austl.*, [1991] AATA 18; FLEMING, *supra* note 103, at 118.

109. See *Ng Chiu Mui v. Sec. & Futures Comm'n*, Application No. 7 of 2007 (HKC).

110. See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

altogether a rather better person than probably any single one of us happens, or perhaps even aspires, to be.”¹¹¹

Given its ubiquity in the common law, there need be nothing especially problematic with reasonableness as a standard for establishment claims, nor with its use by the sorts of public authorities charged with considering whether government involvement constitutes endorsement. Indeed, the examples of such authorities given by Justice Gorsuch—colleges, public transit authorities, and governments themselves—would undoubtedly take legal advice prior to “exclud[ing] religious groups from using public facilities or designations available to others.”¹¹² The actors identified by Justice Gorsuch are hardly the sorts of *Gideon v. Wainwright*¹¹³ litigants that one might classify as incapable either of understanding the standard or, if not, obtaining legal advice.

How might a judge go about applying the standard? An example assists, which we draw from Australian law. Why? Certainly many American decisions at every level of court, federal and state alike, demonstrate the ease with which judges apply *Lemon*'s reasonable observer test. What we want to show, though, is that even without a thoroughgoing knowledge of the American authorities, the *Lemon* standard presents little difficulty for judges seeking to apply it. More importantly, American jurisprudence is relevant to Australia because the text of the First Amendment Establishment Clause is replicated, almost word for word, in the Australian Constitution.¹¹⁴ In *Attorney-General (Vic); Ex Rel Black v. Commonwealth*,¹¹⁵ the High Court of Australia—Australia's functional equivalent to the Supreme Court of the United States—was faced with a purported Establishment Clause violation; in deciding it, the High Court adverted to the *Lemon* test.¹¹⁶ While Justice Gibbs noted that controversy surrounded the entanglement prong,¹¹⁷ it could nonetheless be demonstrated that American cases fell “on both sides of the borderline.”¹¹⁸ As such, “it [was] clear that the Supreme Court ha[d] not taken the view that the

111. FLEMING, *supra* note 103, at 118.

112. *Shurtleff v. City of Boston*, 142 S. Ct. 1583, 1605 n.4 (2022) (Gorsuch, J., concurring).

113. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

114. The First Amendment reads: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”; while section 116 of the Australian Constitution provides: “The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.”

115. *Attorney-General (Vic); Ex Rel Black v. Commonwealth* (1981) 146 C.L.R. 559.

116. See Paul T. Babie, *What Happened When DOGS Tasted Lemon: Australian Reflections on the Contemporary Relevance of Chief Justice Burger's Opinion in Lemon v. Kurtzman*, 49 RUTGERS L. REC. 154, 157 (2022).

117. See *Black*, 146 C.L.R. at 602.

118. *Id.*

[E]stablishment [C]ause entirely forbids the grant of any financial aid to [religious] schools.”¹¹⁹ In other words, it was clear to an Australian judge, reviewing American law, that *Lemon* did not forbid any entanglement whatsoever, but only that which became excessive. Put another way, *Lemon* did not demand strict separation. Rather, Justice Gibbs found, it allowed for an accommodationist stance, with the third prong being applied by judges to determine on which side of the borderline a given set of facts falls.¹²⁰ For Justice Gibbs, this seemed entirely unremarkable, a task squarely within the judicial mandate; one that involved nothing more than what any common law judge would do.

In fact, the conclusion reached by Justice Gibbs is precisely what Justice Gorsuch pointed to in the cases he cited as examples of “differing” or “garbled” results—nothing more and nothing less than the application of a standard of reasonable objectivity to subtly differing sets of facts, reaching outcomes that fall on either side of what Justice Gibbs called a “borderline.” Justice Sotomayor, in dissent, wrote that “*Lemon* summarized ‘the cumulative criteria developed by the Court over many years’ of experience ‘draw[ing] lines’ as to when government engagement with religion violated the Establishment Clause.”¹²¹ The only way to know on which side of that line a new case might fall is to “read the [previous] opinion[s]” and “consider the court’s reasoning before making judgments about the outcome,” as Justice Amy Coney Barrett recently suggested,¹²² and as Karl Llewellyn long ago admonished every student of law.¹²³ A constitution cannot require a judge to give a final definitive answer that will apply to every case. What it can require is that judges apply standards with which they are well-versed and entirely familiar. Reasonableness and objectivity are such standards.¹²⁴

If, then, reasonableness is a standard regularly deployed by law, it can hardly be said that when a litigant makes use of it that it produces “needless litigation.” Any test adopted by law leads to outcomes, some of which fall on one side of a line, and some on others. But is to pursue litigation to determine on which side a claim falls the pursuit of needless litigation? Will any test prevent litigation because the parties

119. *Id.*

120. See *id.* (citing *Tilton v. Richardson*, 403 U.S. 672 (1971); *Hunt v. McNair*, 413 U.S. 734 (1973); *Roemer v. Md. Bd. of Pub. Works*, 426 U.S. 736 (1976); *Comm. for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646 (1980)).

121. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2449 (2022) (Sotomayor, J., dissenting) (citation omitted).

122. See *Amy Coney Barrett Discusses Free Speech on College Campuses, How COVID-19 Affected Supreme Court*, FORBES BREAKING NEWS (Apr. 12, 2022), <https://bit.ly/3VSNqUk>; *With Divisive Supreme Court Rulings Coming, Barrett Says: ‘Read the Opinion,’* POLITICO (Apr. 5, 2022, 12:20 AM EDT), <https://politi.co/3gp8cKZ>.

123. See generally LLEWELLYN, *supra* note 102.

124. See *Kennedy*, 142 S. Ct. at 2447 (Sotomayor, J., dissenting).

agree on their own which side of a line the conduct in dispute falls? Of course not. And, even if that was not so, by what standard is needless litigation assessed? The only way to resolve a legal dispute—and establishment issues produce legal disputes—requires the application of a test, and there is only one way to determine how that test applies: litigation. To pursue such a claim using the relevant test is hardly needless.

The suggestion that reasonableness invites chaos and needless litigation is, frankly, strange. Moreover, if the reasonable observer standard found in *Lemon* is to be replaced, the irony is that what Justice Gorsuch demands—a test to settle all disputes in a way that judges seem unable to provide—is something, as *Dobbs* tells us, that only legislatures can do. Yet seek to replace *Lemon* the Court does.

B. Exchanging Policy for Original Meaning as Found in History and Tradition

For Justice Gorsuch, the grand unified theory of “*Lemon* ignored the original meaning of the Establishment Clause, . . . disregarded mountains of precedent, and . . . substituted a serious constitutional inquiry with a guessing game.”¹²⁵ As such, “*Lemon* has long since been exposed as an anomaly and a mistake,”¹²⁶ an “ahistoric alternative [that] quickly proved both unworkable in practice and unsound in its results,”¹²⁷ the “‘shortcomings’ associated with this ‘ambitiou[s],’ abstract, and ahistorical approach to the Establishment Clause . . . so ‘apparent’ that this Court long ago abandoned *Lemon* and its endorsement test offshoot.”¹²⁸ As such, the Court rejected “the policy outcomes *Lemon* can be manipulated to produce”¹²⁹ in favor of a test based upon original meaning, in which one finds a “more humble jurisprudence.”¹³⁰ The Court turned to “history and tradition,”¹³¹ a test that makes “reference to historical practices and understandings,”¹³² which “contains some helpful hallmarks that localities and lower courts can rely on.”¹³³

125. *Shurtleff v. City of Boston*, 142 S. Ct. 1583, 1610 (2022) (Gorsuch, J., concurring).

126. *Id.* at 1606.

127. *Id.* at 1606–07.

128. *Kennedy*, 142 S. Ct. at 2427 (2022) (citation omitted). Justice Sotomayor challenges this assertion, writing that “the Court chiefly cites the plurality opinion in *American Legion v. American Humanist [Association]* to support this contention. That plurality opinion, to be sure, criticized *Lemon*’s effort at establishing a ‘grand unified theory of the Establishment Clause’ as poorly suited to the broad ‘array’ of diverse establishment claims All the Court in *American Legion* ultimately held, however, was that application of the *Lemon* test to ‘longstanding monuments, symbols, and practices’ was ill-advised for reasons specific to those contexts.” *Id.* at 2449 (Sotomayor, J., dissenting).

129. *Shurtleff*, 142 S. Ct. at 1608 (Gorsuch, J., concurring).

130. *Id.* at 1604.

131. *Kennedy*, 142 S. Ct. at 2434 (Sotomayor, J., dissenting).

132. *Id.* at 2428 (majority opinion) (citation omitted).

133. *Shurtleff*, 142 S. Ct. at 1609 (Gorsuch, J., concurring).

Justice Gorsuch, who seemed unwilling to use the concept in reference to the *Lemon* test, proposed that there exists a “line” that courts and governments “must draw between the permissible and the impermissible,” which must “accor[d] with history and faithfully reflec[t] the understanding of the Founding Fathers.”¹³⁴ An analysis focused on original meaning and history, Justice Gorsuch suggested, “has long represented the rule rather than some ‘exception’ within the ‘Court’s Establishment Clause jurisprudence.’”¹³⁵

Does constitutional history *really* provide such guidance in Establishment Clause claims? No. Howard Gillman and Erwin Chemerinsky write that “history does not provide an answer to the specific questions that arise in applying the Establishment Clause. Asking what the framers would have allowed in terms of giving computers to parochial schools is a meaningless question when education is so vastly different today than in 1791.”¹³⁶ Gillman and Chemerinsky quote Justice Robert Jackson: “Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh.”¹³⁷ Justice Gorsuch merely rejects a test well-known to the common law tradition—the reasonable observer—for one unknown to it, one more familiar to those in the humanities disciplines.

Justice Gorsuch recounted three historical events as examples of the hallmarks he expects would be helpful to courts in addressing possible violations of the Establishment Clause. First, “when designing a seal for the new Nation in 1776, Benjamin Franklin and Thomas Jefferson proposed a familiar Biblical scene—Moses leading the Israelites across the Red Sea The seal ultimately adopted by Congress in 1782 features ‘the Eye of Providence’ surrounded by ‘glory’ above the motto *Annuit Coeptis*—‘He [God] has favored our undertakings.’” Second, “President Washington’s 1789 Thanksgiving Day Proclamation referred to “‘a day of public thanksgiving and prayer’ and the role of a ‘Supreme Being’ in the foundations and successes of our young Nation.” And finally, “President Jefferson allowed various religious groups to use the Capitol for weekly worship services.”¹³⁸ Would most Americans have even passing familiarity with those events? It seems unlikely.¹³⁹ As Gillman and Chemerinsky

134. *Kennedy*, 142 S. Ct. at 2428 (citation omitted).

135. *Id.* (citation omitted).

136. HOWARD GILLMAN & ERWIN CHEMEKINSKY, *THE RELIGION CLAUSES: THE CASE FOR SEPARATING CHURCH AND STATE* 59–62 (2020).

137. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

138. *Shurtleff*, 142 S. Ct. at 1610 n.11 (Gorsuch, J., concurring).

139. The last time we checked, the main event of, and focus of attention on, Thanksgiving was not only two, but more recently *three*, NFL games, followed by turkey!

conclude, what such examples really demonstrate is simply that “research will reveal little more than competing quotations about religion that each side cites to support its position.”¹⁴⁰ Historical hallmarks might be useful for one engaged in historical research treating law as a humanities discipline in an academic setting, but it seems less helpful for litigants, lawyers, and judges charged with resolving claimed establishment violations and the potential for infringement of free exercise. What seems much more probable is that history and tradition will be far more novel to most lawyers and judges than the existing reasonableness and objectivity standards found in the common law.¹⁴¹

Still, Justice Gorsuch is right about one thing; there is something that history might be able to assist with. And that is in answering whether government has become excessively entangled with religion! Justice Gibbs showed us how that question could be answered in looking at the prior case law—by looking at each case, one is looking at history. And if you feel constrained in accepting what an Australian might have to say about it, Justice Sotomayor makes the same point, writing that the “historical practices and understandings” test is one in which “this Court’s settled precedents offer guidance to assist courts, governments, and the public in navigating [Establishment Clause] tensions.”¹⁴² Yet, it cannot be a general test, nor one that should be the exclusive focus of a court,¹⁴³ because it

offers essentially no guidance for school administrators. If even judges and Justices, with full adversarial briefing and argument tailored to precise legal issues, regularly disagree (and err) in their amateur efforts at history, how are school administrators, faculty, and staff supposed to adapt? How will school administrators exercise their responsibilities to manage school curriculum and events when the Court appears to elevate individuals’ rights to religious exercise above all else? Today’s opinion provides little in the way of answers; the Court simply sets the stage for future legal changes that will inevitably follow the Court’s choice today to upset longstanding rules.¹⁴⁴

History and tradition cannot be the sole test, but it can undoubtedly work in concert with the *Lemon* test, providing historical examples of

140. GILLMAN & CHEREMINSKY, *supra* note 136, at 59.

141. See Marcia Coyle, *With Guns, Abortion and Religion, Judges Become the New Historians*, NAT’L L.J. (June 27, 2022), <https://bit.ly/3F2oMKX>.

142. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2445 (2022) (Sotomayor, J., dissenting).

143. *Id.* at 2450.

144. *Id.*

government involvement with religion that falls on either side of excessive entanglement. Seen this way, it may very well be possible to salvage *Lemon*, reconciling it with history and tradition. What *Lemon* did, quite appropriately, was attempt, in the face of indeterminate and vague language, to establish a fixed standard; one which might require greater elaboration by the Court over time, true, but one well-known to the law. The *Lemon* test sets a fixed standard, one capable of application so as to reach the accommodationist outcomes of *Shurtleff* and *Kennedy*. What Justice Gorsuch would use, however, is a standard that will require just as much elaboration over time, with just as many anomalous outcomes flowing from more purportedly “needless” litigation, and which is entirely unknown to the history of the law itself.

IV. CONCLUSION

Justice Gorsuch said that the application of the *Lemon* test “ultimately . . . devolve[s] into a kind of children’s game.”¹⁴⁵ We agree with this much: what happened in *Dobbs*, *Shurtleff*, and *Kennedy* can be seen as a game, but not of the kind that Justice Gorsuch sees. Instead, the Court’s rejection of *Roe* and *Lemon* are the latest chapters in two ongoing constitutional stories: passing the story of unenumerated rights relating to reproductive freedom from *Roe* to *Dobbs* and passing the story of entanglement in deciding Establishment Clause violations from *Lemon* to *Shurtleff* and *Kennedy*. The result at any stage in this constitutional game of pass the story will never, indeed it cannot be, one of certainty, a settled outcome for all time.

The Court in *Dobbs*, *Shurtleff*, and *Kennedy* has written the latest chapter of these two ongoing stories. But the stories *are* ongoing. What the Court decided in *Dobbs*, and what it decided in *Shurtleff* and *Kennedy*, will not be the end of those two stories, just as *Roe* and *Lemon* were not. Before *Roe*, the story, as far as the Court sees it today, can only be found in history, in Blackstone’s *Commentaries*. Before *Lemon*, the story was found in *Walz*, and before that in *Everson*, and before that, the story had yet to be told. There will be new cases with new facts with which new courts—a newly constituted Supreme Court!—will have to grapple. And there will be new installments, new chapters, added to those stories. Moreover, those two stories are not the only constitutional stories being told. They are myriad, and every day courts across the country are adding their own sentences, paragraphs, and chapters. That is simply part of the game of constitutional pass the story. It began with the founding. It never ends.

145. *Shurtleff v. City of Boston*, 142 S. Ct. 1583, 1605 (2022) (Gorsuch, J., concurring).