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Quiet Encroachments on School Prayer Jurisprudence

Amanda Harmony Cooley
South Texas College of Law Houston

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QUIET ENCROACHMENTS ON SCHOOL PRAYER
JURISPRUDENCE

AMANDA HARMON COOLEY*

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“It’s going to set case law that’s going to be really, really inconvenient
for the activists and the people who hate God.”

**I. INTRODUCTION**

In 2019, a third-grade teacher in an Oklahoma public school led the class
in daily Christian prayer, resulting in students believing it was a required part
of the school day and in the religious conversion of one child.¹ That same year, the
head coach of an Alabama public school football team allowed a Baptist minister
to baptize a group of eighteen players on the football field.² In January of 2022,
two classes at a West Virginia public high school were forced to attend a
Christian revival assembly, where an evangelical preacher asked them to give
their lives to Jesus for salvation and proclaimed that all people who do not

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² See Hannah Natanson, *After Court Ruling, Activists Push Prayer Into Schools*, WASH. POST (July 26, 2022, 6:00 AM), https://www.washingtonpost.com/education/2022/07/26/school-prayer-kennedy-church-state/ (discussing the conversion of a third-grader to Christianity based on the daily class prayer and discussions about Jesus in her public school classroom).

believe in the Bible go to hell. In September of 2022, a Georgia public middle school teacher attempted to convert an agnostic eighth-grader to Christianity by praying with her and giving her a Bible in the hopes that she would “give her heart to Jesus.”

These instances of religious indoctrination and teacher-led prayer in public schools contradict 75 years of the Supreme Court’s education law jurisprudence. The Court held that such actions violated the First Amendment in *Illinois ex rel. McCollum v. Board of Education* in 1948, *Engel v. Vitale* in 1962, and *School District of Abington Township v. Schempp* in 1963. The pervasiveness of these contemporaneous acts of non-compliance with Supreme Court precedent makes them even more pernicious. However, teachers, administrators, and school board members who initiate these prayer practices in public schools and at public school-sponsored events are not lone voices in the wilderness. They fit within a larger community of public and private actors who seek a movement to bring increased state-sponsored Christian practices back into public schools, regardless of their unconstitutionality.

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11. See Natanson, supra note 2 (discussing a variety of state officials’ attempts to inject prayer into public schools); see also John 1:23 (“John replied in the words of Isaiah the prophet, ‘I am the voice of one calling in the wilderness, ‘Make straight the way for the Lord.’”).

12. See, e.g., *Patriot Mobile’s ‘In God We Trust’ School Poster Donations Gain National Attention*, *Patriot Mobile* (Aug. 31, 2022), https://www.patriotmobile.com/patriot-mobile-in-god-we-trust-school-poster-donations-gain-national-attention/ (characterizing the private donation of almost 1,000 “In God We Trust” posters to public schools pursuant to Texas Senate Bill 797 as a Christian “movement to bring God back into our schools!”); Mary Beth Schneider, *Ind. Senator’s
Given the decades of consistent Establishment Clause precedent that such state-led religious activities in public schools violate the First Amendment, the question becomes what mechanisms have emboldened this group of advocates to pray with their students or call for school-sponsored prayer. Arguably, these actions have been buoyed by the passage of school prayer laws, the implementation of school prayer policies, and the social media-frenzied installations of the “In God We Trust” National Motto displays in schools pursuant to state statutory requirements. However, the promotion of school prayer does not find justification in these legislative and executive acts alone.

This Article argues that these dogged attempts to install prayer in public schools have been spurred on by a judicial ideology that has advocated for the constitutionality of expansive state religious practices based on the United States historically being a Christian nation. By embracing this ideology in its Establishment Clause analyses, the conservative majority of the Roberts Court has constructed a firm foundation upon which motivated interests can argue that school-sponsored prayer no longer transgresses the boundaries of the First Amendment when analyzed through an interpretive lens of history and tradition. The 2022 Kennedy v. Bremerton School District decision has become the new high water mark for the Supreme Court’s embrace of this Establishment Clause analytical application and has the potential to galvanize the turning of this jurisprudential tide.

Through a series of subtle maneuvers and jurisprudential errors, the Court has established a perilous precedent with Kennedy that has significant implications for the future of First Amendment school law cases. The myriad deficiencies in the majority opinion include a blurry factual narrative, an inaccurate procedural history, a failure to expressly overrule allegedly abrogated precedent, a faulty adoption of a historical interpretive lens, a dangerous delineation of impermissible coercion, and a flawed zero-sum standard that

Bill Seeks Lord’s Prayer in Schools, INDIANAPOLIS STAR (Jan. 4, 2013, 7:44 AM), https://www.usatoday.com/story/news/nation/2013/01/04/indiana-lawmaker-school-prayer-bill/1808507/ (discussing then-chairman of the U.S. Senate Education Committee Dennis Kruse’s proposed bill to legalize the required daily recitation of the Lord’s Prayer in public schools); see also Caroline Mala Corbin, Christian Legislative Prayers and Christian Nationalism, 76 WASH. & LEE L. REV. 453, 457 (2019) (arguing that “government prayers that are mostly or entirely Christian” are “automatically unconstitutional” given that “[o]ne of the goals of the Establishment Clause was to stave off developments like Christian nationalism and its religious (and racial) hierarchies”).


15 See Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022); Am. Legion, 139 S. Ct. at 2067 (plurality opinion).

16 See Kennedy, 142 S. Ct. at 2433.
equates proper establishment analysis with hostility to religion. The consequence of these quiet erosions of core tenets of education law Establishment Clause jurisprudence is an erroneous decision that can and will be exploited to justify future state-sponsored school prayer.

As a result, the country has reached the critical juncture that the Court cautioned of 60 years ago in School District of Abington Township v. Schempp, in which the Court held that required daily Bible readings and Lord’s Prayer recitations in public schools violated the Establishment Clause. In this case, the Court made clear that the school litigants’ contentions “that the[se] religious practices . . . may be relatively minor encroachments on the First Amendment” were no defense to the constitutional violation. Instead, the Court took a proper jurisprudential approach, citing James Madison’s Memorial and Remonstrance Against Religious Assessments to support its warning to the schools and the nation that “[t]he breach of neutrality that is today a trickling stream may all too soon become a raging torrent.”

The current cloistered Court should take heed of this enduring precedential admonition and not relegate it to the dustbin of broken stare decisis in future school prayer decisions. Instead, the Court should provide a constitutionally faithful analysis of these issues to continue to hold that public school prayer violates the Establishment Clause of the First Amendment. This is the necessary bulwark to stem the tide of looming constitutionally violative harm, maintain the Court’s legitimacy, and ensure that all American public schoolchildren are provided essential protections from the major encroachments resulting from state-sponsored prayer in schools.

19 Id. at 225.
20 Id. (citing 2 JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS, IN THE WRITINGS OF JAMES MADISON 183, 187, 190 (Guilford Hunt ed., 1901)).
21 See, e.g., BENJAMIN H. BARTON, THE CREDENTIALED COURT: INSIDE THE CLOISTERED, ELITE WORLD OF AMERICAN JUSTICE 1 (2022) (labeling the modern Supreme Court “cloistered” based on the shared elite experiences of the justices); Jeffrey L. Fisher & Allison Orr Larsen, Virtual Briefing at the Supreme Court, 105 CORNELL L. REV. 85, 130 (2019) (“The Court is already the most cloistered and least understood of the three branches.”).
II. THE SUPREME COURT’S PUBLIC SCHOOL PRAYER JURISPRUDENCE

The Establishment Clause provides that “Congress shall make no law respecting an establishment of religion.” Despite its textual brevity, this First Amendment clause has led to a multifaceted and sometimes convoluted collection of Supreme Court case law. This precedent has been pilloried to no end. It has been described as messy, depressing, and incoherent. It has been likened to a thicket, a maze, and a morass. This has all resulted in little consensus among jurists and scholars on the touchstones of this case law.

However, three things about Establishment Clause jurisprudence are irrefutable. First, it was borne out of examining the meaning of this religion clause in a school law context over 75 years ago. Second, a significant portion of this case law involves litigants who allege that the First Amendment has been

24 U.S. Const. amend. I.
25 See ACLU of Kentucky v. Grayson Cnty., 591 F.3d 837, 845 (6th Cir. 2010) (calling this jurisprudence “convoluted”); Dustin E. Buehler, Solving Jurisdiction’s Social Cost, 89 Wash. L. Rev. 653, 672 n.119 (2014) (discussing the Court’s variety of tests used to determine “whether government conduct violates the Establishment Clause”).
violated by prayer in public schools. Third, despite this extensive body of case law, public schools continue to be the situses for “frequent flash points of conflict” in assessing school prayer and the boundaries of the Establishment Clause.

A. The Origin of Education Law Establishment Clause Doctrine

The Supreme Court provided its first extended substantive interpretation of the Establishment Clause and incorporated it against the states in the seminal 1947 education law case, Everson v. Board of Education. In Everson, the Court upheld the constitutionality of a New Jersey township board of education’s reimbursement of parents for the costs to bus their children to private Catholic schools pursuant to a state statute that authorized “local school districts to make rules and contracts for the transportation of children to and from schools.” Here, the Court rooted its Establishment Clause analysis in Madisonian neutrality, ultimately finding that the “[First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary.” As a result, the Court made clear that “[s]tate power is no more to be used so as to [inhibit] religions, than it is to favor them.” The Court also relied heavily on Jeffersonian separationism, describing the constitutional “wall between church and state” as “high and impregnable.” While it “could not approve the slightest breach” of this wall, the Court concluded that the case did not present such a breach.

33 See Everson, 330 U.S. at 8; Donald L. Beschle, God Bless the Child?: The Use of Religion as a Factor in Child Custody and Adoption Proceedings, 58 Fordham L. Rev. 383, 390 (1989) (deeming Everson “the starting point” of Establishment Clause analysis).
34 Id. at 3, 18.
35 Id. at 18.
36 Id.
38 Everson, 330 U.S. at 18.
39 See id.
B. Establishment Clause Challenges to Religious Exercises and Prayer in Schools from 1948 to 2022

One year after *Everson*, in *Illinois ex rel. McCollum v. Board of Education*, the Court invalidated an Illinois school board’s provision of weekly religious education and prayer by private religious group teachers in its public school classrooms. Students were divided into “three separate religious groups [taught] by Protestant teachers, Catholic priests, and a Jewish rabbi.” Students who opted out of religious instruction were sent out of the classrooms to study in empty rooms or hallways. This policy was challenged by Vashti McCollum, whose son, James Terry, had been ostracized by his elementary school classmates for opting out of attending the religious classes. The plaintiff claimed the religious classes violated the First Amendment and discriminated against non-adherents to religion and minority faiths.

Following the Madisonian neutrality and Jeffersonian separationism of *Everson*, the Supreme Court found that this “use of tax-supported property for religious instruction and the close cooperation between the school authorities and the religious council in promoting religious education” breached the “high and impregnable” wall between Church and State required by the First Amendment. As a result, the Court determined that the employment of this religious instruction “through use of the state’s compulsory public school machinery” was unconstitutional, as it was “beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith.”

Approximately 15 years later, the Court cemented this neutrality analysis in evaluating the constitutionality of school prayer in its 1962 decision of *Engel v. Vitale*. At issue in this case was a New York school board’s requirement that students recite a daily state-authored prayer, which provided: “Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us.

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41 Id. at 208–09.
44 See McCollum, 333 U.S. at 205, 208–09.
46 McCollum, 333 U.S. at 209, 212, 231.
47 Id. at 210, 212.
our parents, our teachers and our Country.”

The families of the ten schoolchildren claimed that this school prayer violated the Establishment Clause.

The Court agreed, using a multi-faceted neutrality approach involving history, purpose, and coercion, to hold that “the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government.”

Historical analysis was one basis for this holding, with the Court emphasizing that “this very practice of establishing governmentally composed prayers for religious services was one of the reasons which caused many of our early colonists to leave England and seek religious freedom in America.”

The Court also clarified that direct governmental compulsion or coercion was not required for an Establishment Clause violation. Instead, “[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion” contravenes the First Amendment. Consequently, an option for students to “remain silent or be excused from the room” during the prayer’s recitation did not cure the constitutional violation.

As a result, the Court invalidated this school prayer practice because the Establishment Clause’s “first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion.”

The Court’s next school prayer decision, School District of Abington Township v. Schempp, was issued the year after Engel. In companion cases, the Court held that a Pennsylvania statute and a Baltimore rule, which required Bible readings and Lord’s Prayer recitations at the start of each public school day, violated the Establishment Clause. Although parents could opt their children out of the religious exercises, many families did not because they feared it would adversely affect their children’s relationships with teachers and classmates.

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49 Id. at 422.
50 See id. at 423.
51 Id. at 425.
52 Id.
53 See id. at 431.
54 Id.
55 Id. at 430.
56 Id. at 431–32 (citing MADISON, supra note 20, at 187).
58 See id.
59 See id. at 208.
In *Schempp*, the Court used neutrality analysis, as it had in *Engel*, to hold that the coercive governmental prayer breached the Establishment Clause.\(^60\) To provide a clear precedent and to guard against the future creation of government orthodoxy by state-sponsored school prayer, the *Schempp* decision articulated an express two-pronged test for government action to pass constitutional muster: “to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.”\(^61\)

Applying this test, the Court found that the purpose of the Bible readings and prayers in the public schools was clearly religious, which was inapposite to the First Amendment requirement “that the Government maintain strict neutrality, neither aiding nor opposing religion.”\(^62\) Here, the Court highlighted the perils of state coercion with these school religious exercises, finding that the opt-out provisions for students afforded no more insulation from a constitutional violation than the non-compulsory nature of *Engel*’s school prayer.\(^63\) The Court also expressly rejected arguments that these biblical readings and sectarian prayers were mere minor encroachments that did not give rise to a First Amendment violation.\(^64\) Instead, quoting Madison, the Court warned that these religious activities in public schools were exemplars of unconstitutional state action that should make the country “take alarm at the first experiment on our liberties.”\(^65\)

*Schempp*’s Madisonian warning signaled the Court’s clear line of demarcation on the unconstitutionality of school prayer. Indeed, it did not take up another public school religious exercises case for over 20 years until the 1985 *Wallace v. Jaffree* decision.\(^66\) In *Wallace*, the Court determined that an Alabama prayer statute challenged by the father of three elementary school students violated the Establishment Clause.\(^67\) In alignment with its school prayer precedent, the Court cited Madison’s *Memorial and Remonstrance* to emphasize the Establishment Clause’s neutrality requirement that:

> derives support not only from the interest in respecting the individual’s freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful, and from recognition of the fact that the political interest in forestalling intolerance extends beyond intolerance among Christian sects—or even intolerance

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\(^60\) See id. at 212–13, 222–23 (citing *Engel*, 370 U.S. at 430–31).
\(^61\) Id. at 222–23.
\(^62\) Id. at 223–24, 225.
\(^63\) See id. at 224–25 (citing *Engel*, 370 U.S. at 430).
\(^64\) See id.
\(^65\) Id. at 224–26 (quoting MADISON, supra note 20, at 185).
\(^67\) See id. at 42, 57, 61.
among “religions”—to encompass intolerance of the disbeliever and the uncertain.68

From there, the Court applied the Lemon v. Kurtzman expansion of the Schempp test, finding the Establishment Clause required that: “[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; and] finally, the statute must not foster ‘an excessive government entanglement with religion.’”69 In applying this test, the Court found that the statute’s express legislative purpose “to return voluntary prayer’ to the public schools[,]” failed Lemon’s secular purpose prong.70 The Court determined that this “legislative intent . . . [was] . . . quite different from merely protecting every student’s right to engage in voluntary prayer during an appropriate moment of silence during the school day.”71 As a result, the Court concluded the State’s “favored practice” of prayer constituted “an endorsement [that] is not consistent with the established principle that the government must pursue a course of complete neutrality toward religion.”72

Instead of the oft-maligned and now arguably overruled Lemon test,73 the Court used coercion analysis in its next school prayer decision in 1992.74 In Lee v. Weisman, the Court examined a Rhode Island policy permitting public school administrators to invite clergy members to pray at middle and high school graduation ceremonies.75 After attending her school graduation, where a rabbi thanked God during an invocation and benediction while students stood silently, a middle school student and her father sought a permanent injunction against these prayers.76 Ultimately, the Court found that the pervasive state involvement with the prayers “creat[ed] a state-sponsored and state-directed religious exercise in a public school[,]” which directly contravened the Establishment Clause.77

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68 Id. at 53 (citing James Madison, Memorial and Remonstrance Against Religious Assessments, 1785, in The Complete Madison: His Basic Writings 299–301 (S. Padover ed., 1953)).
70 See Wallace, 472 U.S. at 57–58, 61.
71 Id. at 59.
72 Id. at 60.
75 See id. at 580.
76 See id. at 581–84.
77 Id. at 587.
This analysis was premised on an “undisputed minimum” First Amendment threshold that “guarantee[d] that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which ‘establishes a [state] religion or religious faith, or tends to do so.’”\(^78\) The Court also underscored that the Free Exercise Clause “does not supersede the fundamental limitations imposed by the Establishment Clause.”\(^79\) Finally, the Court emphasized that unconstitutional coercion is not limited to direct coercion when evaluating prayer and other religious practices in the public school environment where “subtle coercive pressures exist.”\(^80\)

These heightened concerns with protecting students’ freedom of conscience from subtle coercive pressures in public schools were central to the Court’s decision.\(^81\) The Court emphasized that what might seem like a reasonable request to respect another’s religious practice to an adult could appear to be state machinery “to enforce a religious orthodoxy” to schoolchildren, given their acute susceptibility to indirect coercion.\(^82\) The Court held that the Establishment Clause no more allowed the government to “use social pressure to enforce orthodoxy than it may use more direct means.”\(^83\) The Court found the State’s coercive social pressure upon students to stand or be respectfully silent during the graduation prayers was a constitutional injury for the student “dissenter . . . who has a reasonable perception that she is being forced by the State to pray in a manner her conscience will not allow.”\(^84\) And this type of coercive “pressure, though subtle and indirect, can be as real as any overt compulsion.”\(^85\)

Further, like in McCollum, Engel, and Schempp,\(^86\) any state argument that schoolchildren had an option to not participate in the prayer was invalid, even if such a constitutional choice might apply to “mature adults.”\(^87\) Instead, the Court found that this governmental prayer “force[d] students to choose between compliance or forfeiture” of their conscientious liberties.\(^88\) The Court also dismissed the State’s claim “that the option of not attending the graduation” excused “any inducement or coercion in the ceremony itself,” given the universally acknowledged importance and essentially “obligatory” nature of

\(^78\) Id. (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984)).
\(^79\) Id.
\(^80\) Id. at 588, 592.
\(^81\) See id.
\(^82\) Id. at 593–94 (internal citations omitted) (“Research in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention.”).
\(^83\) Id. at 594.
\(^84\) Id. at 593–94.
\(^85\) Id. at 593.
\(^86\) See supra notes 40–65 and accompanying text.
\(^87\) Lee, 505 U.S. at 593–94.
\(^88\) Id. at 595–96.
school graduation attendance.\textsuperscript{89} The Court emphasized that the State cannot constitutionally “require . . . its citizens to forfeit [their] rights and benefits as the price of resisting conformance to state-sponsored religious practice.”\textsuperscript{90} As a result, it was not permissible for the state “to exact religious conformity from a student as the price of attending her own high school graduation.”\textsuperscript{91}

Finally, the Court denied the \textit{de minimis} characterizations of the graduation prayers, just as in \textit{Schempp}.\textsuperscript{92} Here, the Court emphasized that the prayers’ brief durations did not make them mere minor encroachments.\textsuperscript{93} Such a finding would denigrate religious adherents’ spiritual practices and ignore the prayers’ significant coercion of nonadherent students.\textsuperscript{94} Further, the Court rejected the state’s argument that the “civic or nonsectarian” nature of the prayers insulated them from violating the Establishment Clause.\textsuperscript{95} This dovetailed with the Court’s rejection of state claims that the school prayer was constitutional as it reflected a preferred religious exercise of the majority. The Court found that such arguments “fail[ed] to acknowledge that what for many . . . classmates and their parents was a spiritual imperative was for Daniel and Deborah Weisman’s religious conformance compelled by the State.”\textsuperscript{96} The Court concluded that the First Amendment does not permit such a Hobson’s choice in the interplay of the Religion Clauses, finding that “[w]hile in some societies the wishes of the majority might prevail, the Establishment Clause of the First Amendment is addressed to this contingency and rejects the balance urged upon us.”\textsuperscript{97}

The Supreme Court incorporated coercion and endorsement analysis into its next school prayer case, \textit{Santa Fe Independent School District v. Doe}, in 2000.\textsuperscript{98} Here, the Court found that a Texas school district’s policy that provided for a student-body election of students to deliver a brief invocation before high school football games via the school loudspeaker violated the Establishment Clause.\textsuperscript{99} If the policy was judicially enjoined, it contained a provision that: “[a]ny message and/or invocation delivered by a student must be nonsectarian and nonproselytizing.”\textsuperscript{100} This policy was challenged as an Establishment Clause violation by the families of Mormon and Catholic students.\textsuperscript{101}

\textsuperscript{89} \textit{Id.} at 586, 595.
\textsuperscript{90} \textit{Id.} at 596.
\textsuperscript{91} \textit{Id.}
\textsuperscript{92} \textit{See id.} at 594–96; \textit{see also supra} text accompanying notes 57–65.
\textsuperscript{93} \textit{See id.} at 594.
\textsuperscript{94} \textit{See id.}
\textsuperscript{95} \textit{Id.}
\textsuperscript{96} \textit{Id.} at 595–96.
\textsuperscript{97} \textit{Id.} at 596.
\textsuperscript{99} \textit{See id.} at 298 n.6, 317.
\textsuperscript{100} \textit{Id.} at 298 n.6.
\textsuperscript{101} \textit{See id.} at 294–95.
In evaluating this constitutional claim, the Court emphasized that the First Amendment’s purpose was to secure religious liberty, which clearly means that the Constitution does not prohibit all religious activities, including voluntary student prayer, in American public schools. The Court also recognized the sincere desire of many Americans to pray at significant public occasions. However, the Court stressed that religious liberty is “abridged when the State affirmatively sponsors the particular religious practice of prayer.”

In turning to its analysis of the Texas school district policy, the Court found that the policy’s prayers did not constitute private prayer that would insulate the school district from a finding of unconstitutional coercion. Specifically, the Court determined the policy “involve[d] both perceived and actual [school] endorsement of religion.” This state endorsement was based on the “invocations [being] authorized by a government policy and tak[ing] place on government property at government-sponsored school-related events.” The Court emphasized that an objective high school student would “unquestionably perceive the inevitable pregame prayer as stamped with her school’s seal of approval,” given that it was delivered via the school’s loudspeaker by a student elected through a majoritarian process under school supervision at a school-sponsored ceremony typically attended by many students in school uniforms on the school’s football field. Such “[s]chool sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are 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.’” Consequently, the Court deemed this school-sponsored speech that could give rise to an Establishment Clause violation rather than private prayer that fell outside that clause’s ambit.

The Court then applied a coercion analysis like that in Lee, stressing that the prayer policy “encourag[ed] divisiveness along religious lines in a public school

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102 See id. at 313.
103 See id. at 307.
104 Id. at 313.
105 See id. at 307.
106 Id. at 305, 307. This endorsement analysis was premised in part upon Justice Sandra Day O’Connor’s concurrence in Wallace, which provided “[i]n cases involving state participation in a religious activity, one of the relevant questions is ‘whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools.’” Id. at 308 (quoting Wallace v. Jaffree, 472 U.S. 38, 73, 76 (1985) (O’Connor, J., concurring)).
107 Id. at 302.
108 Id. at 308.
110 See id. at 310.
setting," which contravened the First Amendment and resulted in impermissible governmental coercion.\textsuperscript{111} The Court rejected the state’s claim that the prayer was merely a private student decision to convey religious messages.\textsuperscript{112} Instead, the government created the mechanism for students to make these choices for public prayer within the school environment.\textsuperscript{113}

In accordance with its other school prayer precedent, the option to not attend the games did not mitigate the Court’s coercion finding for two reasons.\textsuperscript{114} First, it was compulsory for some students—football team members, cheerleaders, and band members—to attend all of the game’s events.\textsuperscript{115} Second, echoing Lee, the other teenage students would be naturally susceptible “to pressure from their peers towards conformity” in attending these games.\textsuperscript{116} However, the Court reaffirmed that “[t]he Constitution . . . demands that the school may not force this difficult choice” upon students between attending games or avoiding state religious rituals.\textsuperscript{117} For these students, the Court found “the delivery of a pregame prayer ha[d] the improper effect of coercing those present to participate in an act of religious worship.”\textsuperscript{118}

The Court also reaffirmed its holding in Lee that the Establishment Clause bars the state from using either direct means or indirect social pressure to engage students in religious orthodoxy, given the unique contextual circumstances of American public schools.\textsuperscript{119} Thus, the Constitution does not allow the state “‘to exact religious conformity from a student as the price’ of joining her classmates at a varsity football game.”\textsuperscript{120} As a result, the Court found this policy violated the First Amendment because “the religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer.”\textsuperscript{121}

At the conclusion of the opinion, the Court utilized Lemon’s secular purpose prong to address the state’s premature facial challenge claim.\textsuperscript{122} The Court determined that the policy’s plain language indicated the school’s involvement in the unconstitutional purpose of a state preference for religious prayer rather than the creation of a limited public forum for student speech.\textsuperscript{123}

\textsuperscript{111} Id. at 311.
\textsuperscript{112} See id.
\textsuperscript{113} See id.
\textsuperscript{114} See id. at 311–12.
\textsuperscript{115} See id. at 311.
\textsuperscript{116} Id. at 312 (quoting Lee v. Weisman, 505 U.S. 577, 593 (1992)).
\textsuperscript{117} Id.
\textsuperscript{118} Id.
\textsuperscript{119} See id. (citing Lee, 505 U.S. at 592).
\textsuperscript{120} Id.
\textsuperscript{121} Id. at 313.
\textsuperscript{122} See id. at 314.
\textsuperscript{123} See id. at 314–15 (citing Lemon v. Kurtzman, 403 U.S. 602, 612 (1971)).
Here, the Court emphasized the importance of the factual record related to the school’s historical practices and direct involvement with pregame prayers. The Court refused to accede to the state’s pretense of a secular purpose, identifying bluntly “what every Santa Fe High School student understands clearly—that this policy is about prayer.”

In doing so, the Court refused to turn “a blind eye to the context in which this policy arose,” finding “that context quells any doubt that this policy was implemented with the purpose of endorsing school prayer” through a majoritarian election mechanism. This state action provided no viewpoint protections for minority constituencies within the school, promoted religious ideology divisiveness, and created a coercive environment for students who did not want to participate in school prayer. Therefore, the Court found that the “enactment of this policy, with the purpose and perception of school endorsement of student prayer,” violated the Establishment Clause.

The Santa Fe decision was the last case in the Supreme Court’s 75 years of consistent school prayer jurisprudence to uphold plaintiffs’ claims that such prayer violated the Establishment Clause. In this line of cases, the Court applied a proper balance of Madisonian neutrality to protect religious liberty and freedom of conscience in alignment with the original purposes of the First Amendment in the special constitutional environment of America’s public schools. The net result of this decision-making was a prohibition on directly or indirectly “coercive, majoritarian school prayer that harms conscientious liberty and risks degradation of religion” by the state.


Unlike the 75 years of precedent in its public school religious exercises jurisprudence, the Court’s next and last-to-date school prayer decision did not involve a plaintiff-alleged Establishment Clause claim. Instead, the 2022

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124 See id. at 315.
125 Id.
126 Id.
127 See id. at 317.
128 Id. at 316.
The Kennedy v. Bremerton School District case evaluated whether a public school district had violated a high school football coach’s Free Exercise and Free Speech rights by not accommodating his request to pray on the school football field’s 50-yard-line immediately following games.131 In this 6-3 decision, the Court started its substantive analysis by discussing the interplay between the Free Exercise and Free Speech Clauses and emphasizing that it was no accident that “the First Amendment doubly protects religious speech[.].”132 On the Free Exercise claim, the Court determined that it was “effectively undisputed” that Coach Joseph Kennedy had met his burden to “show[] that a government entity ha[d] burdened his sincere religious practice pursuant to a policy that [was] not ‘neutral’ or ‘generally applicable[.][]’” which triggered strict scrutiny.133 In doing so, the majority narrowly limited Kennedy’s contested religious practice to three quiet postgame prayers without his players in October 2015, rather than his years-long practice of leading the team in locker-room prayers before games and delivering religious speeches to them after games.134 The Court then analyzed whether Kennedy met his Free Speech claim burden.135 Here, the Court incorporated the oft-quoted Tinker v. Des Moines Independent Community School District dicta of “our precedents remind us that the First Amendment’s protections extend to ‘teachers and students,’ neither of whom ‘shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.’”136 However, the Court acknowledged the limits of this precept, given that “the speech rights of public school employees are [not] so boundless that they may deliver any message to anyone anytime they wish” as they are paid as government employees “in part to speak on the government’s behalf and convey its intended messages.”137 Here, the Court utilized the Pickering-Garcetti framework to determine that “Kennedy’s speech implicate[d] a matter of public concern” and “was private speech, not government speech.”138 The latter conclusion was based on the determination that his prayers did not occur “while acting within the scope of his duties as a coach.”139 As a result, the Court determined the coach met his

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132 Id. at 2421.
133 Id. at 2422 (quoting Emp. Div. v. Smith, 494 U.S. 872, 879-81 (1990)).
134 See id. (deeming these latter activities irrelevant because Kennedy had discontinued them at the school district’s request).
135 See id. at 2423–24.
136 Id. at 2423 (quoting Tinker v. Des Moines Indep. Cnty. Sch. Dist., 393 U.S. 503, 506 (1969)).
137 Id.
138 Id. at 2424 (citing Pickering v. Bd. of Educ., 391 U.S. 563 (1968); Garcetti v. Ceballos, 547 U.S. 410 (2006)).
139 Id. at 2425.
threshold burden for a Free Speech claim, which left an evaluation of the second step under the *Pickering-Garcetti* analysis, “where the government may seek to prove that its interests as employer outweigh even an employee’s private speech on a matter of public concern.”

Upon finding that Kennedy met his threshold burden for his First Amendment claims, the Court shifted the burden to the school district. In doing so, it found that the school district could not sustain its burden no matter the standard applied, whether it be strict scrutiny, “the more lenient second step of the *Pickering-Garcetti* test,” or intermediate scrutiny. This point of the analysis was alleged to be the crucial intersection for the Court as a whole, with the majority justices claiming “that it is only here where [their] disagreement with the dissent begins in earnest.” Specifically, the majority stated that the dissenting justices agreed that Kennedy had met his threshold burdens, but they disagreed on whether the district had carried its burden to show that the Establishment Clause required the denial of Kennedy’s religious accommodation request.

The Court examined this fracturing issue by analyzing what the majority defined as the school district and Ninth Circuit’s shared contention “that [the] suspension of Mr. Kennedy was essential to avoid a violation of the Establishment Clause[,]” which “‘trump[ed]’ Mr. Kennedy’s rights to religious exercise and free speech.” The majority rejected such a premise, claiming that the First Amendment’s text indicates the Establishment, Free Exercise, and Free Speech Clauses “have ‘complementary’ purposes, not warring ones where one Clause is always sure to prevail over the others.” It proceeded to find that the school district and the Ninth Circuit, in affirming the school district’s actions, erred by relying “on ‘Lemon and its progeny,’” rather than applying historical practices and original meaning; by determining that “a ‘reasonable observer’

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140 *Id.*
141 See *id.* at 2426.
142 *Id.*
143 *Id.* at 2426 n.3.
144 See *id.* (stating the Court did not understand the dissenting justices to be “contest[ing] that Mr. Kennedy has met his burdens under either the Free Exercise or Free Speech Clause, but only to suggest the District has carried its own burden ‘to establish that its policy prohibiting Kennedy’s public prayers was the least restrictive means of furthering a compelling state interest’”). This statement by the majority is one of many that distorts the actualities of the case. See *id.* at 2445 (Sotomayor, J., dissenting) (stating that although “the District has a strong argument that Kennedy’s speech, formally integrated into the center of a District event, was speech in his official capacity as an employee that is not entitled to First Amendment protections at all[,] [i]t is unnecessary to resolve this question . . . because, even assuming that Kennedy’s speech was in his capacity as a private citizen, the District’s responsibilities under the Establishment Clause provided ‘adequate justification’ for restricting it”).
145 *Id.* at 2426 (majority opinion) (quoting Kennedy v. Bremerton Sch. Dist., 991 F.3d 1004, 1017 (9th Cir. 2021), rev’d, 142 S. Ct. 2407 (2022)).
146 *Id.*
could think [the district] ‘endorsed Kennedy’s religious activity by not stopping the practice’”; by finding that the coach’s prayers were “impermissible government coercion”; and by “suppress[ing]…otherwise protected First Amendment activities” to avoid concerns about “phantom” Establishment Clause violations.147

The Kennedy case is a curious and contentious bookend to the Court’s 75 years of education law Establishment Clause jurisprudence. Unlike its preceding school prayer cases, it involved Free Exercise and Free Speech claims rather than Establishment Clause claims. It reviewed litigation brought by a public school employee rather than students or their families. And it resulted in a finding of no Establishment Clause violations, unlike all cases involving school prayer before it.

However, Kennedy shared one similarity with many of its school prayer predecessors: it divided the Court and the nation. Because of the commensurate controversy it has engendered, Kennedy will prove to be as revolutionary as Everson and as perilously encroaching on school prayer jurisprudence as once forewarned by Schempp. Its division with foundational principles of the Court’s own precedent will provide a steady foothold to argue that a broad swath of unconstitutional religious activities within public schools should now be interpreted as no longer violating the Establishment Clause. The only circuit breaker for this First Amendment degradation will be a legitimate Court that fulfills its proper constitutional role by preventing Kennedy from serving as the standard bearer for the future raging torrents against liberty in America’s public schools that are now sure to come.

D. The Controversies of the School Prayer Cases

The Court’s school prayer decisions have often divided the Court and “endured sharp criticism from the elected branches and enduring opposition from the public.”148 “This is unsurprising given the controversial legacy of the seminal Everson case and the general jumbled affairs of Establishment Clause cases.”149 This consistent pattern of government and private pushback signals that the Supreme Court’s future decision-making on the constitutionality of school prayer will continue to be divisive.

Everson’s incorporation of the Establishment Clause through the Fourteenth Amendment Due Process Clause’s liberty provision to apply to state and local governments was recently deemed a “quiet revolution” by Professor

147 Id. at 2426–29, 2432.
149 See Kyle Duncan, Misunderstanding Freedom from Religion: Two Cents on Madison’s Three Pence, 9 Nev. L.J. 32, 60 (2008) (“Establishment Clause jurisprudence has generated many controversial, persistent, and seemingly intractable questions.”).
Dan Coenen. However, this is not just a 21st-century assessment. Contemporaneous to the decision, *Everson* was controversial, invoking a “national cry of protest and alarm.” Many critics argued against it because “freedom from religious establishments does not constitute [a protected] individual liberty interest.” Other criticism centered around the cursory jurisprudential approach of the incorporation itself.

The majority opinion in *Everson* was also heavily critiqued by four of the Court’s dissenting justices as incorrectly finding the Establishment Clause permitted the state reimbursements to families for the transportation costs of their children to attend Catholic parochial schools. Justice Robert Jackson rallied against the legitimacy of the decision based on the Court’s “deviations from the facts” of the case; its assumption of “a state of facts the record [did] not support”; and its “refus[al] to consider facts which [were] inescapable on the record.” Jackson challenged the majority’s framing that the “legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools.” He instead urged that the question of the case based on the factual record was whether “it [was] constitutional to tax [for . . .] the cost of carrying pupils to church schools of one specified denomination.” And, for Jackson, the answer was “no,” as “the prohibition against establishment of religion cannot be circumvented by a subsidy, bonus or reimbursement of expense to individuals for receiving religious instruction and indoctrination.”

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150 See *Everson v. Bd. of Educ.*, 330 U.S. 1, 8 (1947) (“The First Amendment, as made applicable to the states by the Fourteenth, commands that a state ‘shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.’”) (internal citation omitted); Dan T. Coenen, *Quiet-Revolution Rulings in Constitutional Law*, 99 B.U. L. REV. 2061, 2069–70 (2019).


153 See, e.g., *Town of Greece v. Galloway*, 572 U.S. 565, 607 n.1 (2014) (Thomas, J., concurring in part) (“Thus, in the space of a single paragraph and a nonresponsive string citation, the *Everson* Court glibly effected a sea change in constitutional law.”); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1157–60 (1991) (arguing that *Everson*’s incorporation was error); Glendon & Yanes, supra note 32, at 485 (criticizing *Everson* for its analysis based on “little or no support from text, history, or tradition”).

154 See generally *Everson*, 330 U.S. at 1.

155 Id. at 19 (Jackson, J., dissenting).

156 Id. at 18 (majority opinion).

157 Id. at 21 (Jackson, J., dissenting).

158 Id. at 24.
Justice Wiley Rutledge, joined by Justice Jackson, Justice Felix Frankfurter, and Justice Harold Burton, also vociferously dissented in *Everson.* Rutledge criticized the majority’s “oblique ruling” in that the briefs submitted to the Court did not raise the Establishment Clause issue and instead focused on whether the state action was public or private under the Fourteenth Amendment’s Due Process Clause. He warned that the majority’s decision established precedent that ran counter to the Framers’ purposes of religious liberty in adopting the First Amendment. This dissent argued that the First Amendment’s text compelled an equal application of the Free Exercise Clause and Establishment Clause, rather than a broader one of the former and a narrower one of the latter. Further, this dissent argued that the history of the First Amendment indicated it was unconstitutional to use “any appropriation, large or small, from public funds to aid or support any and all religious exercises[,]” like the reimbursements in the case. This dissent also predicted that the case would trigger a cascade effect of state actions breaching the boundaries of the Establishment Clause, as there was a constant drive “to abridge, in the name of education, the complete division of religion and civil authority which our forefathers made” through the unconstitutional introduction of “religious education and observances into the public schools.”

*McCollum* also engendered a significant amount of hostility, with one newspaper article declaring that “little Terry McCollum now has the right to go to hell.” His mother “lost her job, had her home vandalized, was targeted as anti-God in the local newspaper, had rotten tomatoes thrown at her, and received [nearly six thousand pieces of] unrelenting hate mail.” Terry “was called a ‘godless communist’ and was beaten up so many times that he had to be sent to Rochester, New York, to live with his grandparents.”

*McCollum* created less division within the Court than *Everson,* as it produced only a lone dissent by Justice Stanley Reed. Reed incorporated a historical and original meaning approach in his dissent, arguing that “[t]he

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159 See id. at 28 (Rutledge, J., dissenting).
160 Id. at 29 n.3.
161 See id. at 29.
162 Id. at 32.
163 See id. at 41, 63.
164 Id. at 29, 63.
165 God in America Transcript, supra note 42.
history of American education is against” an interpretation of the First Amendment that “religious instruction of public school children during school hours is prohibited.” Consequently, he asserted that McCollum’s Establishment Clause holding was “far from the minds of the authors” of the Bill of Rights. Reed concluded his dissent by stating, “[t]his Court cannot be too cautious in upsetting practices embedded in our society by many years of experience.”

Engel was another incredibly controversial decision that “was intensely unpopular with the American public[,]” many of whom viewed it as “an affront to God, civic virtue, and the American way.” The case was meteoric in its incitement of fervored pushback, with polls showing over three-quarters of Americans, including former Presidents Herbert Hoover and Dwight Eisenhower, condemning the opinion. Over fifty prayer constitutional amendments were proposed in Congress within three days of the decision. The original plaintiffs of the litigation “suffered through vile hate mail, an endless series of harassing incidents including telephone calls day and night at their homes, and threats of arson, kidnapping, bodily harm, and death.” To most Americans, the Court had become “an incomprehensible, unpredictable, and seemingly immutable enemy” that had “driven God out” of the public schools.

Like McCollum, though, the decision in Engel only produced one dissent, that of Justice Potter Stewart. In this dissent, he argued that the Establishment Clause was not violated by letting schoolchildren “who want to say a prayer say it” and that the Court had ignored history by “deny[ing] the wish of these school children to join in reciting this prayer [which also denied] them the opportunity of sharing in the spiritual heritage of our Nation.” For Stewart, the determinative history for this analysis was not the history of colonial America or the contemporaneous historical record of the First Amendment, but instead “the history of the religious traditions of our people, reflected in countless

169 Id. at 241.
170 Id. at 241, 244.
171 Id. at 256.
175 Newman, supra note 166, at 704.
176 Gordon, supra note 173, at 1212 (quoting Anthony Lewis, Supreme Court Outlaws Official School Prayers in Regents Case Decision: Ruling is 6 to 1, N.Y. TIMES, June 26, 1962, at 16 (quoting George Andrews of Alabama)).
178 Id. at 445.
practices of the institutions and officials of our government[,]” which included congressional legislative prayer, the presidential oath of office, The Star-Spangled Banner, the national motto, the Pledge of Allegiance, and the National Day of Prayer.\textsuperscript{179} He chastised the majority for an opinion that did not reflect the Court’s finding in \textit{Zorach v. Clauson} that “[w]e are a religious people whose institutions presuppose a Supreme Being.”\textsuperscript{180}

\textit{Schempp} joined \textit{Engel} to produce the most hate mail the Supreme Court had ever received.\textsuperscript{181} Although \textit{Schempp} did not inflame the public as much as \textit{Engel}, it still had vociferous critics and intransigent calls for non-compliance.\textsuperscript{182} It generated additional proposed constitutional amendments in Congress, with more than 150 introduced by the end of the eighty-eighth Congress in 1965.\textsuperscript{183} Many officials in Southern states openly defied the decision, with the Alabama Governor and the Arkansas State Attorney General advising the continuation of religious devotional exercise in the states’ public schools.\textsuperscript{184} In short, \textit{Schempp}, like its predecessors, was highly controversial and “widely disobeyed” by those who wished to maintain prayer and religious activities within public schools.\textsuperscript{185}

However, like \textit{McCollum} and \textit{Engel}, \textit{Schempp} did not result in a significant fracturing of the Court, producing only one dissent—again from Justice Stewart.\textsuperscript{186} In this dissent, Stewart argued that the Court committed an error if it did “not recognize, as a matter of history and as a matter of the imperatives of our free society, that religion and government must necessarily interact in countless ways.”\textsuperscript{187} Stewart also argued that “a doctrinaire reading of the Establishment Clause leads to irreconcilable conflict with the Free Exercise Clause.”\textsuperscript{188} As a result of these two arguments, Stewart claimed the case presented “a substantial free exercise claim on the part of those who affirmatively desire to have their children’s school day open with the reading of passages from the Bible.”\textsuperscript{189} Thus, he characterized the Court’s refusal to permit such religious exercises in a compulsory state educational system as “not . . . the realization of

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\textit{See id. at 446–49.}
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\textit{Id. at 450 (quoting Zorach v. Clauson, 343 U.S. 306, 313 (1952)).}
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\textit{See Lain, \textit{supra} note 172, at 538.}
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\textit{See Stone, \textit{supra} note 174, at 826.}
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\textit{See Lain, \textit{supra} note 172, at 538 n.368 (discussing these officials’ pushback to \textit{Schempp}).}
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\textit{Id. at 309.}
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\textit{Id. at 312.}
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state neutrality, but rather [] the establishment of a religion of secularism, or at the least, as government support of the beliefs of those who think that religious exercises should be conducted only in private.”

However, Stewart conceded that state coercion always transgresses the Establishment Clause. He also emphasized the unique K-12 public school environment in the application of coercion considerations, noting that “[i]t is clear that the dangers of coercion involved in the holding of religious exercises in a schoolroom differ qualitatively from those presented by the use of similar exercises or affirmations in ceremonies attended by adults.” While he found no such evidence of coercion in the record, he still recognized that “the duty laid upon government in connection with religious exercises in the public schools is that of refraining from so structuring the school environment as to put any kind of pressure on a child to participate in those exercises.”

The plaintiffs in Wallace v. Jaffree suffered harassment similar to those in the other school prayer cases. Ishmael Jaffree, a self-described agnostic, initially brought the lawsuit “to stop teacher-initiated Bible readings and grace before lunch at the three public elementary schools attended by his children,” which continued to persist after “teachers ignored his requests to stop the vocal prayers.” Throughout the litigation, the Jaffree family suffered property damage, were targeted with hate mail, were shunned in their workplaces, and were taunted in their schools. Also, throughout the lawsuit and its appeal, widespread teacher and administrator-led prayer and Bible readings continued to occur in the classrooms and over the public address systems of Alabama schools.

The controversy surrounding the issues in Wallace mirrored the division of the Court. The decision was 6-3, producing three separate dissenting opinions authored by Chief Justice Warren Burger, Justice William Rehnquist, and Justice Byron White. Burger disagreed with the majority’s application of the Lemon test to find that the statute’s sole purpose “was to endorse and promote prayer.” Rehnquist took up the mantle of history in his dissent, arguing that “[t]he true meaning of the Establishment Clause can only be seen in its history.” He criticized the Court’s jurisprudence since Everson as being “[u]nsound

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190 Id. at 313.
191 See id. at 316.
192 Id.
193 See id. at 319.
194 Id.
196 See id.
197 See id.
199 See id. at 85, 88–89 (Burger, J., dissenting).
200 Id. at 113 (Rehnquist, J., dissenting).
constitutional doctrine” because it was built “upon a mistaken understanding of constitutional history” of Jeffersonian separationism.\textsuperscript{201} Instead, Rehnquist concluded that Madison just “saw the [First] Amendment as designed to prohibit the establishment of a national religion, and perhaps to prevent discrimination among sects.”\textsuperscript{202} As a result, he labeled McCollum, Engel, and Schempp ahistorical and advocated for their abandonment.\textsuperscript{203} He argued that history demonstrated that “Congress did not mean that the Government should be neutral between religion and irreligion.”\textsuperscript{204} He concluded that the drafters of the Bill of Rights would be shocked by the majority’s decision because “[n]othing in the Establishment Clause of the First Amendment, properly understood, prohibits any such generalized ‘endorsement’ of prayer” by a state for its public schools.\textsuperscript{205} White wrote that Rehnquist’s dissent compelled him to reconsider all of the Court’s education law Establishment Clause cases.\textsuperscript{206}

Rehnquist’s dissent in Wallace became a standard-bearer for advocating for the abandonment of the Court’s then-fifty years of school prayer precedent. Justice Antonin Scalia incorporated it into his dissent in Lee, which Rehnquist, White, and Justice Clarence Thomas joined.\textsuperscript{207} In the Lee dissent, Scalia took the baton on the position that the Establishment Clause’s meaning must “be determined by reference to historical practices and understandings.”\textsuperscript{208} He criticized the majority opinion for being “bereft of any reference to history” and the Court for “invent[ing] a boundless, and boundlessly manipulable, test of psychological coercion[.]”\textsuperscript{209} For Scalia, the key dividing line for the permissibility of religious exercises in schools under the First Amendment was “one which accords with history and faithfully reflects the understanding of the Founding Fathers.”\textsuperscript{210}

Applying this line, Scalia argued that because “[t]he history and tradition of our Nation are replete with public ceremonies featuring prayers of thanksgiving” and because students prayed in a church hall during the “first public high school graduation ceremony” the same month the Fourteenth Amendment was ratified, public school invocations did not violate the

\textsuperscript{201} Id. at 91–92.
\textsuperscript{202} Id. at 98.
\textsuperscript{203} See id. (“Stare decisis may bind courts as to matters of law, but it cannot bind them as to matters of history.”).
\textsuperscript{204} Id. at 100.
\textsuperscript{205} Id. at 113–14.
\textsuperscript{206} See id. at 90–91 (White, J., dissenting).
\textsuperscript{208} Id. at 631 (quoting Cty. of Allegheny v. ACLU, 492 U.S. 573, 657, 670 (1989)).
\textsuperscript{209} Id. at 631–32.
\textsuperscript{210} Id. at 632 (quoting Sch. of Dist. of Abington Twp., v. Schempp, 374 U.S. 203, 294 (1963) (Brennan, J., concurring)).
Establishment Clause. He flat-out rejected the majority’s inclusion of indirect social coercion within what the Establishment Clause proscribes, arguing that impermissible constitutional coercion is instead circumscribed to those “acts backed by threat of penalty.”

Rehnquist, joined by Scalia and Thomas, incorporated his Wallace dissent into his dissent in Santa Fe. This dissent focused on criticizing the majority’s application of Lemon. However, it also levied substantial criticism against the majority opinion, stating that “it bristles with hostility to all things religious in public life[,]” which was not “faithful to the [original] meaning of the Establishment Clause[.]”

The continued use of the Rehnquist Wallace dissent as a touchpoint in subsequent school prayer cases demonstrates how incredibly contentious school prayer cases have been for the Court and the country. For example, in Lee, Deborah Weisman, the eighth-grader who initiated the lawsuit with her father, received hate mail and death threats throughout the pendency of the appeal. Throughout the Santa Fe case, the plaintiffs had to seek a protective order to litigate anonymously to shelter them “from intimidation or harassment” from school district employees, parents, and other students. These cases show that, as Professor Steven Epstein has observed, “the price of challenging unconstitutional establishments of religion can be exacting” and can result in “hostility, enmity, persecution, and attacks.”

This division within the nation and the Court continued with the response to Kennedy, the Court’s last extended substantive analysis of the Establishment Clause in the context of school prayer—albeit through the lens of a Free Speech and Free Exercise case brought by a school employee. This record also demonstrated threats related to Kennedy’s prayers. However, unlike the other school prayer cases, these threats were lodged against the defendant school district and the head football coach, who believed they had complied with the

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211 Id. at 633, 635–36.
212 Id. at 642.
214 See id.
215 See id. at 318.
217 Santa Fe, 530 U.S. at 294.
218 Epstein, supra note 166, at 2169.
Establishment Clause. The head coach received hostile and threatening communications and was accosted after a football game about Kennedy’s prayers.\(^{220}\) Similarly, the school district was flooded with hateful and threatening emails, letters, and phone calls, shutting down its entire telephone system.\(^{221}\)

The *Kennedy* decision also generated intense reactions from all sides of the ideological spectrum. Some claimed the case destroyed the Court’s Establishment Clause jurisprudence and the Establishment Clause itself.\(^{222}\) Conversely, others enthusiastically lauded the case as “another victory for religious freedom.”\(^{223}\) There has been incredibly divisive back-and-forth parrying between these two contingents ever since.\(^{224}\)

*Kennedy*’s two opinions also starkly demonstrated the “partisan polarization on religious issues on the Roberts Court.”\(^{225}\) Justice Neil Gorsuch’s majority opinion was joined by the other justices who compose the conservative bloc on the Court and who had “voted most often for the religious side” in cases, with percentages ranging from 93 to 100 percent in 2020.\(^{226}\) Justice Sonia

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\(^{220}\) See J.A. at 346, *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022) (No. 21-418) [hereinafter *Kennedy* Joint Appendix] (providing Coach Nathan Gilliam’s statements about the “distraction and stress” caused by the prayers, his receipt of “hostile and even threatening” communications, and his encounter with an adult stranger after one football game who cursed at him “in a vile manner”).

\(^{221}\) *Id.* at 351.


Sotomayor’s dissent was joined by Justice Stephen Breyer and Justice Elena Kagan, whose commensurate statistics in 2020 for voting for the religious litigants ranged from 29 to 73 percent.227 Statistics like these, supplemented by the Court’s decisions in Kennedy and Carson v. Makin, reaffirm the validity of concerns that the “Supreme Court [is now] controlled by a conservative supermajority that is eager to expand religious freedom.”229

In the Kennedy dissent, Sotomayor levied similar criticism on the majority’s approach while arguing that “[t]he Constitution does not authorize, let alone require, public schools to embrace [Kennedy’s] conduct.”230 She contended that the majority wrongly “misread the record”; ignored the “context and history” of Kennedy’s years of leading prayers and giving religious speeches to his students; jeopardized decades of school prayer precedent by overruling Lemon and its so-called “offshoot[s]”; wrongfully replaced endorsement analysis with a new historical tradition approach; “and applie[d] a nearly toothless version of the coercion analysis, failing to acknowledge the unique pressures faced by students when participating in school-sponsored activities[,]” all of which disserved “[schools and the young citizens they serve[.].]”231 The dissent ultimately concluded that the Court perilously “erod[ed] the protections for religious liberty for all” and that the decision, “[a]s much as the Court protests otherwise,” was “no victory for religious liberty.”232

III. Kennedy’s Encroachments on School Prayer Jurisprudence

Like Everson, Kennedy could be called a quiet revolution of education law Establishment Clause jurisprudence.233 In doing so, two inaccurate assertions about the case must first be dispelled. First, Kennedy did not expressly overrule the Court’s preceding 75 years of its jurisprudence involving religious activities
in public schools despite some critical claims to the contrary.\footnote{See, e.g., Mark Joseph Stern, \textit{Supreme Court Lets Public Schools Coerce Students Into Practicing Christianity}, \textit{Slate} (June 27, 2022, 4:19 PM), https://slate.com/news-and-politics/2022/06/coach-kennedy-bremerton-prayer-football-public-school.html (claiming \textit{Kennedy} “overruled a half-century of precedent to elevate the rights of public school officials over students”).} Second, despite some post-decision clamors, \textit{Kennedy} did not expressly hold that school official-led prayer of students is now constitutional.\footnote{See, e.g., Ali Swenson, \textit{Posts Distort Supreme Court Ruling on Coach’s Prayer}, \textit{Associated Press} (July 1, 2022), https://apnews.com/article/fact-check-supreme-court-coach-prayer-schools-602630743738 (outlining a variety of mischaracterizations of \textit{Kennedy}’s holding, including that “‘staff and coaches can now lead students in prayer in public schools’”).} However, \textit{Kennedy} has effected a significant catalytic change to the future trajectory of the Court’s decision-making in school prayer cases in a subtle and harmful way through a series of four substantial encroachments on this longstanding precedent. First, the opinion glosses over, deviates from, and ignores critical contextual facts and factual inconsistencies in the record, which contradicts the extant endorsement and coercion analysis required by the Court’s own school prayer jurisprudence. This shunt of the Court’s appropriately protective role of K-12 schools in Establishment Clause analysis has harmed Bremerton students and will harm schoolchildren throughout the country. It also has damaged the Court itself because its blatant disregard for a truthful narrative of the case undercuts the decision’s legitimacy and the decision-makers’ authority. Second, the majority opinion inaccurately presents the case’s procedural history, ultimately resulting in an informal overruling of \textit{Lemon} and its undefined endorsement “offshoots” that provides little guidance to school districts and lower courts in evaluating future school prayer cases and that places the Court’s other seminal school prayer cases on the chopping block. Third, the majority opinion embraces an exclusive history and tradition interpretation of the First Amendment religion clauses for school prayer cases based upon inapposite precedent that runs counter to the decades of the Court’s school law precedent without acknowledging this asymmetry. Finally, it inaccurately equates impermissible government coercion in school prayer cases only with direct coercion in a further tipping of its hand that its longstanding school prayer precedent will no longer be applied faithfully by this Court.

The net result of these jurisprudential errors is the creation of a faulty and dangerous zero-sum game between the Religion Clauses in public schools through the guise of purporting to cure the constitutional misdeeds of a school district hellbent on being hostile to religion. These errors are all incorporated in a subtextual, coded way that falsely evinces that the Court is merely doing what it has always done in its school prayer cases. These \textit{Kennedy} components work together to erode the Court’s actual Establishment Clause jurisprudence regarding religious activities in schools, and these deleterious erosions provide sufficient fodder, if not a call to arms, for future arguments that school prayer does not violate the First Amendment. Consequently, these quiet encroachments
may well become the raging torrents to which the Court warned we, like the Framers, should heed.\textsuperscript{236}

\textbf{A. Ellipses and Inconsistencies: Kennedy’s Blurry Factual Narrative}

Much has been made about the facts of this case throughout its litigation. For example, in describing oral argument before the Ninth Circuit, Kennedy stated that one of the judges “made up his own facts.”\textsuperscript{237} Disputes regarding these facts continued past the Ninth Circuit to the Supreme Court’s decision. While the dissenters stated the majority “misconstrue[d] the facts,”\textsuperscript{238} other commentators claimed that the Court outright lied about the facts in the majority opinion.\textsuperscript{239} This gave rise to charged criticism that these were lies about lies.\textsuperscript{240} Given these contentious claims, the presentation of the facts in the \textit{Kennedy} majority opinion must be compared comprehensively with the appellate record. Such an extended examination yields multiple examples of how the decision’s factual omissions and distortions have upended the Court’s previous precedential commitment to engage in a complete contextual Establishment Clause analysis of school prayer issues.

\textbf{1. The Different Story of the \textit{Kennedy} Majority Opinion}

The \textit{Kennedy} majority opinion’s first sentences encapsulate its framing of the entire narrative: “Joseph Kennedy lost his job as a high school football coach because he knelt at midfield after games to offer a quiet prayer of thanks . . . while his students were otherwise occupied.”\textsuperscript{241} According to the Court, the Bremerton School District disciplined Kennedy for his action “because it thought anything less could lead a reasonable observer to conclude (mistakenly) that it endorsed Mr. Kennedy’s religious beliefs.”\textsuperscript{242} This “misguided” reasoning was based on the district’s improper understanding that the Establishment Clause “require[s] the government to single out private

\textsuperscript{236} See \textit{Sch. Dist. of Abington Twp. v. Schempp}, 374 U.S. 203, 225 (1963) (discussing how incremental state encroachments on the neutrality required by the Establishment Clause were concerns warned against by Madison).

\textsuperscript{237} \textit{Promise Keepers Interview, supra} note 1, at 40.21.

\textsuperscript{238} \textit{See Kennedy}, 142 S. Ct. at 2434 (Sotomayor, J., dissenting).


\textsuperscript{240} \textit{See, e.g., Conn Carroll, The Left’s New Smear Against Gorsuch, WASH. EXAM’r} (June 28, 2022, 2:03 PM), https://www.washingtonexaminer.com/opinion/the-lefts-new-smear-against-gorsuch (arguing that liberal media outlets have “published items falsely accusing Gorsuch of ‘lying’ and relying on ‘falsehoods’ to support his majority opinion” in \textit{Kennedy}).

\textsuperscript{241} \textit{Kennedy}, 142 S. Ct. at 2415.

\textsuperscript{242} \textit{Id.} at 2416.
religious speech for special disfavor.”^{243} Therefore, the Court found that this
discipline violated Kennedy’s First Amendment Free Exercise and Free Speech
rights because “[t]he Constitution and the best of our traditions counsel mutual
respect and tolerance, not censorship and suppression, for religious and
nonreligious views alike.”^{244}

After this introduction, the Court told the coach’s story this way.^{245} In
2008, Kennedy became a Bremerton High School (BHS) football coach.^{246} “Like
many other football players and coaches across the country, Kennedy gave
‘thanks through prayer on the playing field’ at the conclusion of each game.”^{247}
These “quiet” prayers expressed gratitude for the players and the game, lasted
around 30 seconds, and were delivered “after the players and coaches had shaken
hands, by taking a knee at the 50-yard-line[].”^{248}

Kennedy prayed alone initially. However, his players started praying
alongside him over time; after some games, most of his and the opposing teams
would join Kennedy in his prayer.”^{249} Kennedy gave “short motivational speeches
with his prayer” during these instances.^{250} The team would also sometimes be
led in prayer by Kennedy before and after games in the locker room in a tradition
that predated his hiring.^{251} Kennedy stated that he never told students “‘it was
important they participate in any religious activity.’”^{252} He also “‘never pressured or encouraged any student to join’ his postgame midfield prayers.”^{253}
The Court emphasized that there were no complaints to the school district about
these prayers “[f]or over seven years.”^{254}

How, then, did this innocuous case end up in the Supreme Court? After
an individual praised these prayers to the district superintendent in September
2015, the district quickly reacted. It identified “‘two problematic practices’” in a
September 17, 2015 letter to Kennedy: 1) his delivery of the midfield
motivational speeches with the students that included “‘overtly religious
references’” and that likely constituted prayer with the students and 2) his

243 Id.
244 Id.
245 See id.; see also John V. Orth & Paul T. Babie, Not Child’s Play: A Constitutional Game of
(using Kennedy as one example of the “ongoing process of constitutional pass the story”).
246 See Kennedy, 142 S. Ct. at 2416.
247 Id. (internal citation omitted).
248 Id.
249 See id.
250 Id.
251 See id.
252 Id.
253 Id.
254 Id.
leadership of students and coaches in locker room prayer.\textsuperscript{255} To resolve the “direct tension between” the Establishment Clause and Kennedy’s First Amendment rights, the district explained that Kennedy’s “free exercise rights ‘must yield so far as necessary to avoid school endorsement of religious activities.’”\textsuperscript{256} Consequently, the district instructed Kennedy to refrain from leading religiously expressive motivational speeches and prayers with students and from encouraging or discouraging student prayer.\textsuperscript{257} If students were also engaged in religious conduct, Kennedy’s religious activity was to be “nondemonstrative (i.e., not outwardly discernible as religious activity)” in order to “avoid the perception of endorsement.”\textsuperscript{258}

After receiving this letter, Coach Kennedy stopped leading locker-room prayers and no longer included religious references or prayer in his postgame, on-field speeches to the players.\textsuperscript{259} He also “felt pressured to abandon his practice of saying his own quiet, on-field postgame prayer[,]” which “‘broke[,] [his] commitment to God.’”\textsuperscript{260} As a result, after a game, he returned to the field once everyone left the stadium to kneel on the 50-yard line and pray.\textsuperscript{261}

Kennedy, through counsel, sent a letter on October 14, 2015, to the school district “informing them that, because of his ‘sincerely-held religious beliefs,’ he felt ‘compelled’ to offer a ‘postgame personal prayer’ of thanks at midfield” and “asked the district to allow him to continue that ‘private religious expression’ alone.”\textsuperscript{262} Kennedy explained that he did not request, encourage, or discourage student participation in the prayer and “that he sought only the opportunity to ‘wait until the game is over and the players have left the field and then walk to mid-field to say a short, private, personal prayer.’”\textsuperscript{263} However, he objected to the “logical implication” of the district’s letter that he was “bann[ed] ‘from bowing his head’ in the vicinity of students” and required to “flee the scene” when praying if students came near.\textsuperscript{264}

According to the majority opinion, the district responded with an ultimatum in an October 16, 2015 letter shortly before the next football game rather than providing Kennedy with his requested accommodation “to offer a brief prayer on the field while students were busy with other activities[.]”\textsuperscript{265} The school district expressly forbade Kennedy “from engaging in ‘any overt actions’

\textsuperscript{255} Id.
\textsuperscript{256} Id. at 2417.
\textsuperscript{257} See id. at 2416–17.
\textsuperscript{258} Id. at 2417.
\textsuperscript{259} Id.
\textsuperscript{260} Id.
\textsuperscript{261} Id.
\textsuperscript{262} Id.
\textsuperscript{263} Id.
\textsuperscript{264} Id.
\textsuperscript{265} See id.
that could ‘appea[r] to a reasonable observer to endorse . . . prayer . . . while he is on duty as a District-paid coach’ . . . because it judged that anything less would lead it to violate the Establishment Clause.”

“After receiving this letter, Mr. Kennedy offered a brief prayer following the October 16 game . . . at midfield” while most of his team was singing the fight song in front of the stands.267 Alone when he started to pray, Kennedy was joined by the opposing team’s players and community members during the prayer.268 According to the majority, “[t]his event spurred media coverage of Mr. Kennedy’s dilemma” and led to the district’s enforcement of its prohibition on public access to the field by police officers.269

The district sent another pregame letter to Kennedy on October 23, 2015, expressing appreciation for Kennedy’s “‘efforts to comply’ with the District’s directives” to avoid praying with the football players in the locker room and on the field after games and acknowledging that students did not pray with him during his “‘fleeting’” postgame prayer on October 16.270 However, because the district’s perspective was that “a ‘reasonable observer’ could think government endorsement of religion had occurred when a ‘District employee, on the field only by virtue of his employment with the District, still on duty’ engaged in “overtly religious conduct[,]” it “made clear that the only option it would offer [Kennedy for religious accommodation] was to allow him to pray after a game in a ‘private location’ behind closed doors and ‘not observable to students or the public.’”

Instead, Kennedy bowed his head in “‘brief, quiet prayer’” alone while kneeling on the 50-yard line after the October 23 football game, which was deemed “‘unconstitutional’” by the district superintendent.272 On October 26, Kennedy “again knelt alone to offer a brief prayer as the players engaged in postgame traditions”; adults “gathered around him” during the prayer; and his players rejoined him “for a postgame talk” after singing the fight song.273

Kennedy was put on paid administrative leave “for engaging in ‘public and demonstrative religious conduct while still on duty as an assistant coach’” during his October 16, 23, and 26 postgame prayers.274 This was explained in a letter from the superintendent that criticized Kennedy for praying and “faulted [him] for not being willing to pray behind closed doors.”

266 Id. at 2417–18.
267 Id. at 2418.
268 See id.
269 Id.
270 Id.
271 Id.
272 Id.
273 Id.
274 Id. at 2418–19.
275 Id. at 2419.
to the public that it had no evidence of direct coercion of students to pray with Kennedy and that Kennedy had stopped leading pregame locker room prayers and postgame field prayers in compliance with the district’s instructions. The district further communicated to the public that it could not permit Kennedy “to engage in a public religious display” as that would be an Establishment Clause violation based on the idea that “reasonable . . . students and attendees’ might perceive the ‘district [as] endors[ing] . . . religion.”

The majority concluded its summary of the facts by stating that Kennedy was given a “poor performance evaluation” that advised against his rehiring after the conclusion of the 2015 football season despite receiving “uniformly positive evaluations” for the duration of his employment at the high school. The recommendation against hiring was based on a failure “to follow district policy regarding religious expression” and a failure “to supervise student-athletes after games.” The following football season, Kennedy did not return. After that, Kennedy sued the school district, claiming it violated his Free Speech and Free Exercise rights. And so ended the majority’s factual narrative.

However, this version of the facts does not provide the complete context of the events from 2008 to 2015 that composed the controversy that gave rise to the litigation. A careful examination of the Joint Appendix filed with the Court reveals several relevant facts about the communications between Kennedy and the school district that are omitted in the majority opinion. Such a careful examination also reveals critical factual inconsistencies at the core of the controversy related to Kennedy’s October 2015 prayers that give rise to genuine issues of material fact concerning the case. Consequently, the net result of this examination affirms the veracity of the dissent’s statement that the majority opinion “tells a different story” than what is reflected in the appellate record. The opinion’s different factual story is significantly injurious as it affects the accuracy of the Court’s precedential analysis and results in the granting of an improper remedy in the case; it inappropriately broadens the holding beyond the facts of the underlying case; and it undercuts the legitimacy of the Court as an American governmental institution.

276 See id.
277 Id.
278 Id.
279 Id.
280 Id.
281 See id.
282 See id.
283 See Kennedy Joint Appendix, supra note 220.
284 Kennedy, 142 S. Ct. at 2435 (2022) (Sotomayor, J., dissenting).
2. Factual Omissions and Inconsistencies Regarding Kennedy’s Pre-
October 2015 Prayers and Religious Speeches

The Kennedy majority failed to acknowledge a host of relevant facts and
factual inconsistencies in the appellate record about Kennedy’s pre-October 16
religious practices at the high school. These omissions include any mention of
the record’s factual inconsistencies regarding Kennedy’s history of praying and
proselytizing the football team; a complete discussion of the fall 2015 events
related to the case’s controversy; and a failure to identify inarguable
Establishment Clause violations arising out of Kennedy’s locker-room prayers
and on-field religious speeches. These omissions are substantial because the
Court failed to acknowledge the full context in which the school district was
making its decisions regarding Kennedy’s religious accommodations request,
which runs contrary to the precedent that the district was applying and that the
Court should have used in resolving the Establishment Clause issue.

Although not mentioned once in the 32-page opinion,285 the fact that
Kennedy was a practicing Christian was an uncontroverted part of the record.286
The record is also clear that Kennedy “became an active Christian after watching
the evangelical film ‘Facing the Giants’—about a faith-challenged high-school
football coach[,]” which was the catalyst for his post-football game prayers to
God.287 While these facts are stated consistently throughout the record, the Joint
Appendix is replete with factual inconsistencies about the explicitly Christian
nature of Kennedy’s pre-October 16 prayers and motivational speeches.
Although one paragraph of the Complaint alleged that Kennedy would give
motivational speeches that “often involved religious content” to the players after
football games,288 a conflicting averment in the next paragraph claimed that
Kennedy would not “say ‘under God’ or anything involving religion” in the
postgame speeches.289 The October 14 letter from Kennedy to the district stated
that he did “not pray in the name of a specific religion or deity, and he [did] not
say ‘amen.’”290 However, Kennedy’s statement in support of his motion for
preliminary injunction provided that his postgame speeches were addressed to
the “Lord.”291 Similarly, in its October 16 letter, the district referenced a
“published video of Mr. Kennedy beginning his postgame address on September
14, 2015, with the word ‘Lord,’ and ending it with the word ‘amen.’”292

285 See id. at 2407 (majority opinion).
286 See Kennedy Joint Appendix, supra note 220, at 148, 168.
287 Id. at 74. See also id. at 148, 168.
288 Id. at 149.
289 Id. at 150.
290 Id. at 63–64.
291 Id. at 170.
292 Id. at 77.
However, the majority noted none of these inconsistencies in reciting the facts. The words “Lord” and “amen” do not appear once in the opinion, and the word “God” is only used in the part of the majority’s story where Kennedy “felt upset that he had ‘broken [his] commitment to God’ by not offering his own prayer[.]”

This failure to include a complete discussion of Kennedy’s religion and the factual inconsistencies about the nature of the pre-October 2015 prayers is significant, as it blurs the context of the decision-making environment for the district at the time.294

Additionally, no mention is made in the majority opinion of the record facts related to the September 11, 2015 football game, which was the pivotal date identified by Kennedy as the start of “the controversy over [his] prayers with the team[,]”295 Before that football game, the head coach informed Kennedy that school leadership had determined he could no longer engage in his prayers.296 After the game, despite the coach’s instructions to cease leading the prayers with the students, Kennedy led the prayer with the students after a student kneeled in front of him and asked him to pray.297 After praying with the students on the field, Kennedy stated that the head coach “mouthed . . . ‘They’re going to fire you,’” which that coach denied.298 Kennedy posted to Facebook on the bus ride

294 While the majority carries fault with its omission of these record factual consistencies, it bears mention that Kennedy described the events of the case in the press in inconsistent ways on multiple occasions. For example, despite Kennedy’s statement in an interview with Bill O’Reilly on Fox News that he didn’t even “mention the word ‘God’ in his prayers[,]” there are multiple facts that belie this assertion. Fox News, High School Coach Under Fire for Postgame Prayer, YouTube (Nov. 3, 2015), https://www.youtube.com/watch?v=tHIOANOpM. During his interviews with the press following the October 16 prayer, Kennedy shared his prayer with the media, saying that “[I]t was some version of the basic prayer he’s said for years[].] ‘Lord, I thank you for these kids and the blessing you’ve given me with them. We believe in the game, we believe in competition and we can come into it as rivals and leave as brothers,’” Christine Clarridge, Crowd Prays with Coach as he Defies School District, SEATTLE TIMES (Oct. 16, 2015, 10:24 PM), https://www.seattletimes.com/seattle-news/education/scores-join-coach-in-postgame-prayer/. The press also confirmed that there was a recording of Kennedy using the words “Lord” and “amen” to begin and end his prayers. See id. (confirming this recording). Finally, Kennedy stated in another interview that, during the last year he coached, every team in the district joined in the postgame prayers, in which he held up the two teams’ helmets, expressly thanked “God,” and ended with “in Your Name” and “amen.” Promise Keepers Interview, supra note 1, at 5.00. Thus, Kennedy inconsistently presented the facts in the public sphere, just as the facts were presented inconsistently in the record. However, this certainly does not exonerate the Court for its corollary omissions.
295 See id. at 21, 270, 361. Kennedy’s response was, “‘This is America. The Constitution. You know, I have the right to freedom of speech . . . . What’s the worst thing that they could do to me?’” Id. at 270.
296 See id. at 271. Specifically, “one of the kids kneeled in front of [Kennedy], handed [him] his helmet and said, ‘Coach, would you use this in the prayer?’” to which Kennedy responded, “‘Absolutely.’” Id.
297 See id. at 271, 361.
home that he thought he “just might have been fired for praying.”  

The question might arise of why the omissions of these facts and these factual inconsistencies in the record matter when the majority determined that the contested religious exercise before the Court did “not involve leading prayers with the team or before any other captive audience.”  

The Court emphasized that Kennedy “voluntarily discontinued the school tradition of locker-room prayers and his postgame religious talks to students” when requested by the school district.  

Consequently, for the majority, the contested religious exercise was limited very narrowly to “[t]he District disciplin[ing] him only for his decision to persist in praying quietly without his players after three games in October 2015.”  

The pre-October 2015 events matter because the district did not have the luxury to act within a vacuum when evaluating its exposure to potential liability for allegations of Establishment Clause violations based on Kennedy’s prayers. In making its determinations in October, the district had witnessed Kennedy leading students in prayer at the September 11 and September 14 games in direct contravention of his supervisor’s directions to “cease these activities.”  

This occurred during the district’s extensive investigation that revealed Kennedy had been leading overtly religious prayers and giving overtly religious speeches to students before and after games for over seven years. The district also had to consider Kennedy’s September 19 media comment that he “would not ensure that he could” follow the district’s policy. In that local news report, Kennedy was quoted as saying, “You know the Lord works in mysterious ways . . . I have been a loose cannon from time to time.”  

None of these crucial contextual facts from the record about these September events are included in the majority’s opinion.  

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299 Id. at 271.  
300 Id. at 361–62.  
302 Id.  
303 Id.  
304 Kennedy Joint Appendix, supra note 220, at 41. Although not in the record, Kennedy acknowledged in an interview that he is “a rebellious kind of guy” and that his response to being told not to pray on September 11 was, “What are you going to do about it? . . . They can’t do anything to me. I’m not a teacher; I’m just a high school football coach, and I can’t give a prayer of thanks. Give me a break.” Promise Keepers Interview, supra note 1, at 7:27, 9:05.  
305 See Kennedy Joint Appendix, supra note 220, at 40–45.  
306 Id. at 54.  
307 Id.  
308 The majority also omitted any reference to an October 14 article in the record, in which Kennedy is described as planning to continue his “postgame ritual at midfield after each game [of] a motivational talk and prayer.” See id. at 74 (providing the text of Mike Carter, Bremerton
However, this context was central to the district’s decision to place Kennedy on administrative leave. And, in contrast to the Court’s narrow determination that “[t]he District disciplined [Kennedy] only for his decision to persist in praying quietly without his players after three games in October 2015[,]” the factual record demonstrates that the basis for Kennedy’s placement on administrative leave was much broader than that. The sole decisionmaker for this action, the district superintendent, testified that his “basis for putting Coach Kennedy on leave was that he continued to disobey directives from me [and that Kennedy] was invited to come meet with me to further discuss any accommodations or solutions, and he did not engage on that level.” The superintendent further testified that Kennedy “continued to do exactly what his position and his position of his attorneys outlined for him to do in [their October 14] letter . . . [in] that the only accommodation that would be suitable for Coach Kennedy was to continue the exact practice that he was already engaged in.”

So, at the time of its decision-making (and still to this day), the district was bound to examine the complete context surrounding Kennedy’s prayers under *Lee* and *Santa Fe*, in which the Court required examinations of the contexts surrounding school prayers to decide whether such prayer violated the Establishment Clause. The Court made clear in *Santa Fe* that it would not “turn a blind eye to the context” in which school prayers arose. This case law also emphasized that “Establishment Clause jurisprudence remains a delicate and fact-sensitive one” with particular distinction within “the public school context.” This 360-degree context has critical resonance in evaluating “prayer exercises in public schools [as they] carry a particular [and pronounced] risk of indirect coercion.”

This complete context matters when analyzing potential Establishment Clause issues in public schools under all of the Court’s education law precedent. At least, it did matter until the *Kennedy* majority quietly omitted key contextual facts and ignored factual inconsistencies in making its determinations that the

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310 See *Kennedy* Joint Appendix, supra note 220, at 193 (providing District Superintendent Aaron Leavell’s deposition testimony that he was “the sole decisionmaker in the decision to suspend Coach Kennedy”).

311 *Id.* at 218–19.

312 *Id.*


314 *Santa Fe*, 530 U.S. at 315.

315 *Lee*, 505 U.S. at 597.

316 *Id.* at 592.
case had no Establishment Clause violations, that it presented no material issues of fact that needed resolution before a proper application of Establishment Clause analysis, and that Kennedy was entitled to summary judgment on his claims. This abandonment of analysis of the context in which the religious activities in school arose, without directly acknowledging it, injuriously encroaches upon the Court’s longstanding education law Establishment Clause jurisprudence.

Another substantial blow to the foundations of school prayer jurisprudence was the Court’s failure to identify clear transgressions of the Establishment Clause by Kennedy’s pre-October 2015 practices of leading his students in prayer before and after the football games and delivering religious speeches to them. Under the Court’s pre-Kennedy case law, school official-led prayer of students, like the years-long tradition of Kennedy and other school staff leading students in locker-room prayer, violates the Establishment Clause. Under this same jurisprudence, the delivery of religiously expressive prayers and motivational speeches by a school coach to players on his team and other schools’ teams on the football field after football games, like Kennedy’s prior years-long tradition, violates the Establishment Clause. Kennedy tacitly acknowledged in the record and in media appearances that he did not have a Free Exercise right to lead the pregame prayers to “a captive audience” and that such prayers violated the Constitution. Like Kennedy’s admissions, a legitimate Establishment Clause decision would have acknowledged that these previous practices constituted clear First Amendment violations. However, the majority opinion fails to include any such acknowledgment.

Proponents of the majority’s jurisprudential approach might counter that this would be unnecessary dicta given the Court’s limitation of Kennedy’s Free Speech and Free Exercise claims as being based on “[t]he District disciplin[ing] him only for his decision to persist in praying quietly without his players after three games in October 2015.” However, the context of Kennedy’s years of school prayer practices is critical for proper establishment analysis under cases that have not been overruled, abrogated, or abandoned. Further, it would be disingenuous to claim that the Supreme Court has fastidiously avoided the inclusion of dicta in any of its modern opinions. Consequently, the Court should have included at least a sentence in its opinion (even if in a footnote) identifying

318 See id. at 2417.
319 See id. at 2416.
320 See Kennedy Joint Appendix, supra note 220, at 74 (providing that, in October 2015, Kennedy “acknowledged that he [had] routinely held pregame locker-room prayers, which he now agrees involved a ‘captive audience’” and he “said at a news conference [that] he will no longer hold those pregame prayers’); King 5, “Praying Coach” Joe Kennedy Prepares to Head to Court, YOUTUBE (June 12, 2017), https://www.youtube.com/watch?v=odQ37UozhoY (stating that he fully agreed with the district that the pregame prayers were to a “captive audience” and that he stopped leading them when instructed to do so).
321 Kennedy, 142 S. Ct. at 2422.
these pre-October 2015 prayer practices as clear Establishment Clause violations. Its failure to do so is yet another example of the Kennedy majority laying the foundation for future advocacy of expanded state-sponsored religious activities within public schools.

3. Factual Omissions and Inconsistencies Related to the Communications Between Kennedy and the School District

The Court also omitted relevant details about the district’s policies and the communications between the district and Kennedy. For example, nowhere in the majority opinion can one find the existing board policy that was communicated in the September 17, 2015 letter as the basis for the district’s initial investigation of Kennedy that provided that “School staff shall neither encourage nor discourage a student from engaging in non-disruptive oral or silent prayer or any other form of devotional activity.”\(^{322}\) The Court also omitted the facts in the record that both the superintendent of public instruction and the district superintendent had “no problem with ‘students or staff silently praying on their own.’”\(^{323}\) Further, the majority opinion does not mention the multiple instances, including the district’s September 17 letter, in which the district or its representatives stated concern that allowance of Kennedy’s prayer practices would expose the district to a “significant risk of liability” for violating the Establishment Clause.\(^{324}\)

The majority opinion instead presented the directives of the September 17 letter as if they were singular in nature, providing that “[t]he District also explained that any religious activity on Mr. Kennedy’s part must be ‘nondemonstrative (i.e., not outwardly discernible as religious activity)’ if ‘students are also engaged in religious conduct’ in order to ‘avoid the perception of endorsement.’”\(^{325}\) However, the letter’s directives were broader than this presentation by the majority. The letter reaffirmed the constitutional free exercise rights of school employees and provided two options for Kennedy in that exercise, explicitly stating:

You and all District staff are free to engage in religious activity, including prayer, so long as it does not interfere with job responsibilities. Such activity must be physically separate from any student activity, and students may not be allowed to join such activity. In order to avoid the perception of endorsement discussed above, such activity should either be nondemonstrative (i.e., not outwardly discernible as religious

\(^{322}\) Kennedy Joint Appendix, supra note 220, at 42.

\(^{323}\) Id. at 84, 88, 209.

\(^{324}\) Id. at 41. See also id. at 43, 45, 47, 50, 81, 95, 106, 107, 135, 138, 140, 141, 220.

\(^{325}\) Kennedy, 142 S. Ct. at 2417.
activity) if students are also engaged in religious conduct, or it should occur while students are not engaging in such conduct.\textsuperscript{326} Under the plain language of this letter that was not included in the majority opinion, the District stated that Kennedy could pray so long as it did not interfere with his job responsibilities; it was physically separate from student activity; students did not join in the prayer; and it took place while students were not engaged in religious conduct.\textsuperscript{327} Similar to the Court, Kennedy’s response in his October 14 letter also did not acknowledge this alternative option, and his specific request for religious accommodation in this letter was to allow him to continue “his postgame personal prayer” that he had engaged in “[s]ince August 2008 . . . whereby at the conclusion of each football game, he walks to the 50-yard line and prays.”\textsuperscript{328} This is not symmetrical with the majority opinion’s description of his requested accommodation in the letter that “he sought only the opportunity to ‘wait until the game is over and the players have left the field and then walk to mid-field to say a short, private, personal prayer.’”\textsuperscript{329} Kennedy’s letter also stated that his prayers were audible; that “he does not pray in the name of a specific religion or deity, and he does not say ‘amen[;]’” that they last about fifteen to twenty seconds; that he is unaware of people in the vicinity during them; and that they took place after his official duties had ceased.\textsuperscript{330} However, there were controverting facts for all of these assertions throughout the record that the majority again neglected to acknowledge within its version of the facts of the case.\textsuperscript{331} Further, the final paragraph of Kennedy’s letter provided that “[b]eginning October 16, 2015, Coach Kennedy will continue his practice of saying a private, postgame prayer at the 50-yard line.”\textsuperscript{332} This was not a mere request for a religious accommodation; it was a throwing down of the gauntlet. This was not, as the Court framed it, Kennedy “ask[ing] the District to allow him to continue his ‘private religious expression’ alone.”\textsuperscript{333} This was an express statement that Kennedy would not comply with the district’s directives following the big October 16 Homecoming football game.\textsuperscript{334} (If it is surprising that this critical date fell on Homecoming, don’t fault yourself; the majority opinion does

\textsuperscript{326} Kennedy Joint Appendix, supra note 220, at 45 (emphasis added).
\textsuperscript{327} See id.
\textsuperscript{328} Id. at 62.
\textsuperscript{329} Kennedy, 142 S. Ct. at 2417.
\textsuperscript{330} Kennedy Joint Appendix, supra note 220, at 63–64.
\textsuperscript{331} See Kennedy, 142 S. Ct. at 2407–33.
\textsuperscript{332} Kennedy Joint Appendix, supra note 220, at 71–72.
\textsuperscript{333} Kennedy, 142 S. Ct. at 2417.
\textsuperscript{334} See Kennedy Joint Appendix, supra note 220, at 38–39 (providing the football schedule showing that the October 16 game was Homecoming).
Ironically, although this letter stressed the importance of “the factual context surrounding Coach Kennedy’s practice” to understand why it was constitutionally protected, the majority opinion certainly does not present these facts from the letter (likely because they do not support the Court’s constitutional analysis).

The final communication mischaracterized by the majority opinion is the district’s October 16 letter in response to Kennedy. The Court described this letter as “an ultimatum[,]” in which “[i]t forbade Mr. Kennedy from engaging in ‘any overt actions’ that could ‘appear to a reasonable observer to endorse . . . prayer . . . while he is on duty as a District-paid coach.’” The majority stated that the district issued such an ultimatum as it “judged that anything less would lead it to violate the Establishment Clause.”

However, the October 16 letter did not issue an ultimatum; it reaffirmed the “guidance and expectations” of its September 17 letter to Kennedy and informed Kennedy that “strict adherence [to those directives was] required and expected.” The letter also informed Kennedy that the district was taking these actions “[g]iven the significant potential liability to which conduct violating those [September 17] guidelines would expose the District[.]” Notably, the September 17 letter had explained that this concern for liability was the result of an application of a Third Circuit school prayer case:

Given the marked similarity of facts between the [Borden v. School District of the Township of East Brunswick] case and Mr. Kennedy’s prior, long-standing and well-known history of leading students in prayer, the District has no choice but to conclude that a federal court would rule in the same way here. That is, any overt actions on Mr. Kennedy’s part, appearing to a reasonable observer to endorse even voluntary, student-initiated prayer, while he is on duty as a District-paid coach, would amount to District endorsement of religion in violation of the Establishment Clause.

Consequently, unlike the majority opinion’s characterization, the October 16 letter did not expressly forbid “Kennedy from engaging in ‘any overt actions’ that could ‘appea[r] to a reasonable observer to endorse . . . prayer . . . while he is on duty as a District-paid coach.’”

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335 See Kennedy, 142 S. Ct. at 2407–33.
336 See Kennedy Joint Appendix, supra note 220, at 63.
337 Kennedy, 142 S. Ct. at 2417–18.
338 Id. at 2418.
339 Kennedy Joint Appendix, supra note 220, at 81.
340 Id.
341 Id. (emphasis added).
342 Kennedy, 142 S. Ct. at 2417 (emphasis added).
Including ellipses within the majority’s decision here is incredibly troubling. This is an intentional deletion of relevant undisputed factual content from the record that runs counter to the majority’s selectively included, bits-and-pieces narrative. This feels very much like an attempt by the Court to reach a particular result that was not based on the actual facts of the case. The lack of inclusion of relevant facts about the other communications between Kennedy and the district compounds this effect.

Another more egregious example of the majority’s incomplete storytelling involves its characterization of the district’s October 23 letter to Kennedy following the Homecoming prayer, given that it omitted relevant factual content and contained a false statement of the record. Concerning this omission, the Court stated that the district explained in this letter “that a ‘reasonable observer’ could think government endorsement of religion had occurred when a ‘District employee, on the field only by virtue of his employment with the District, still on duty’ engaged in ‘overtly religious conduct.’” However, what is missing here is a critical component of this letter that incorporated the context of Kennedy’s actions in light of his years of prayer practice and his publicized-to-the-nation plans to pray after the October 16 game. Specifically, the district wrote: “More importantly, any reasonable observer saw a District employee, on the field only by virtue of his employment with the District, still on duty, under the bright lights of the stadium, engaged in what was clearly, given your prior public conduct, overtly religious conduct.” Here is yet another instance of the Court glossing over facts harmful to the overall narrative it was trying to present to support its subsequent decision.

The Supreme Court should refrain from crafting such narratives via omissions to support its analysis. This tail-wagging-the-dog approach to jurisprudence is illegitimate constitutional decision-making and detracts from the public’s trust in the Court. Indeed, in Kennedy and all cases, the Supreme Court should be basing its analysis on the facts as they are, rather than as the justices in the majority might wish them to be.

While omissions are one thing, false statements regarding the record are another. This type of jurisprudential approach undercuts the Supreme Court as an institution. After the extreme harms of intransigence after the issuance of factually accurate Supreme Court decisions within American history, the Court must avoid the loss of public trust through the inclusion of inaccurate facts within its decisions as it did in its following description of the October 23 letter: “The District thus made clear that the only option it would offer Mr. Kennedy was to allow him to pray after a game in a ‘private location’ behind closed doors and

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343 Id. at 2418.
344 Kennedy Joint Appendix, supra note 220, at 93 (emphasis added).
not observable to students or the public.” This is not a truthful reflection of the letter provided verbatim in the record. The October 23 letter provided various options by the district for constitutional accommodation of its employees’ Free Exercise rights. In the letter, the superintendent twice “emphasize[d] that the District does not prohibit prayer or other religious exercise by employees.” He specifically wrote that there is no prohibition on “prayer or other religious exercise by employees while on the job[],” so long as “such exercise must not interfere with the performance of job responsibilities, and must not lead to a perception of District endorsement of religion.” The letter then stated that Kennedy’s “conduct on October 16, 2015, [was] not consistent with these requirements.” The district proceeded to “make it clear that religious exercise that would not be perceived as District endorsement, and which does not otherwise interfere with the performance of job duties, can and will be accommodated.”

Then, contrary to the majority opinion’s characterization, the District did not make “clear that the only option it would offer Mr. Kennedy was to allow him to pray after a game in a ‘private location’ behind closed doors and ‘not observable to students or the public.’” Instead, the letter stated that it is “common for schools to provide an employee whose faith requires a particular form of exercise with a private location to engage in such exercise during the work day, not observable to students or the public, so long as this does not interfere with performance of job responsibilities.” It then provided an example that it could make “a private location within the school building, athletic facility or press box . . . available to [Kennedy] for brief religious exercise before and after games, if this will not interfere with [his] assigned duties.” The letter clearly identified this as an “example”; it does not make clear that this was “the only option” the district would offer Kennedy as the majority opinion stated. In actuality, the letter invited Kennedy “to discuss options” for accommodations of his private religious exercise while on the job “in a manner that will not violate the law.”

345 Kennedy, 142 S. Ct. at 2418 (emphasis added).
346 See Kennedy Joint Appendix, supra note 220, at 90–95.
347 Id. at 91, 93.
348 Id. at 91.
349 Id.
350 Id. at 93.
352 Kennedy Joint Appendix, supra note 220, at 94.
353 Id.
354 Id.
355 Kennedy, 142 S. Ct. at 2418 (emphasis added).
356 Kennedy Joint Appendix, supra note 220, at 93–94 (emphasis added).
This corresponded with the principal’s previous communications with Kennedy, in which he stated that Kennedy could pray alone on the 50-yard line after the school event was over. Specifically, the principal testified in his deposition that his direction to Kennedy was:

to do his job as coach, supervise the students like he was assigned. My understanding is that the head coach had certain duties for all the assistant coaches, and my understanding is that Joe’s were partially to continue to supervise students off the field to the locker room, make sure they got home safely or left the school.

And then that if there were any altercations, often there’s a potential for, you know, tempers flaring after games, we need coaches supervising to assure that kids don’t get in physical altercations, both with the team or with the other team. Those were part of his responsibility to maintain, you know, kind of line of sight of kids and then be in the locker room after the game. Those were—and my direction was, as soon as that’s done, you can go out and pray at midfield or do whatever you want to, but your job is to be a coach first.

The principal specifically stated that Kennedy was not “forbidden from praying” while on duty. Consequently, contrary to the majority’s opinion, the record demonstrates that Kennedy, rather than the district, proffered an exclusive option for his accommodation—that the prayer be “on the 50-yard line” and “immediately after games while in view of students and parents . . . and spectators” at the conclusion of the fourth quarter before the school event was over.

Overall, the majority’s incomplete and inaccurate recitation of the facts concerning the communications between the district and Kennedy contributed significantly to the illegitimacy of this decision. The justices in this majority will likely never disclose the reasons for these omissions and this false statement.

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357 See id. at 224 (“Even though the fourth quarter may have ended, the game, the event is not over. We have plenty of supervision that takes place after an event and coaches retain—and . . . the position of the District was that he’s still on the job until the event is over.”).
358 Id. at 223.
359 See id. at 223–24.
360 Id. at 100.
362 This is one of many examples of a failure to give reasons and a lack of transparency in the majority opinion, both of which are significant reasons for the delegitimization of the decision. See Christopher Bryant & Kimberly Breeden, How the Prohibition on “Under-Ruling” Distorts the Judicial Function (and What to Do About It), 45 PEPP. L. REV. 505, 522 (2018) (discussing the problems that result from a lack of “consistency and transparency” in judicial decision-making); Frederick Schauer, Giving Reasons, 47 STAN. L. REV. 633, 633–34 (1995) (arguing that a “necessary condition of rational” jurisprudence is reason-giving).
leaving the lingering question of “why?”. Arguably, this could be just sloppy jurisprudence. However, the sheer number of omissions in the majority opinion, some of which are intentional given the use of ellipses in specific quotations and the incomplete and inaccurate descriptions of the record, indicates more than a merely negligent approach to opinion writing. Further, the dissent pulls no punches in identifying these mischaracterizations and misreadings of the record multiple times, and the majority opinion purports that its justices read the dissenting opinion. So, framing the facts about the communications between the parties with these types of intentional omissions and inaccurate presentations gives rise to justifiable concerns that the Court engaged in results-oriented jurisprudence. This is incredibly significant to the future legitimacy of education law Establishment Clause decision-making, as Kennedy’s approach seems to indicate that any facts that hedge against a specific result—that of a finding that school prayer does not violate the Establishment Clause—will be omitted, disregarded, or falsely stated.

4. Factual Omissions and Inconsistencies Regarding Kennedy’s October 2015 Prayers

The Court’s failure to include core relevant facts and acknowledge significant inconsistencies within the record regarding Kennedy’s October 2015 prayers was also a jurisprudential error. Specifically, the Court did not provide an accurate account of the October 16 Homecoming game prayer. As a result, the majority engaged in faulty constitutional analysis that raises significant concerns about the integrity of the Court. Further, it used these factual omissions and distortions to issue a much broader edict than necessary to resolve the case, signaling to school prayer advocates that they should continue to transgress the once-clear Establishment Clause boundaries in public schools.

According to the Court, “Kennedy offered a brief prayer following the October 16 game.” The majority opinion offers two additional sentences about the seemingly innocuous prayer:

When he bowed his head at midfield after the game, “most [BHS] players were . . . . singing [] the school fight song to the audience.” Though Mr. Kennedy was alone when he began to pray, players from the other team and members of the community joined him before he finished his prayer.

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363 See Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2434 (2022) (Sotomayor, J., dissenting) (“To the degree the Court portrays petitioner Joseph Kennedy’s prayers as private and quiet, it misconstrues the facts . . . . Today’s decision goes beyond merely misreading the record.”).
364 See id. at 2426 n.3 (majority opinion) (citing dissent in the case).
365 Id. at 2418.
366 Id.
The Court then provided that “[t]his event spurred media coverage of Mr. Kennedy’s dilemma and a public response from the District.”

However, several crucial facts are missing for a complete constitutional analysis of this prayer. These facts include the postgame events on the field leading up to and during the prayer, the media coverage related to the prayer, and the audibility of the prayer. The Court could not engage in accurate precedential school prayer analysis by not including these facts, but that may be the entire point.

The Court’s characterization of the Homecoming prayer significantly underplayed the facts related to the postgame events contained within the record and first-hand accounts from an amici curiae brief filed with the Court. According to the record, the district was legitimately concerned by the lack of safety that accompanied Kennedy’s October 16 prayer. A former BHS football player in an amici curiae brief validated these district concerns. According to this player’s account of the “aftermath” of the Homecoming game, “before the two teams had the opportunity to shake hands, over 500 people [were] ‘storm[ing] the football field . . . from both sides, hopping the fences and rushing to the field to be close to Kennedy before he started his prayer.’” The district superintendent’s declaration confirmed this perspective:

[a]t the conclusion of the game on October 16, a large number of people came on to the field, some to pray with Mr. Kennedy. There were people jumping the fence and others running among the cheerleaders, band, and players. Afterward, the District received complaints from parents of band members who were knocked over in the rush of spectators onto the field.

Further, the principal’s testimony in the record provided that it “became unsafe . . . when the public went out onto the field, [and the district] could not supervise effectively[, resulting in an] inability to keep kids safe . . . caused by [Kennedy’s] actions.” None of these facts related to the significant numbers of people rushing the field to pray with Kennedy on October 16 or the district’s

367 Id.
368 See Kennedy Joint Appendix, supra note 220, at 222 (providing the principal’s testimony that this was not “just praying”; it was a “whole spectacle that took place and the disruption to the events for students and all of the consequential impact to supervision, safety, restrictions on the field”).
370 Id.
371 Kennedy Joint Appendix, supra note 220, at 181.
372 Id. at 222–23.
valid safety concerns were included in the majority opinion. Instead, in its final footnote, the Court summarily dismissed any concerns related to the need to keep order at the games as the basis for the district’s denial of Kennedy’s religious accommodation request as disingenuous justifications, “hypothesized or invented post hoc in response to litigation.” Given the significant facts about the chaotic on-field events related to the October 16 prayer in the record and in the amici curiae brief that were omitted in the majority opinion, it appears that the only entity that has acted disingenuously was the majority itself.

Other omissions related to the October 16 prayer involve its media coverage. The majority mentioned media coverage just once in its opinion (“This event spurred media coverage of Mr. Kennedy’s dilemma.”), making it appear as if it happened spontaneously only after the October 16 prayer. However, unlike the dissent, the majority did not include facts from the record about Kennedy and his legal counsel’s pre-October 16 social media postings and extensive media interviews about his prayer practices at the school and his plan for the Homecoming game prayer. The Court also did not include the essential

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374 Id. at 2432 n.8 (quoting United States v. Virginia, 518 U.S. 515, 533 (1996)).
375 Id. at 2418.
376 See, e.g., id. at 2438 n.2 (Sotomayor, J., dissenting) (citing Kennedy v. Bremerton Sch. Dist., 443 F. Supp. 3d 1223, 1230 (W.D. Wash. 2020)) (internal citation omitted) (“The Court describes the events of the October 16 game as having ‘spurred media coverage of Mr. Kennedy’s case.’ In fact, the District Court found that Kennedy himself generated the media coverage by publicizing his dispute with the District in his initial Facebook posting and in his media appearances before the October 16 game.”).
377 See Kennedy Joint Appendix, supra note 220, at 53–55 (providing the text of this news article with quotations from Kennedy: Drew Mikkelsen, Bremerton HS Coach Doesn’t Pray, But Speaks After Game, K5 News (Sept. 19, 2015), https://www.king5.com/article/news/local/bremerton-hs-coach-doesnt-pray-but-speaks-after-game/281-140119530; id. at 73 (quoting Mike Carter, supra note 308) (“A Bremerton High School football coach said Wednesday he will pray at the 50-yard line after Friday’s homecoming game against Centralia, disobeying the school district’s orders and placing his job at risk.”); id. at 79 (“For example, one recent media report states: ‘Nearly an hour after the game, Kennedy told KING 5 he waited until the lights were out and he was the only person left in the stadium. Then, he walked to the 50-yard-line, alone, and bowed his head in prayer.’”; id. at 90 (“While most of the BHS players were at that moment engaged in the traditional singing of the school fight song to the audience, your intention to pray at midfield following the game was widely publicized, including through your own media appearances.”); id. at 106 (“Instead, [Kennedy’s] legal representatives have clearly stated in the media that an accommodation that does not allow Kennedy the spotlight of the 50-yard line immediately following games will be unacceptable to him.”); id. at 136 (“Instead of proposing alternative accommodations meeting the District’s need to avoid an Establishment Clause violation, the Complainant’s legal representatives stated in the media that the options offered by the District were no accommodations at all.”); id. at 138 (“Mr. Kennedy failed to supervise student-athletes after games due to his interactions with media and community.”); id. at 180 (“In the earlier stages of the issue with Mr. Kennedy, the publicity that was generated and the content of comments on social media led the District to have concerns about
undisputed fact that members of the media joined Kennedy during the prayer. Likely, this fact was not included in the majority’s version of the story because Kennedy falsely represented in his complaint that he was “spontaneously joined . . . on the field” by the “coaches and players from the opposing team, as well as members of the general public and media, . . . who knelt beside him.” Spontaneity certainly was not supported by the facts of the record. Further, the Court neglected to clarify that, after the Homecoming game prayer, Kennedy spoke to the media at length on the edge of the football field while still on duty as a coach about his prayer practices. Media accounts confirmed this aspect of the record as well.

Why does all of this matter? It matters because the majority used its incomplete version of the facts regarding the Homecoming prayer to conclude multiple times that the district used “misguided” reasoning in placing Kennedy on leave “because it thought anything less could lead a reasonable observer to conclude (mistakenly) that it endorsed Mr. Kennedy’s religious beliefs.” The complete context of the events before, during, and after Kennedy’s October 16 prayer demonstrates the inverse in that a granting of his October 14 requested accommodation would indeed “lead a reasonable observer to conclude” (correctly) “that it endorsed Mr. Kennedy’s religious beliefs” and would commensurately have resulted in a violation of the Establishment Clause under a proper application of the Court’s pre-Kennedy school prayer precedent. By the

people joining Mr. Kennedy for prayer or otherwise coming on the District’s football field immediately after the final whistle.”); id. at 300–01 (providing Kennedy’s deposition testimony about his media appearances in which he testified he “was spreading the word of what was going on in Bremerton”); id. at 345–46 (“After the next football game, Mr. Kennedy made a post on social media about possibly getting fired for praying. . . . I did not believe his post accurately described the state of affairs. Mr. Kennedy’s post was disappointing to me. We had just recently discussed with the players the importance of being careful with their social media posts and comments. I believed Mr. Kennedy’s post set an example that was contrary to what we wanted the players to learn.”); id. at 346 (“The attention that was generated as a result of the issue concerning Mr. Kennedy’s prayers caused a tremendous amount of distraction and stress in the football program and detracted from the positive attention that are [sic] players and program deserved. I was aware of a large amount of phone calls, letters, emails, social media posts, and other communications that were directed at the school district as a result of the issue. Some of these communications were directed at me individually. Many of these communications were hostile and even threatening.”); id. at 354 (“At the same time as the letter of October 14, 2015, and immediately thereafter, Mr. Kennedy and his representatives made numerous appearances and announcements through various forms of media stating Mr. Kennedy’s intent to pray on the field immediately after the homecoming game on October 16, 2015.”).

378 Id. at 155 (emphasis added).

379 See id. at 343 (providing Kennedy’s deposition testimony about his interviews with the media following the October 16 game).


Kennedy decision stating otherwise, the Court blurred the realities of the critical relevant facts in the record and mistakenly concluded that the October 16 prayer did not violate the Establishment Clause.

Finally, the majority also erred in omitting relevant facts or record inconsistencies related to the audibility of Kennedy’s three October 2015 prayers. This resulted in an inappropriate broadening of the holding beyond the facts of the case. Specifically, the Court used the terms “quiet” and “silent” interchangeably and without explanation throughout the majority opinion, without providing necessary clarification on the audibility of each of these prayers and without acknowledging the specific religious accommodation Kennedy sought. This conflation of two words with different meanings in the context of school prayer is a significant error, as a prayer’s audibility certainly impacts a proper application of the Court’s constitutional analysis of these religious exercises in public schools.

The majority classified the October 2015 prayers as “quiet prayer[s] of thanks” in the first sentence of its opinion.\(^{382}\) However, it specifically described the October 16 prayer only as “a brief prayer,” omitting the nature of its audibility, despite the Complaint’s explicit identification of it as “a brief, silent prayer.”\(^{383}\) The Court accurately described October 23’s postgame prayer as a “brief quiet prayer.”\(^{384}\) The majority also describes the October 26 prayer as “a brief prayer” without a descriptor on its audibility; interestingly, the complaint did not mention this prayer.\(^{385}\) Finally, the majority failed to acknowledge that Kennedy’s motion for preliminary injunction specifically requested that he be allowed “to take a knee at midfield at the conclusion of BHS football games and say a silent prayer lasting 15–30 seconds[,]”\(^{386}\) rather than a quiet prayer.

Despite Kennedy’s request to engage in silent prayer for his religious accommodation and his engagement in at least one silent prayer during October 2015, the Court instead found that Kennedy’s right to “engag[e] in a brief, quiet, personal religious observance [was] doubly protected by the Free Exercise and Free Speech Clauses of the First Amendment.”\(^{387}\) This fusion of “quiet” and “silent” in parts of the majority opinion mirrors that same approach in Kennedy’s

\(^{382}\) \textit{Id.} at 2415, 2422.

\(^{383}\) Compare Kennedy Joint Appendix, supra note 220, at 172, with \textit{Kennedy}, 142 S. Ct. at 2418. Because the Court subsequently referenced an October 20 email from the superintendent that discussed Kennedy engaging in silent prayer, it is curious that it did not provide a specific notation of the October 16 prayer being a silent one. \textit{See id.}

\(^{384}\) Compare \textit{Kennedy}, 142 S. Ct. at 2418, with Kennedy Joint Appendix, supra note 220, at 157.

\(^{385}\) \textit{See Kennedy}, 142 S. Ct. at 2418. \textit{See also Kennedy Joint Appendix, supra note 220, at 143–66 (providing the full complaint).}


\(^{387}\) \textit{Kennedy}, 142 S. Ct. at 2433 (emphasis added).
filings throughout the litigation. As a result of this approach, the Court essentially broadened the application of its holding to facts beyond the established record, indicating a willingness to expand permissible school prayer beyond its past precedent.

School prayer advocates are ready to run with this expansion. The First Liberty Institute, the religious freedom organization representing Kennedy, now characterizes his October 16 Homecoming silent prayer as a “brief, quiet prayer.” Many might argue that silent and quiet, although not synonymous, are close enough and that this semantic difference is of no great import. For example, a National Review commentator asserted that it would be difficult to see how anything in the constitutional interpretation of the district’s action “turns on whether Kennedy’s prayers were silent or audible.” However, under decades of education law Establishment Clause jurisprudence, the contextual calculus can change when a teacher, administrator, or school staff member’s prayers are audible in the presence of public schoolchildren. Quiet (versus silent) prayer by a school official in the presence of students increases the potential for impermissible constitutional coercion. Quiet (versus silent) prayer to a specific deity by a school official in the presence of students also creates more of a potential of being inherently divisive by signaling that religious adherent students are insiders and that those students who do not follow those beliefs are outsiders in contravention of longstanding school prayer precedent.

This subtle expansion of the nature of the October 2015 prayers and Kennedy’s initial requested remedy through intentional linguistic choices by the majority will have significant consequences for those parties seeking to expand state-sponsored religion in public schools and for all constituencies within those schools. This quiet accretion could be deemed a minor encroachment; however, Schempp warned against this very type of unconstitutional encroachment of liberties. The Court’s broadening of the application of its holding by conflating silent and quiet prayer was erroneous, and it will be used in the future to justify state religious action in public schools that violates the Establishment Clause.

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388 See, e.g., Kennedy Motion for Preliminary Injunction, supra note 386, at 6, 7, 29 (framing the case as one about Kennedy’s right to pray quietly, yet asking for specific relief to pray silently).


391 See Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 309–10 (2000) (discussing how [s]chool-sponsored religious messages are constitutionally impermissible when they “send[] the ancillary message to members of the audience who are 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’”).

5. The Coda on the Harms of Kennedy’s Incomplete Story

An essential element of an effective political system is the legitimacy of its institutions. Historically, the Supreme Court has attempted to maintain its authority through its lack of political engagement in fulfilling its Article III role. However, this has changed in recent years, leading to many questions about the legitimacy of the Court, especially in its role as “the final arbiter” of the Constitution. It is troubling when the Court acts in a manner that significantly inhibits it from carrying out its essential functions. The Court must make its decisions in a way that supports its traditions of stare decisis unless there is a valid reason not to do so. It must also base those decisions, especially

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393 See RICHARD PIous & CHRISTOPHER PYLE, THE PRESIDENT, CONGRESS, AND THE CONSTITUTION 2 (1984) (“Thus constitutional reinterpretation in the United States follows the ancient pattern of the common law, under which old rules of the decision have been adapted to new circumstances by artful restatements that maintain continuity—or the appearance of continuity—while permitting gradual change.”).


395 See Over Half of Americans Disapprove of Supreme Court as Trust Plummet, ANNEenberg PUB. POLICY CTR. (Oct. 20, 2022), https://www.asc.upenn.edu/news-events/news/over-half-americans-disapprove-supreme-court-trust-plummet (“Only 46% of U.S. adults have a great deal/fair amount of trust in the Supreme Court to operate in the best interests of the American people, down from 68% in 2019, when we last asked this question. In APPC surveys since 2005, this is only the second time trust has dropped below 60%.”). See also About the Court, SUP. CT. U.S., https://www.supremecourt.gov/about/about.aspx (last visited Jan. 10, 2024) (“The Court is the highest tribunal in the Nation for all cases and controversies arising under the Constitution or the laws of the United States. As the final arbiter of the law, the Court is charged with ensuring the American people the promise of equal justice under law and, thereby, also functions as guardian and interpreter of the Constitution.”). Interestingly, a segment of the American population has pushed back against the propriety of this framing. See, e.g., Michael Miller & Samuel A. Thumma, It’s Not Heads or Tails: Should Scopes Have an Even or Odd Number of Justices?, 31 S. CAL. INTERDISC. L.J. 1, 46 (2021) (“It may be an opportune time to reconsider the role of the Supreme Court as the final arbiter of constitutional law in closely divided matters that are important to both the legal community and all of society.”); Christopher W. Schmidt, Popular Constitutionalism on the Right: Lessons from the Tea Party, 88 DENV. U. L. REV. 523 (2011) (discussing the popular constitutionalism perspective that “[t]he Supreme Court is not (or should not be) the final arbiter of constitutional meaning.”).

396 See Neil Siegel, The Trouble with Court-Packing, 72 DUKE L.J. 71, 87 (2022) (“Enforcement and compliance have not always existed in this country (consider, for example, massive resistance to Brown), and they may not always exist. They endure only insofar as presidents, Congresses, state officials, and private litigants continue to accept the legitimacy of the Court—only insofar as they continue to enforce or comply with decisions with which they may strongly disagree.”).

397 See Lee Epstein, William M. Landes & Adam Liptak, The Decision to Depart (or Not) from Constitutional Depart: An Empirical Study of the Roberts Court, 90 N.Y.U. L. REV. 1115, 1118 (2015) (“For example, the Justices could, and should, be more transparent in their application of stare decisis policy by reformulating their justifications to reflect what they actually do, not what they say they do.”).
ones that break with precedent, on a spotless account of the events and verbatim recounting of the record brought before it.

Unfortunately, neither of these jurisprudential pillars was fulfilled in *Kennedy*. As observed by Professor Mark Lemley in the *Harvard Law Review Forum*, “the Court [instead] took the remarkable step of rewriting the facts of the case, ignoring what actually happened (as found by both the [lower courts] and documented with photographs), and writing its own (false) set of facts to tell a more favorable story for the outcome it wanted to reach.” These omissions and blurrings of the facts harm the Supreme Court’s longstanding school prayer precedent, the Court as an institution, the legitimacy of future precedent, and the country as a whole. This type of faulty narrative crafting makes the public lose faith in the decision-making process by a body that is supposed to represent the pinnacle of judicial objectivity. Ultimately, this jurisprudential aspect of *Kennedy* alone merits its spot in the Court’s anti-canon, as it has contributed to a substantial loss in the public’s trust in the apex of the judicial branch that is now on par with American public perceptions of the political branches.

This erosion of public trust might ironically become the legacy of the Roberts Court. Despite some of the current Justices’ commentary regarding their commitments to legitimate nonpartisan decision-making, the public perceives the Court as more political than a generation ago. This has stemmed from a reactionary and intentional anti-Warren Court reclamation project to appoint conservative Justices and the result of the decisions made by this Court. And

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401 See Colin Glennon & Logan Strother, *The Maintenance of Institutional Legitimacy in Supreme Court Justices’ Public Rhetoric*, 7 J. L. & CTS. 241, 261 (2019) (discussing some of the Justices’ speeches regarding the Court’s effectiveness); Colleen Slevin, *Chief Justice John Roberts Defends Legitimacy of Court*, ASSOCIATED PRESS NEWS (Sept. 10, 2022), https://apnews.com/article/abortion-us-supreme-court-colorado-springs-john-roberts-government-and-politics-cdf7d291a37c3b8459e787421c633d2 (“If the court doesn’t retain its legitimate function of interpreting the Constitution, I’m not sure who would take up that mantle. You don’t want the political branches telling you what the law is, and you don’t want public opinion to be the guide about what the appropriate decision is.”).

this reaching into the past to settle disputes of the present goes back further than the 1960s. Overturning the Warren Court’s decisions does not seem out of step for the current conservative majority. However, looking to reverse course on core principles contained within the nearly unanimous precedent of the McCollum decision of the Vinson Court of the 1940s demonstrates their radicalism. The casting of the Court in this regressive mold will come with a heavy price. Sadly, this decline in public support based on the growing actual and perceived illegitimacy of the Court will only continue as precedents are tossed out in the school prayer and religious exercises arena, just as they were in Kennedy.

B. Wait, What?: Kennedy’s Inaccurate Procedural History and Silent “Overruling” of Lemon and Its Progeny

The rampant factual distortions in Kennedy’s majority opinion were a prologue to an equally faulty discussion of the case’s procedural history. Through several inaccurate references to the school district and the Ninth Circuit’s reliance “on Lemon and its progeny” in the opinion, the Court has provided silent support for the future overruling of the seminal Santa Fe decision. Such a reversal of school prayer precedent would undoubtedly set the foundation for an influx of state-sponsored religious activities and prayer in public schools.

Further, this incomplete and inaccurate procedural history ultimately resulted in a seismic shift in all Establishment Clause jurisprudence—an apparent “overruling” of the long-criticized Lemon. And while the majority certainly reflected that criticism, it neither formally nor expressly overruled Lemon, keeping in line with the Court’s continuous failure to do so since that denigrated case was decided. (Indeed, if one were not to read the dissent’s statement that “[t]he Court overrules Lemon,” one might easily miss this landmark abrogation.) This silent, or perhaps quiet, overruling of “Lemon entirely and in all contexts,” represents not a minor encroachment but a momentous sea change for all Establishment Clause cases, including those involving school prayer.


In the procedural history section of the opinion, the Court first established that the district court and the Ninth Circuit determined that the school district’s restriction of Kennedy’s prayers was required to avoid violating the

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Firsthand Account (1991) (discussing “the center of the Reagan legal project of dismantling the liberal judicial legacy of Earl Warren [and] redirecting the courts”); G. Michael Parsons, Contingent Design and the Court Reform Debate, 23 U. Pa. J. Const. L. 795, 828 (2021) (“It is now the case that fifteen of the last twenty Supreme Court Justices have been nominated by Republicans, even though Republicans have lost the popular vote in seven of the last eight presidential elections.”).

Establishment Clause. From there, the majority discussed how the Ninth Circuit dissenters to the denial of the petition to hear the case en banc “argued that the panel erred” because its “analysis rested on Lemon[] and its progeny for the proposition that the Establishment Clause is implicated whenever a hypothetical reasonable observer could conclude the government endorses religion”—an approach which the Court stated it had “long since abandoned.” Yet, the majority did not tell the whole story of these Ninth Circuit dissenters, given that their primary argument was that Santa Fe’s holding should not have been extended to Kennedy’s case “as it stems from Lemon . . . and the Supreme Court has effectively killed Lemon.”

However, Santa Fe was at the time and remains extant school prayer precedent. As such, the dissent’s author, Judge Ryan Nelson, argued that the Ninth Circuit should not comply with the hierarchical precedent doctrine, which is an extraordinarily radical claim. The misdirection here by the Kennedy majority in glossing over the main argument of these en banc dissenters is another example of a quiet encroachment on the Court’s existing education law Establishment Clause jurisprudence, as it obscures the en banc dissenters’ revolutionary approach. Nelson’s dissent essentially called for the dismantling of all education law Establishment Clause jurisprudence that applies Lemon in whole or in part (or seemingly any guidance that can be perceived to be building from Lemon) with its proclamation that “[i]t makes little sense to kill Lemon but keep its progeny.”

Like Nelson’s dissent, the Kennedy majority opinion also states that the school district inaccurately “relied on Lemon and its progeny,” citing three pages in the joint appendix to support that proposition. However, this is another less than accurate reference in the opinion. These three cited pages from the district’s September 17 letter to Kennedy reference Santa Fe and other circuit court school prayer cases, but they do not mention Lemon a single time. Contrary to the

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404 Id. at 2420 (majority opinion) (citing Kennedy v. Bremerton Sch. Dist., 4 F.4th 910, 945 (9th Cir. 2021) (Nelson, J., dissenting)).
405 Kennedy, 4 F.4th at 945–46 (Nelson, J., dissenting).
406 See Ashutosh Bhagwat, Separate but Equal?: The Supreme Court, the Lower Federal Courts, and the Nature of the ‘Judicial Power,’ 80 B.U. L. Rev. 967, 969 (2000) (discussing the Court’s directives to lower courts to abide by the hierarchical precedent doctrine even for precedent that may be overruled); see also Evan H. Caminker, Why Must Inferior Courts Obey Superior Court Precedents?, 46 Stan. L. Rev. 817, 819 (1994) (classifying “the doctrine of hierarchical precedent[,]” where lower courts are required to follow relevant binding precedent from controlling higher courts, as a core tenet of the American judicial system).
407 Kennedy, 4 F.4th at 952 (Nelson, J., dissenting).
408 Kennedy, 142 S. Ct. at 2427 (citing “App. 43–45”).
majority’s claims, Lemon is not expressly mentioned in the 376 pages of the joint appendix.\footnote{See id.}

The majority opinion also states that “the Ninth Circuit followed the same course” by relying on Lemon and its progeny.\footnote{Kennedy, 142 S. Ct. at 2427.} However, this statement is false regarding the Kennedy litigation’s procedural history. Although the Ninth Circuit’s decision applied Santa Fe to find the Establishment Clause required the district not to allow Kennedy’s continued prayer practices, its opinion also does not contain a single citation to Lemon.\footnote{See Kennedy v. Bremerton Sch. Dist., 991 F.3d 1004, 1019 (9th Cir. 2021), rev’d, 142 S. Ct. 2407 (2022).}

So, given this complete lack of Lemon citations in the record and the Ninth Circuit’s opinion, why did the Kennedy majority blame the school district and the court of appeals for their reliance “on Lemon and its progeny”?\footnote{Kennedy, 142 S. Ct. at 2427.} This is because the Court inaccurately characterized all post-Lemon Establishment Clause case law that applied Lemon or an endorsement approach, in part or in whole, as “Lemon and its progeny.”\footnote{See id.} The majority opinion explicitly connects the Lemon test to “estimations about whether a ‘reasonable observer’ would consider the government’s challenged action an ‘endorsement’ of religion.”\footnote{Id.} The majority’s substantive analysis here again echoes Nelson’s dissent almost verbatim, finding “the panel erred by holding that a failure to discipline Mr. Kennedy would have led the District to violate the Establishment Clause” because the “analysis rested on Lemon[] and its progeny for the proposition that the Establishment Clause is implicated whenever a hypothetical reasonable observer could conclude the government endorses religion”—an approach which the “Court has long since abandoned.”\footnote{Id. at 2420–21 (citing Kennedy v. Bremerton Sch. Dist., 4 F.4th 910, 945 (9th Cir. 2021) (Nelson, J., dissenting)) (emphasis added).}

Why does this signal another quiet encroachment on the Court’s longstanding school prayer precedent? This symmetrical approach between Kennedy’s majority opinion and Nelson’s dissent ultimately advocates that it is time to claim Santa Fe has also been long abandoned, which Nelson called for expressly and the Court now seems to adopt silently. This likely explains why the Kennedy majority does not rely upon Santa Fe’s critical differentiation between government and private speech to bolster its conclusion that Kennedy engaged in private speech rather than state-sponsored speech.\footnote{See Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 302 (2000) (“[T]here is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses...”).} This likely also
explains why the majority’s only citations to Santa Fe appear to distinguish Kennedy’s three October 2015 prayers from the student pre-football game prayers deemed unconstitutionally coercive in that 2000 case.\footnote{See Kennedy, 142 S. Ct. at 2431–32.}

Overruling or abandoning (whatever that might mean) Santa Fe would effectuate a massive sea change to the trajectory of whether future school prayers violate the Establishment Clause. With this implicit support, Kennedy provides one lever many school prayer advocates will enthusiastically pull to breach the Court’s longstanding school prayer precedent. While this approach is extraordinarily wrong in that it relies upon a lower appellate court judge’s call to nullify Supreme Court precedent, it is also invalid because it depends upon an inaccurate recounting of Santa Fe and the evolution of endorsement in school prayer jurisprudence as solely being an offshoot of Lemon.

Santa Fe actually relied upon Lee and Wallace for its endorsement analysis.\footnote{See Santa Fe, 530 U.S. at 305, 308.} It likened its student prayer policy’s “perceived and actual endorsement of religion” to the “school[’s] degree of involvement” that bore “the imprint of the State” for the policy in Lee.\footnote{Id. at 305 (quoting Lee v. Weisman, 505 U.S. 577, 590 (1992)).} Santa Fe also quoted Justice O’Connor’s Wallace concurrence as the basis for the relevant question in Establishment Clause analysis of “whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools.”\footnote{Id. at 308 (quoting Wallace v. Jaffree, 472 U.S. 38, 76 (1985) (O’Connor, J., concurring)).} And while Wallace was decided by applying the Lemon test, Lee used coercion and endorsement analysis that was not dependent upon Lemon.\footnote{Compare Wallace v. Jaffree, 472 U.S. 38 (1985) (applying the Lemon test), with Lee v. Weisman, 505 U.S. 577 (1992) (applying a coercion and endorsement analysis).}

However, under the Court’s subtextual adoption of Nelson’s dissent, is Lee now also considered “Lemon and its progeny” because Santa Fe based some of its endorsement analysis on an analogy to Lee? If so, this “Lemon and its progeny” dog whistle in Kennedy’s procedural history and substantive analysis parts indicates the Court’s willingness to set aside fifty years of post-Lemon school prayer jurisprudence. The majority solidifies this intention through its subsequent corollary abandonment of “Lemon and its endorsement test offshoot,”\footnote{Kennedy, 142 S. Ct. at 2427.} signifying that Santa Fe and other school prayer decisions are on the precipice of dismantling if they have not been pushed off the cliff with Lemon already.

\footnote{See Haupt, Mixed Public-Private Speech and the Establishment Clause, 85 Tul. L. Rev. 571, 577 (2011) (noting there are no Establishment Clause concerns for “private speech by itself”); Laycock, Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers, 81 Nw. L. Rev. 1, 30 (1986) (outlining the limited application of the Establishment Clause to government speech).}
2. *Kennedy’s* Problematic Silent “Overruling” of *Lemon* and Its Endorsement Test Offshoot

Through an inaccurate procedural history recitation, the Court incorrectly found that the school district and the Ninth Circuit relied on *Lemon* and its progeny.\(^{424}\) The majority opinion deems this reliance error because the district and the Ninth Circuit “overlooked . . . the ‘shortcomings’ associated with this ‘ambitious, abstract, and ahistorical approach to the Establishment Clause [which] became so ‘apparent’ that this Court long ago abandoned *Lemon* and its endorsement test offshoot.”\(^{425}\) To support this alleged long abandonment, the Court cited the 2019 *American Legion v. American Humanist Association* plurality opinion, the 2014 *Town of Greece v. Galloway* decision, and the same-term *Shurtleff v. City of Boston* decision.\(^{426}\) This provided a springboard for the majority opinion’s subsequent declaration that history has replaced *Lemon* and endorsement in interpreting the Establishment Clause.\(^{427}\) The *Kennedy* dissenters characterized this part of the majority opinion as an erroneous “overrul[ing of] *Lemon* entirely and in all contexts.”\(^{428}\)

Insert several record scratches here. This part of the majority’s opinion presents two significant jurisprudential problems and perilous precedents. First, the long abandonment of “*Lemon* and its endorsement test offshoot” assertion is overblown for the Court’s general Establishment Clause case law, if not outright inaccurate when applied to its education law Establishment Clause jurisprudence.\(^{429}\) Second, despite the dissent’s characterization, the *Kennedy* decision did not actually overrule “*Lemon* entirely and in all contexts.”\(^{430}\)

To the first point, the *Kennedy* majority failed to provide sufficient precedential support for its claim of “*Lemon* and its endorsement test offshoot[‘s]” long abandonment, as *American Legion, Town of Greece*, and *Shurtleff* had all been decided less than a decade before *Kennedy*. For context, the Court defined a “long sweep of history” as “over 100 years” in its *Dobbs v. Jackson Women’s Health Organization* decision just three days before issuing *Kennedy*.\(^{431}\) Using that “long history” metric, it echoes hollow for the Court to cite case law that had only been decided three to eight years before *Kennedy* for

\(^{424}\) See id.

\(^{425}\) Id.


\(^{427}\) *Kennedy*, 142 S. Ct. at 2427.

\(^{428}\) Id. at 2449 (Sotomayor, J., dissenting).

\(^{429}\) Id. at 2427 (majority opinion).

\(^{430}\) Id. at 2449 (Sotomayor, J., dissenting).

the basis of long abandonment. Additionally, the Court neglected the reality that the school district could not be guided by the 2019 American Legion precedent in making decisions in 2015 without a time machine or a Supreme Court jurisprudential divining rod.

Further, contrary to the Kennedy claims, Town of Greece, which did not cite Lemon and barely referenced endorsement, did not abandon Lemon or endorsement analysis. Instead, Town of Greece applied Marsh v. Chambers to hold that including Christian prayers in monthly town board meetings did not violate the Establishment Clause “because history shows that the specific practice is permitted.” Applying Marsh, the Court concluded that the American “tradition assumes that adult citizens, firm in their own beliefs, can tolerate and perhaps appreciate a ceremonial prayer delivered by a person of a different faith.” Despite the application of this historical approach, Town of Greece did not abandon the coercion constraints of its previous prayer cases, expressly recognizing “[i]f circumstances arise in which the pattern and practice of ceremonial, legislative prayer is alleged to be a means to coerce or intimidate others,” such coercion could give rise to an Establishment Clause violation. It did not find such coercion in that case, though, by contrasting it with Lee, where “a religious invocation was coercive as to an objecting student” when it took place in “a graduation where school authorities maintained close supervision over the conduct of the students and the substance of the ceremony.” Unlike the students in Lee, the Court found that there was no Establishment Clause violation for these “mature adults, who ‘presumably’ [were] ‘not readily


433 See Town of Greece, 572 U.S. at 565 (Justice Breyer’s dissent is the only Town of Greece opinion to mention Lemon). See id. at 614–15 (Breyer, J., dissenting) (quoting Lemon v. Kurtzman, 403 U.S. 602, 622 (1971)) (framing the “question in this case [as] whether the prayer practice of the town of Greece, by doing too little to reflect the religious diversity of its citizens, did too much, even if unintentionally, to promote the ‘political division along religious lines’ that ‘was one of the principal evils against which the First Amendment was intended to protect’”). Further, the Town of Greece majority opinion has only two endorsement references. First, the Court summarized the Second Circuit’s finding “[t]hat board members bowed their heads or made the sign of the cross further conveyed the message that the town endorsed Christianity.” Id. at 574. The second reference described how the four dissenting Justices in County of Allegheny v. ACLU “disputed that endorsement could be the proper test” in the evaluation of whether a Christmas nativity scene display at a county courthouse was a violation of the Establishment Clause.” Id. at 579 (citing Cnty. of Allegheny v. ACLU, 492 U.S. 573 (1989)).

434 Kennedy, 142 S. Ct. at 2427 (citing Town of Greece, 572 U.S. at 575–77).

435 See Town of Greece, 572 U.S. at 569, 571–72, 577 (citing Marsh v. Chambers, 463 U.S. 783 (1983)).

436 Id. at 584.

437 Id. at 589.

438 Id. at 590 (citing Lee v. Weisman, 505 U.S. 577, 592-94 (1992)).
susceptible to religious indoctrination or peer pressure" and who could choose to exit or quietly acquiesce during the prayer without an unconstitutional imposition.\footnote{Id. (quoting \textit{Marsh}, 463 U.S. at 792).}

Consequently, despite \textit{Kennedy}'s use of \textit{Town of Greece} to support a long abandonment of \textit{Lemon} and endorsement analysis, this legislative prayer exception case did not actually do so. While it did utilize a historical approach for the specific evaluation of legislative prayer in a local context, \textit{Town of Greece} also reaffirmed the validity of coercion analysis in Establishment Clause jurisprudence, differentiated between adults and public schoolchildren in the calculus of this coercion analysis, and relied upon \textit{Santa Fe} for positive source support.\footnote{See supra text accompanying notes 432–439. See also \textit{Town of Greece}, 572 U.S. at 587 (citing \textit{Santa Fe Indep. Sch. Dist. v. Doe}, 530 U.S. 290, 308 (2000)).} So, once again, the \textit{Kennedy} majority, following its established pattern, presented faulty support for its analytical claims.\footnote{Other commentators have levied much more scathing criticism upon the Court for this aspect of the decision-making in \textit{Kennedy}. See, e.g., Borja, \textit{ supra} note 399 (“Now, with six sympathetic justices on the Court, the conservative movement has moved beyond plaintiff shopping to fact invention. The opinion in \textit{Kennedy}, written by Justice Neil Gorsuch, signals to these advocates that they can fudge timelines and fabricate narratives going forward, confident that this Court will uncritically accept them as true.”).}

What about \textit{American Legion}? While it found \textit{Lemon} no longer applied to a specific subset of cases via a cobbled-together mishmash of opinions, it certainly did not provide an express abandonment of \textit{Lemon} or endorsement analysis for all contexts, including education law establishment cases. (Since one seemingly cannot rely on the \textit{Kennedy} majority to explain its past precedent accurately, another extended case examination is necessary here.) In \textit{American Legion}, a majority of the Court agreed that the Bladensburg Peace Cross, a World War I public memorial, did not violate the Establishment Clause through seven fractured opinions.\footnote{See \textit{Am. Legion v. Am. Humanist Ass’n}, 139 S. Ct. 2067 (2019) (providing six opinions finding there was no Establishment Clause violation and one in dissent).} Here, the majority of the Court determined that the \textit{Marsh} historical approach, rather than the \textit{Lemon} test, applied to evaluating whether public religious displays and historical monuments violate the Establishment Clause.\footnote{See \textit{id.} at 2081–82, 2087 (plurality opinion); \textit{id.} at 2074, 2080–84 (Breyer, J., concurring); \textit{id.} at 2094 (Kagan, J., concurring); \textit{id.} at 2097 (Thomas, J., concurring); \textit{id.} at 2102 (Gorsuch, J., concurring).} As a result, many long-time critics of \textit{Lemon} declared that \textit{American Legion} formally closed the chapter on \textit{Lemon} in all Establishment Clause analyses,\footnote{See, e.g., Stephanie H. Barclay, \textit{Untangling Entanglement}, 97 WASH. U. L. REV. 1701, 1727 (2020) (“In its recent \textit{American Legion} decision, the Supreme Court strongly suggested that the three-prong \textit{Lemon} test is essentially dead letter.”); Roger Byron, \textit{Lemon is Dead}, \textit{FEDERALIST} 1701, 1727 (2020).} including Ninth Circuit Judge Nelson in his dissent from the court’s

439 \textit{Id.} (quoting \textit{Marsh}, 463 U.S. at 792).
440 \textit{Id.}
441 See supra text accompanying notes 432–439. See also \textit{Town of Greece}, 572 U.S. at 587 (citing \textit{Santa Fe Indep. Sch. Dist. v. Doe}, 530 U.S. 290, 308 (2000)).
442 Other commentators have levied much more scathing criticism upon the Court for this aspect of the decision-making in \textit{Kennedy}. See, e.g., Borja, supra note 399 (“Now, with six sympathetic justices on the Court, the conservative movement has moved beyond plaintiff shopping to fact invention. The opinion in \textit{Kennedy}, written by Justice Neil Gorsuch, signals to these advocates that they can fudge timelines and fabricate narratives going forward, confident that this Court will uncritically accept them as true.”).
443 See \textit{Am. Legion v. Am. Humanist Ass’n}, 139 S. Ct. 2067 (2019) (providing six opinions finding there was no Establishment Clause violation and one in dissent).
444 See \textit{id.} at 2081–82, 2087 (plurality opinion); \textit{id.} at 2074, 2080–84 (Breyer, J., concurring); \textit{id.} at 2094 (Kagan, J., concurring); \textit{id.} at 2097 (Thomas, J., concurring); \textit{id.} at 2102 (Gorsuch, J., concurring).
445 See, e.g., Stephanie H. Barclay, \textit{Untangling Entanglement}, 97 WASH. U. L. REV. 1701, 1727 (2020) (“In its recent \textit{American Legion} decision, the Supreme Court strongly suggested that the three-prong \textit{Lemon} test is essentially dead letter.”); Roger Byron, \textit{Lemon is Dead}, \textit{FEDERALIST} 1701, 1727 (2020).
denial of rehearing the Kennedy case en banc. However, just wishing for something does not make it so.

To that point, American Legion did not expressly overrule Lemon in its entirety or its application in all contexts, meaning that it did not completely abandon “Lemon and its endorsement test offshoot.” One of Lemon’s staunchest opponents, Justice Thomas, expressly acknowledged this in his concurring opinion, in which he advocated for an express overruling of the case “in all contexts” because the “test has no basis in the original meaning of the Constitution[, . . .] has been manipulated to fit whatever result the Court aimed to achieve[, and . . . ] continues to cause enormous confusion in the States and the lower courts.” He even chided his fellow Justices for failing to do so.

Instead, the American Legion plurality opinion written by Justice Alito, joined by Chief Justice Roberts, Justice Breyer, and Justice Kavanaugh, acknowledged the Lemon test’s “shortcomings,” which resulted in it being unable to resolve all Establishment Clause cases. Although Justice Gorsuch deemed “Lemon now shelved” in his concurrence, he did not argue that American Legion expressly overruled it. While Kavanaugh’s concurrence declared that the “Court no longer applies the old test articulated in Lemon,” it cited case law that did not support this proposition to do so. Further, Kavanaugh neither expressly called for Lemon’s overruling nor asserted that it had been overruled in its entirety in all contexts.

Lemon’s precedential status outside the context of public religious displays and monuments remained unclear among the lower courts and unresolved by the high court after American Legion. While some lower courts declared Lemon altogether “dead letter,” other courts appropriately applied this hierarchical precedent in other Establishment Clause analyses based on the

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446 See Kennedy v. Bremerton Sch. Dist., 4 F.4th 910, 945 (9th Cir. 2021) (Nelson, Cir. J., dissenting from denial of rehearing en banc) (citing American Legion for the claim that the “Supreme Court has effectively killed Lemon”).
448 Am. Legion, 139 S. Ct. at 2097 (Thomas, J., concurring).
449 See id. at 2097–98 (acknowledging, as one of Lemon’s most significant critics, that the case did not “overrule the Lemon test in all contexts”).
450 Id. at 2080 (plurality opinion).
451 Id. at 2102–03 (Gorsuch, J., concurring).
452 Id. at 2092–94 (Kavanaugh, J., concurring).
453 See id. at 2093–94.
Court’s failure to formally overrule it. Meanwhile, only two Justices, Thomas and Gorsuch, cited Lemon between American Legion and Kennedy. While Thomas thrice reaffirmed in his own opinions that the “Court [had] not overruled Lemon,” he also joined Gorsuch’s Shurtleff concurrence that framed Lemon’s status differently.

In Shurtleff, a unanimous Court found that Boston violated the Free Speech Clause by refusing a city hall Christian flag display request, which was the first such refusal out of hundreds of requests in a twelve-year private group flag display program that was based on concern the flag’s religious viewpoint would violate the Establishment Clause. The Court anchored its constitutional conclusion on the finding that the “flag-raising program [did] not express government speech.” Further, it reaffirmed the principle that “[w]hen a government does not speak for itself, it may not exclude speech based on ‘religious viewpoint’” as that “constitutes impermissible viewpoint discrimination.

Justice Gorsuch did not join the majority in Shurtleff, only concurring in the judgment with an opinion that appeared to be a rehearsal for his close-up in authoring the Kennedy majority decision, given that his argument centered on what he deemed Boston’s mistaken application of Lemon to determine the flag display would violate the Establishment Clause. In a seeming tee-up to Kennedy, Gorsuch deemed Boston’s “drag[ging] Lemon once more from its grave . . . as risky as it was unsound” because “Lemon ignored the original meaning of the Establishment Clause, it disregarded mountains of precedent, and it substituted a serious constitutional inquiry with a guessing game.

Gorsuch heaped scorn on Boston, other state actors, and lower courts for their continued reliance on Lemon, arguing that it had “long since been exposed

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455 See, e.g., Danville Christian Acad. v. Beshear, 503 F. Supp. 3d 516, 528–29 (E.D. Ky. 2020) (noting that Lemon “has not been officially overruled, and the Sixth Circuit has stated that it is still the proper test for analyzing claims involving the Establishment Clause”); Irish 4 Reprod. Health v. U.S. Dep’t of Health & Hum. Servs., 434 F. Supp. 3d 683, 709 (N.D. Ind. 2020) (“Although the Lemon test has been much criticized, the Seventh Circuit continues to faithfully apply it.”); Wallace v. Jaffree, 472 U.S. 38, 47 n.26 (1985) (“Federal District Courts and circuit courts are bound to adhere to the controlling decisions of the Supreme Court”).


458 Id. at 1587, 1593 (majority opinion).

459 Id. at 1593.

460 Id. (quoting Good News Club v. Milford Cent. Sch., 533 U.S. 98, 112 (2001)).

461 See id. at 1603 (Gorsuch, J., concurring).

462 Id. at 1610.
as an anomaly and a mistake” by *Town of Greece* and *American Legion*. Although he rested “at least some of the blame” on the Court in deciding *Lemon* in the first place, he neglected to acknowledge the Court’s culpability in not expressly overruling *Lemon* or what he deemed its modified “‘effects’ test [that required] lower courts to ask whether a ‘reasonable observer’ would consider the government challenged action to be an ‘endorsement’ of religion.” He also failed to acknowledge that it would have been impossible for Boston in its 2017 actions to be guided by the 2019 *American Legion* decision without yet another time machine. Instead, he criticized those who continued to apply *Lemon*, claiming that “some simply prefer the policy outcomes [it] can be manipulated to produce,” and that its “three-part test may seem a simpler and tempting alternative to busy local officials and lower courts.”

Ironically, for Gorsuch, the persistence of *Lemon* was not an “us” problem; it was a “them” problem. In alignment with this perspective, he incorrectly concluded, “[t]his Court long ago interred *Lemon*, and it is past time for local officials and lower courts to let it lie.” In doing so, Gorsuch myopically failed to acknowledge that the Court had never expressly overruled *Lemon* in all contexts. It should be no surprise then that he reiterated this hollow and unsupported claim in his *Kennedy* majority opinion that the Court had “long abandoned *Lemon* and its endorsement test offshoot.”

However, like this erroneous long abandonment claim by the majority, the *Kennedy* dissent’s assertion that the case “overruled *Lemon* entirely and in all contexts” is also incorrect. Under a textual analysis, *Kennedy* does not expressly or formally overrule *Lemon* itself, let alone *Lemon* and its progeny. Why didn’t the Court do so? This cannot be hinged on its lack of knowledge on how to overrule precedent expressly; it was plenty able to do so three days before *Kennedy* was released in *Dobbs*, where it expressly overruled *Roe* and *Casey*. If the Court intended to overrule *Lemon* expressly in *Kennedy*, this was a failure. Although the dissent’s claim that *Kennedy* “overruled *Lemon* entirely and in all contexts” is an overstatement, the majority’s specifically applied rejection of *Lemon* and the endorsement test to Kennedy’s prayers has likely

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463 See *id.* at 1603 (“How did the city get it so wrong?”); *id.* at 1606, 1607–08 (citing *Town of Greece v. Galloway*, 572 U.S. 565 (2014); *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067 (2019)).

464 *Id.* at 1603–04.

465 *Id.* at 1608, 1609.

466 *Id.* at 1610.

467 *Id.* at 1608.


469 *Id.* at 2449 (Sotomayor, J., dissenting).


471 See supra text accompanying note 430.
resulted in a silent overruling of this case law for future school prayer cases. This subtle jurisprudence portends peril for so much more than the application of 
Lemon alone. A complete overruling of this sort exposes the entire body of school Establishment Clause precedent to significant weakening, unraveling a thread that connects to the Court’s first extended Establishment Clause analysis in 
Everson. It impacts not only those seminal cases upon which Lemon was based—Everson, McCollum, and Schempp—but also those cases that applied the Lemon test or any arguable derivative of any endorsement offshoot to reach their holdings in whole or in part—Wallace, Santa Fe, and Lee.\(^\text{472}\) This potential domino effect and its deleterious destabilization of the Court’s longstanding precedent in this area leaves local school districts and the lower federal courts with no practical guidance as to how they should decide these cases beyond the ether, as “reference to historical practices and understandings” is not particularly helpful for the evaluation of the constitutionality of prayer in the public school context.\(^\text{473}\)

In addition to this negative impact on schools and lower courts, this silent overruling of Lemon and its endorsement test offshoot for school prayer cases has also contributed to a cascade of harm for the Supreme Court as an institution of the American government. Like with the factual omissions and misstatements of the case, Kennedy’s silent overruling of Lemon for school prayer cases has undercut the actual and perceived legitimacy of the Court,\(^\text{474}\) a concern that Chief Justice Roberts once ascribed to when the Court was deciding whether to overrule a past precedent expressly.\(^\text{475}\) This has been magnified by the context of Kennedy’s quick following in the footsteps of the seismic overruling in Dobbs.\(^\text{476}\)

Many harms will manifest when the Court appears to stray from the core values of stare decisis, as it has with these two significant decisions. These include jurisprudential destabilization, the perceived subversion of reasoned decision-making, and a loss of the public’s trust in the judicial authority and legitimacy of what should be the paragon of Article III stability.\(^\text{477}\) Be that as it

\(^{472}\) See Amanda Harmon Cooley, The Persistence of Lemon, 47 U. DAYTON L. REV. 411, 438–443 (2022) (outlining Lemon’s alignment with these foundational education law Establishment Clause cases); see also supra Part II.

\(^{473}\) Kennedy, 142 S. Ct. at 2428.

\(^{474}\) Lynch v. Donnelly, 465 U.S. 668, 694 (1984) (O’Connor, J., concurring) (cautioning the Court to be cognizant of “both the fundamental place held by the Establishment Clause in our constitutional scheme and the myriad, subtle ways in which Establishment Clause values can be eroded”).


\(^{476}\) See Dobbs v. Jackson Women’s Health Org., 142 S. Ct. 2228, 2242 (2022) (“We hold that Roe and Casey must be overruled.”).

\(^{477}\) See Evelyn Keyes, Judicial Strategy and Legal Reason, 44 IND. L. REV. 357, 381–82 (2011) (“[T]he integrity and functionality of the [judicial] system depends upon the shared expectation
may, the conservative majority bloc’s discarding of seminal Supreme Court cases in a religiously ideological way and its increasing reliance on the primacy of history appears to indicate a continued willingness to tear down its 75 years of school prayer jurisprudence, no matter the damage it might inflict.

C. What History? Kennedy’s Unsupported Adoption and Incomplete Application of History and Tradition as the Interpretive Principle for School Prayer Cases

In *Kennedy*, the Court connected its invalidation of *Lemon* and its endorsement test offshoot for school prayer cases with an ambiguous directive that “the Establishment Clause must be interpreted by ‘reference to historical practices and understandings.’” Here, the Court expressly relied upon principles in the *American Legion* plurality opinion and the *Town of Greece* decision that reflect the core arguments of Rehnquist’s *Wallace* dissent and Scalia’s *Lee* dissent. The majority then explained that Establishment Clause analysis must “accor[d] with history and faithfully reflec[t] the understanding of the Founding Fathers.” Finally, the Court provided a relatively unsupported gloss that “[a]n analysis focused on original meaning and history . . . has long represented the rule rather than some ‘exception’ within the ‘Court’s Establishment Clause jurisprudence.’


*Kennedy*’s proposition of the long rule of historical primacy for school prayer cases is unfounded. Like its use of *American Legion* and *Town of Greece* for the claim that *Lemon* and its endorsement test offshoot have long been

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478 See Dan T. Coenen, *Reconceptualizing Hybrid Rights*, 61 B.C. L. REV. 2355, 2413 (2020) (discussing the Roberts Court conservative justices’ willingness to overrule past precedent, “especially when they are seen as unsupported by originalist principles”); Alexander Dushku, *The Case for Creative Pluralism in Adoption and Foster Care*, 131 YALE L.J. FORUM 246, 253 (2021) (“Justice Barrett [is] likely more amenable to religious-liberty defenses than the late Justice Ginsburg[,]’); *Chapter Two Reframing the Harm: Religious Exemptions and Third-Party Harm After Little Sisters*, 134 HARV. L. REV. 2186, 2207 (2021) (arguing that “[w]ith the passing of Justice Ginsburg and the confirmation of Justice Barrett, . . . it seems nearly inevitable that the Court’s trajectory on religion will be toward granting more and more extreme religious exemptions—even where they threaten the health and lives of fellow citizens”).


480 See *Kennedy*, 142 S. Ct. at 2428.; *supra* text accompanying notes 202–205, 207–212.

481 Id. (quoting *Town of Greece*, 572 U.S. at 577).

482 Id. (quoting *Town of Greece*, 572 U.S. at 575).
abandoned, the Court’s reliance on these cases for this historical standard for education law cases is inapposite. Neither of these cases nor any of the remaining cases cited by the Kennedy majority in this section provide precedent for the Court’s consistent use of a historical approach for the sole evaluative process of whether school prayer violates the Establishment Clause.\textsuperscript{483} American Legion only established this was the proper interpretive lens for Establishment Clause claims based on public religious displays and longstanding monuments, but it did not address school prayer.\textsuperscript{484} Town of Greece only established this was the appropriate interpretive lens for legislative prayer,\textsuperscript{485} and the Court has emphasized that this legislative prayer exception has no place in school prayer cases given the “[i]nherent differences between the public school system and a session” of a legislative body.\textsuperscript{486} Consequently, this is yet another example of “the Court rel[y]ing on an assortment of pluralities, concurrences, and dissents by Members of the current majority to effect fundamental changes in this Court’s Religion Clauses jurisprudence, all the while proclaiming that nothing has changed at all.”\textsuperscript{487}


Despite the lack of apposite precedent, the Court heralded this new historical approach for school prayer cases by cursorily centering the error of the school district and the Ninth Circuit on a failure “to heed” this gossamer “guidance” that did not exist at the time of their decision-making about Kennedy’s prayers.\textsuperscript{488} Here, the majority, once again, silently eroded the Court’s education law Establishment Clause jurisprudence by introducing “a reference to historical practices and understandings” as the new interpretive measure of school prayer cases and acting as if it had always been the exclusive evaluative tool for these claims. Further, by not explaining what this analytical approach means and not applying this metric to the case beyond implying that such an application results in no Establishment Clause violation, the Court continued to set an egregiously unhelpful precedent for public schools and lower courts’ future considerations about the constitutionality of school prayer.

\textsuperscript{483} See id.
\textsuperscript{484} See Am. Legion, 139 S. Ct. at 2081–82 (plurality opinion); id. at 2074, 2080–84 (Breyer, J., concurring); id. at 2094 (Kagan, J., concurring); id. at 2097 (Thomas, J., concurring); id. at 2102 (Gorsuch, J., concurring).
\textsuperscript{485} See Town of Greece, 572 U.S. at 569, 571–72, 577 (citing Marsh v. Chambers, 463 U.S. 783 (1983)).
\textsuperscript{487} Kennedy, 142 S. Ct. at 2446 (Sotomayor, J., dissenting).
\textsuperscript{488} Id. at 2428 (majority opinion).
Essentially, *Kennedy* tells us history is now the way. But, what history? What history was applied in *Kennedy*, and what history should be used in future school prayer Establishment Clause cases? Unfortunately, *Kennedy* does not provide any real answers beyond “original meaning and history,” which is problematic as clear reasons are a core part of principled decision-making.\(^{489}\) This lack of clarity is especially harmful to school districts and lower courts because “[i]n an area of law where constitutional scholars and Supreme Court justices struggle to perceive the lines of demarcation of state establishment of religion, public schools and their policymakers need guidance in crafting educational regulations and in evaluating claims of potential transversal of these lines.”\(^{490}\) American schoolchildren need sufficient constitutional safeguards and not “mere platitudes.”\(^{491}\) Consequently, *Kennedy’s* Janusian paucity of past precedential support and lack of future instructive applicatory guidance harms school law jurisprudence and real public school communities.

Without real guidance from *Kennedy*, schools and lower courts will be forced to figure out these historical analytical parameters on their own. Suppose one takes *Dobbs’s* historical approach as an analogue for these Establishment Clause cases. Under such an approach, the constitutionality of school prayer will hinge on a long-tradition historical yardstick of the meaning of the First Amendment at the time of adoption as applied to religious exercises in public schools.\(^{492}\) *Kennedy’s* Founding Fathers dividing line between “the permissible and impermissible,” derived from Justice Brennan’s concurrence in *Schempp* and advanced in *Town of Greece* and Scalia’s dissent in *Lee*, certainly aligns with this methodology.\(^{493}\) A 1791-based touchstone does not bode well for the use of the *Schempp* and *Engel* majority opinions as precedential historical guides, given that they have only been binding precedent for 60 years and that this same Court in *Dobbs* deemed a substantive due process right enshrined for 50 years in the

\(^{489}\) *See* Donald J. Kochan, *The “Reason-Giving” Lawyer: An Ethical, Practical, and Pedagogical Perspective*, 26 GEO. J. LEGAL ETHICS 261, 267–68 (2013) (“[R]eason-giving demands a check of power and helps the governed determine whether those in power are acting within their constraints . . . deviations from given reasons tend to call action into question.”).

\(^{490}\) *Cooley*, supra note 472, at 444–45.


\(^{492}\) *See* Dobbs v. Jackson Women’s Health Org., 142 S. Ct. 2228, 2248 (2022) (internal citations omitted) (emphasis in original) (“On occasion, when the Court has ignored the ‘[a]ppropriate limits’ imposed by ‘respect for the teachings of history,’ it has fallen into the freewheeling judicial policymaking that characterized discredited decisions such as *Lochner*. The Court must not fall prey to such an unprincipled approach. Instead, guided by the history and tradition that map the essential components of our Nation’s concept of ordered liberty, we must ask what the *Fourteenth Amendment* means by the term ‘liberty.’”).

Court’s jurisprudence not to be “deeply rooted in this Nation’s history and tradition.”


Is such a long historical (and anti-precedential historical) approach this Court’s *modus operandi*? There is some evidence of it. The majority opinions from *Schempp* and *Engel* are not cited a single time in the *Kennedy* majority decision. The Court also did not incorporate any of the historical applications of its pre-*Lemon* school prayer precedent in its cursory determination that the coach’s actions did not violate the Establishment Clause.

The *Kennedy* majority also did not provide an extended discussion of education in the colonies and the early United States to apply original meaning in a historical approach to its coercion analysis. The absence of such a contextual discussion of early public education in America cuts against this long game of historical primacy. This failure by the Court indicates how the solely historical approach can be a problematic interpretive tool for all Establishment Clause cases, especially those involving the constitutionality of religious instruction and prayer in public schools. These voluminous omissions also indicate that, for this Court, the call for history is just code for the call for the return of constitutional prayer to public schools.

The *Kennedy* majority opinion omits that, throughout its timed release and prayer in public schools precedent, the Supreme Court has situated its analysis in a historical context or incorporated history into its constitutional reasoning. In *McCollum*, the Court emphasized that its holding “that a state cannot consistently with the First and Fourteenth Amendments utilize its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals” did not “manifest a governmental hostility to religion or religious teachings” as that “would be at war with our national tradition as embodied in the First Amendment’s guaranty of the free exercise of religion.” In doing so, the Court applied the original meaning of the First Amendment “that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere.”

Justice Frankfurter also used a historical approach in his *McCollum* concurrence, in which he provided an extended discussion of “the relevant

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495 *See* *Kennedy*, 142 S. Ct. at 2407–33.
496 *See* Eric J. Segall, *Mired in the Marsh: Legislative Prayers, Moments of Silence, and the Establishment Clause*, 63 U. MIAMI L. REV. 713, 714 (2009) (arguing that the “purely historical test was not reflective of Establishment Clause doctrine at the time] and is still not today”).
498 *Id.* at 212.
history of religious education in America.\textsuperscript{499} He noted that early American education “was Church education” and that “colonial schools certainly started with a religious orientation.”\textsuperscript{500} However, he contrasted these origins by stating the “modern public school derived from a philosophy of freedom reflected in the First Amendment,” noting that Madison’s \textit{Memorial and Remonstrance} was created to protest “a proposal which involved support to religious education.”\textsuperscript{501} From there, Frankfurter outlined a series of events in various states, illustrating “famous chapters in the history that established disassociation of religious teaching from State-maintained schools.”\textsuperscript{502} As a result of this historical analysis, Frankfurter concluded that “[t]he upshot of these controversies, often long and fierce, is fairly summarized by saying that long before the Fourteenth Amendment subjected the States to new limitations, the prohibition of furtherance by the State of religious instruction became the guiding principle, in law and feeling, of the American people.”\textsuperscript{503} And to put a point on it, Justice Frankfurter wrote, “[t]hat was more than one hundred years ago.”\textsuperscript{504}

At no point does the \textit{Kennedy} majority allude to or reference the extended original meaning or historical analyses in the \textit{McCollum} opinions.\textsuperscript{505} This makes sense, though, as it does not jibe with the type of Founding Fathers’ original meaning that the current Court is peddling. The \textit{McCollum} majority’s determination that a proper interpretation of the Establishment Clause in public schools reflects the original meaning of the First Amendment, rather than hostility to religion, certainly does not coalesce with the \textit{Kennedy} worldview. Further, it seems that this Court is not interested in Frankfurter’s use of the closer-in-time Fourteenth Amendment incorporation as the pivotal historical reference point because of the nature of Reconstruction public education.

Similarly, \textit{Kennedy} provides no citation to \textit{Engel}’s historical analysis used to find that school prayer violated the Establishment Clause. In \textit{Engel}, the Court recognized that government composition of prayers was a core reason for many colonists seeking “religion freedom in America” and that American history demonstrated a widespread awareness “of the dangers of a union of Church and State.”\textsuperscript{506} Consequently, the Court determined that “[t]he First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayer the American people can say.”\textsuperscript{507} Like

\begin{itemize}
\item \textsuperscript{499} Id. at 213 (Frankfurter, J., concurring).
\item \textsuperscript{500} Id. at 213–14.
\item \textsuperscript{501} Id. at 214.
\item \textsuperscript{502} Id.
\item \textsuperscript{503} Id. at 215.
\item \textsuperscript{504} Id.
\item \textsuperscript{505} See \textit{Kennedy v. Bremerton Sch. Dist.}, 142 S. Ct. 2407, 2407–33 (2022).
\item \textsuperscript{506} \textit{Engel v. Vitale}, 370 U.S. 421, 425, 429 (1962).
\item \textsuperscript{507} Id.
\end{itemize}
McCollum, Engel countered claims that its decision “indicate[d] a hostility toward religion or toward prayer” by pointing to the historical record of Christian men with “faith in the power of prayer who led the fight for the adoption of our Constitution and also for our Bill of Rights with the very guarantees of religious freedom that forbid the” type of prayer in that case. However, Engel is not cited a single time in the Kennedy majority’s opinion despite Engel’s employment of the Founding Fathers’ original meaning as a matter of history to reach its decision on the unconstitutionality of the prayer.  

Kennedy also does not cite the Schempp majority decision a single time, despite its application of “the history of the First Amendment” to hold that daily recitations of the Lord’s Prayer and Bible readings in public schools violated the Establishment Clause. Specifically, Schempp found that the Madisonian neutrality used in establishment analysis stemmed “from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies.”

The Kennedy majority did not incorporate this historical analysis of the Schempp majority; instead, its only reference to Schempp is to quote Justice Brennan’s concurrence in the case that provided the accordance with history and faithful Founding Father reflection dividing line for school prayer Establishment Clause analysis. This argument on the differences between permissible accommodation and impermissible establishment has been argued previously in the Court’s other school prayer cases—including by Scalia in his vociferous dissent in Lee that would have upheld the school graduation prayer policy as constitutional.

The Kennedy Court’s proffering of this historical and originalist yardstick from Brennan’s concurrence, without placing it within the historical neutrality context of the Schempp majority opinion, is an unhelpful, ethereal, and elusive measuring device for school districts, administrators, and teachers. One need only look at the test case of Kennedy to illustrate this dilemma. How should a school district in 2015 in Washington properly reflect the understanding of the Founding Fathers as to whether the First Amendment prohibits it from allowing

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508 Id. at 433–34.
509 Id. at 434–35.
510 See Kennedy, 142 S. Ct. at 2407–33.
511 See id.
513 Id. at 222.
515 See supra text accompanying notes 207–212.
a public high school part-time football coach, inspired by the movie *Facing the Giants*, to kneel on the 50-yard line of the football field immediately after the game under the bright lights of the stadium after he has generated a frenzy of viral support based on his Facebook posts and his television interviews with national media about his past prayer practices in the locker room and on the field with students. The Founding Fathers would have no context for most of the relevant aspects of this crucial question. So, how should a school district faithfully determine these men’s understanding of the First Amendment’s application to it?

This notion explains why many learned Justices on the Court have correctly pointed out the deficiencies of a purely Founding-based approach to interpreting the Establishment Clause for school prayer, given the paucity of public K-12 education in the late 1700s and the non-inclusion of public education in the constitutional text. In *Edwards v. Aguillard*, the Court directly stated that “a historical approach is not useful in determining the proper roles of church and state in public schools, since free public education was virtually nonexistent at the time the Constitution was adopted.” In his concurrence in *Schempp*, Justice Brennan argued that history could not be the key determinant in a school prayer Establishment Clause case because “the structure of American education has greatly changed since the First Amendment was adopted” given that “[e]ducation, as the Framers knew it, was in the main confined to private schools more often than not under strictly sectarian supervision.”

Justice Brennan then provided an extended footnote of historical analysis and concluded that “[i]t was not until the 1820’s and 1830’s, under the impetus of Jacksonian democracy, that a system of public education really took root in the United States.” Justice Jackson in his dissent in *Everson* designated an even later timeline, describing the American “public school [as] . . . a relatively recent development dating from about 1840”; Jackson juxtaposed this historical context with textual analysis, emphasizing that “the Constitution says nothing of education.” However, none of this historical interpretive discussion makes the *Kennedy* cut.

The *Kennedy* majority also does almost nothing to delve deeper into the history of American public education from the colonial period through the time in which *Everson* was decided. This omission is likely because the divergent

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518 *Schempp*, 374 U.S. at 238 (Brennan, J., concurring).
519 Id. at 238 n.7.
522 An examination of the origins of public education would actually yield a starting point that the history of education in the colonies was often intertwined with religion. See Bernard Bailyn,
historical applications in the Court’s school prayer precedents illustrate that history is not a unitary account of events that supports a singular interpretation of what happened hundreds of years ago, despite originalist claims to the contrary. Indeed, as Professor Steven Green has argued, “the historical record [alone] is too amorphous and too easily misread or manipulated to resolve modern controversies” like these related to school prayer.523

It seems that the Kennedy majority recognized this quandary. This would explain its lack of elaboration on how the school district and the Ninth Circuit should have applied the historical primacy metric beyond just finding that the coach was “entitled to summary judgment on his First Amendment claims.”524 As an unfortunate result of this omission, the Court has left schools and lower courts with the elusive directive of applying “original meaning and history” as the Founding Fathers would, which appears to be coded subtext to allow more clearly unconstitutional religious instruction and prayer in public schools.525 Without sufficient support or guidance, this insistence on the primacy of history for school prayer establishment cases jibes with one of the hallmarks of the Roberts Court—its extensive interpretation of religious liberty to find increasing Free Exercise violations and fewer Establishment Clause violations.526 This runs in tandem with what has been deemed by Professor Caroline Mala Corbin as “opportunistic originalism,” in which there is a pick-

523 Green, supra note 152, at 1719.
524 Kennedy, 142 S. Ct. at 2433.
525 Id. at 2428.
526 See Lee Epstein & Eric Posner, The Roberts Court and the Transformation of Constitutional Protections for Religion: A Statistical Portrait, 2021 SUP. CT. REV. 315, 324 (2021) (“Across the Warren, Burger, and Rehnquist Courts, the religious side prevailed about half the time, with gradually increasing success. In the Roberts Court, the win rate jumps to 83%.”); Christopher C. Lund, Second-Best Free Exercise, 91 FORDHAM L. REV. 843, 844 (2022) (“Free exercise is in the middle of a revolution. Long neglected, the free exercise of religion has quickly become the favorite child of the Roberts Court.”).
and-choose based-on-a-desired-outcome approach to constitutional interpretation under the banner of applied original meaning. Such is the case with *Kennedy*, which continues this Court’s disruptive tradition of using just enough historical source material for alleged plausibility and ignoring contrary relevant historical precedential applications to achieve a specific outcome. With *Kennedy*, this oblique and directionless turn to history seemingly has become the singular opportunistic guiding force for future Establishment Clause decisions. However, this contradicts the years of the Court’s education law Establishment Clause decision-making, which emphasized that “one fixed Establishment Clause jurisprudential rule or test is impossible” for the complex evaluation of the constitutionality of school religious exercises and prayer.

D. No Pressure, Missing Context: Kennedy’s Faulty Coercion Analysis

*Kennedy*’s final quiet jurisprudential error is its treatment of unconstitutional coercion. Although the Court did not jettison coercion analysis for school prayer Establishment Clause cases as it did with endorsement analysis, it substantially attenuated it through a retrograde equation of impermissible establishment coercion with direct coercion. In doing so, the majority presented an incomplete picture of the range of coercion prohibited by the Establishment Clause. It also ignored the Court’s prior applications of history to support an originalist interpretation of the First Amendment that would find Kennedy’s school prayer to constitute impermissible establishment coercion. This faulty conflation also signaled the Court’s willingness to scuttle indirect social coercion as an indicator of an Establishment Clause violation, even though this has been a hallmark of the Court’s examination of the constitutionality of prayer within the unique K-12 public school environment. Finally, the Court cemented this intention by failing to acknowledge the presence of social coercion within the record of litigation through a complete contextual analysis of school prayer to achieve its desired ends. This resulted in an inaccurate and inflammatory holding that the coach’s “private religious exercise did not come close to crossing any line one might imagine separating protected private expression from

527 Caroline Mala Corbin, *Opportunistic Originalism and the Establishment Clause*, 54 Wake Forest L. Rev. 617, 618–19 (2019) (“[T]he Supreme Court as a whole has not adopted a consistent approach to originalism—even as to a single clause.”).

528 See ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM 93 (2022) (“[O]riginalism was initially created in order to unsettle the evolving doctrine of the Warren and Burger Courts, which conservatives despised. Disruption was baked into originalism from the beginning.”).

impermissible government coercion.\textsuperscript{530} This faulty and incomplete analysis further degraded the Court’s longstanding school prayer jurisprudence and will continue to encourage the expansion of religious exercises in America’s public schools.

1. \textit{Kennedy’s Faulty Conflation of Direct Coercion with Impermissible Establishment Coercion}

At the outset of its coercion analysis, the Court stated that it “has long held that government may not, consistent with a historically sensitive understanding of the Establishment Clause, ‘make a religious observance compulsory’; […] ‘coerce anyone to attend church,’ [or] force citizens to engage in ‘a formal religious exercise.’”\textsuperscript{531} The Court also made clear that “coercion along these lines was among the foremost hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment.”\textsuperscript{532} Here, the Court seemingly signaled that the foundational coercion analysis of \textit{Engel, Schempp, Lee,} and \textit{Santa Fe} would not join \textit{Lemon} and its progeny’s endorsement test offshoot in the broken \textit{stare decisis} depository of Establishment Clause case law.

However, such was not the case, as the Court intentionally winnowed its selection of precedential tipping point prohibitions here to circumscribe the Establishment Clause’s coercion limitations, especially in public schools. The \textit{Kennedy} majority cited only two cases for these historically sensitive principles and only a subcategory of coercion within them.\textsuperscript{533} However, these selected activities do not encompass the complete range of coercive governmental activities that the Court has invalidated within its 75 years of school prayer and religious instruction in public schools jurisprudence. Once again, \textit{Kennedy}’s failure to acknowledge its past precedent suggests an intention to abandon it in future school prayer cases.

In establishing the foundation of its coercion analysis, the Court cited \textit{Zorach} for the prohibitions on compulsory religious observance and coerced church attendance and \textit{Lee} for the ban on forced engagement in formal religious exercises.\textsuperscript{534} While these state actions inarguably violate the First Amendment, this is an incomplete picture of unconstitutional coercion regarding religious instruction and prayer inside public schools. \textit{Kennedy} omitted \textit{Lee}’s proscription on coercive prayer exercises in public schools, even when they result from

\textsuperscript{531} Id. (first quoting \textit{Zorach} v. Clauson, 343 U.S. 306, 314 (1952); then quoting \textit{Lee} v. Weisman, 505 U.S. 577, 589 (1992)).
\textsuperscript{532} Id.
\textsuperscript{533} See id. (first quoting \textit{Zorach}, 343 U.S. at 314; then quoting \textit{Lee}, 505 U.S. at 589).
\textsuperscript{534} See id.
“indirect coercion.” Similarly, the Court omitted Zorach’s recognition that it would have been a different constitutional evaluation if teachers had used direct or indirect coercion for student participation in the released time program at issue. Unsurprisingly, this Kennedy coercion framing also omitted Santa Fe’s finding that the government may not use social pressure to coerce public school students “to participate in an act of religious worship.”

In refusing to acknowledge inconvenient history, the Court also neglected to explore Lee’s rooting of its coercion analysis in history and original meaning. Nowhere in Kennedy will one find Lee’s critical historical analysis that “the lesson of history that was and is the inspiration for the Establishment Clause [is] the lesson that in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce.”

All of this omitted content indicates the Court’s intent to exclude indirect social coercion from its future school prayer analysis, which is reinforced by what comes next in the majority opinion.

The Court followed these narrowed precedential statements (and their corollary critical omissions) with a vitally important, yet nonchalantly delivered, qualifying sentence: “Members of this Court have sometimes disagreed on what exactly qualifies as impermissible coercion in light of the original meaning of the Establishment Clause.” In support of this statement, the Court contrasted Lee’s majority decision, in which the Court held that state-sponsored direct and social coercion in schools transgresses the Establishment Clause, with Scalia’s dissent in that case, which rejected the majority’s premise that “state-induced ‘peer-pressure’ coercion” can tip the scale on an Establishment Clause violation. For Justice Scalia, “[t]he coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support by force of law and threat of penalty.” Consequently, Scalia equated impermissible government coercion only with direct coercion, no matter the situs of the prayer.

In light of the precedential omissions at the outset of its coercion analysis, Kennedy’s comparison between the majority opinion and Justice Scalia’s dissent in Lee to demonstrate judicial disagreement over the original

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535 Lee, 505 U.S. at 592.
536 Zorach, 343 U.S. at 308, 311 (stating it would be “a wholly different case” for its Establishment Clause analysis “if in fact coercion were used, if it were established that any one or more teachers were using their office to persuade or force students to take the religious instruction.”).
538 Lee, 505 U.S. at 591–92.
539 Kennedy, 142 S. Ct. at 2429.
540 Id. (comparing Lee, 505 U.S. at 593 (majority opinion), with Lee, 505 U.S. at 640–41 (Scalia, J., dissenting)).
541 Lee, 505 U.S. at 640 (Scalia, J., dissenting).
542 See id. at 640–41.
meaning of impermissible coercion is significant. This elevation of Scalia’s exclusively direct coercion to be on par with Lee’s holding arguably indicated the Court’s willingness to eliminate indirect social coercion as a form of impermissible government coercion in Establishment Clause analysis, even within the special K-12 public school environment. The Court then did so by failing to acknowledge the record of social coercion in an incomplete contextual analysis that concluded with the holding that Kennedy’s prayers did not present an Establishment Clause concern for the school district.

2. Kennedy’s Incomplete Contextual Coercion Analysis

For so many omissions and obfuscations, the Kennedy majority was blunt in its conclusion that “the evidence cannot sustain” the school district’s claim that the Establishment Clause required it to stop Kennedy’s prayer activities because they were impermissibly coercive of students.543 Indeed, the Court put a full stop to this conclusion by stating that “Mr. Kennedy’s private religious exercise did not come close to crossing any line one might imagine separating protected private expression from impermissible government coercion.”544 However, this conclusion results from inaccurate, incomplete contextual coercion analysis.

In support of this conclusion, the Court found that the school district did not correspond about any coercion concerns with the coach and instead “conceded in a public 2015 document that there was ‘no evidence that students [were] directly coerced to pray with Kennedy.’”545 The Court also emphasized that Kennedy made repeated statements that he “‘never coerced, required, or asked any student to pray,’ and that he never ‘told any student that it was important that they participate in any religious activity.’”546 The Court then differentiated Kennedy’s pre-October 2015 locker-room and postgame prayers from the three October 2015 prayers he “‘told everybody’” he wished to do while the “athletes were occupied.”547 As to the latter, the Court found that mature secondary school students would certainly not be coerced to participate in such an exercise just by seeing or hearing Kennedy “pray quietly by himself.”548

What is significantly concerning about this part of Kennedy is its conflation between coercion and direct coercion, which is an outgrowth of the overly narrow legal foundation it constructed at the outset of its coercion

543 Kennedy, 142 S. Ct. at 2428–29.
544 Id. at 2429.
545 Id.
546 Id.
547 Id. at 2429–30.
548 Id. at 2430.
When the Court stated in *Kennedy* that there was no evidence of coercion within the record, it meant there was no evidence of direct coercion in the record. This disregards the *Lee-Santa Fe* precedent that established that indirect social coercion also constitutes impermissible coercion prohibited by the Establishment Clause, especially when dealing with adolescents who are susceptible to the powers of peer pressure and the state is exerting social pressure to enforce religious orthodoxy. This subtle limitation of coercion to only being direct coercion marks yet another quiet *Kennedy* encroachment on the Court’s foundational school prayer precedent principles.

This is a significant error. Such a jurisprudential approach carries substantial harm for all American schoolchildren because it ignores the reality that unconstitutional coercion is magnified when state prayer is directed towards children, rather than “mature adults.” As recognized repeatedly by the Court, students in K-12 schools are acutely susceptible to social coercion due to their stages of cognitive development, especially when it comes to religious or spiritual identity, as that is an integral part of “adolescent larger identity formation.” Consequently, these students “are particularly vulnerable to the inculcation of orthodoxy in the guise of pedagogy” by school-employed role models inside and outside the classroom. As a result, the constitutional

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549 See Driver, supra note 6, at 239 (“By equating ‘coercion’ with ‘direct coercion’ and turning its back on ‘indirect coercive pressure,’ ‘indirect coercion,’ and ‘subtle coercive pressure,’ *Kennedy* opened a Pandora’s box of religious influence and religious indoctrination in the nation’s public schools.”).

550 See Lee v. Weisman, 505 U.S. 577, 578 (1992) (“Since adolescents are often susceptible to peer pressure, especially in matters of social convention, the State may no more use social pressure to enforce orthodoxy than it may use direct means.”); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 311–12 (2000) (quoting *Lee*, 505 U.S. at 593) (“We stressed in *Lee* the obvious observation that ‘adolescents are often susceptible to pressure’ from their peers towards conformity, and that the influence is strongest in matters of social convention.”).


calculus changes when analyzing coercion and school prayer due to the transformative power the state wields over students in the values instillation that occurs in public schools.\textsuperscript{556}

However, the Kennedy majority demonstrated that it was ready to disregard the power of such authority in school prayer cases, just as Justice Scalia called for in his Lee dissent.\textsuperscript{557} Here, the Court exhibited its apparent abandonment of the indirect social coercion standard of Lee and Santa Fe by mischaracterizing and outright ignoring evidence of such coercion within the record. The majority dismissed the school district’s arguments that Kennedy’s influence as a coach would indirectly coerce students on the team to pray with him and rejected facts within the record of past, pre-October 2015 coercion to do so “as hearsay.”\textsuperscript{558} In a footnote, the majority also dismissed the dissent’s call for a complete coercion analysis that evaluated Kennedy’s October 2015 prayers within the context of his years of leading students in religious activities through the football program as the basis to find the district acted in accordance with the Establishment Clause.\textsuperscript{559} The Court refused to engage in this contextual analysis, stating that those past practices did not matter because they ceased upon the district’s direction and the coach did not “claim First Amendment protection for them.”\textsuperscript{560} Further, the Kennedy majority refused to alter its coercion analysis based on the potentiality that students might choose to participate in Kennedy’s prayers in the future.\textsuperscript{561}

However, these deliberative declinations fly in the face of the required complete contextual coercion analysis of Lee and Santa Fe. In Lee, the Court emphasized, “prayer exercises in public schools carry a particular risk of indirect coercion.”\textsuperscript{562} The Court distinguished that “[w]hat to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy.”\textsuperscript{563} In evaluating whether the graduation prayer violated the Establishment Clause, the Court in Lee placed it within the context of the years-


\textsuperscript{557} See supra notes 207–212 and accompanying text.


\textsuperscript{559} See id. at 2432 n.7.

\textsuperscript{560} Id.

\textsuperscript{561} See id.


\textsuperscript{563} Id.
long policy of inviting clergy members to provide graduation prayers. It refused to accept a de minimis argument to sustain the constitutionality of the approximately “two minutes” of prayer, finding that “the intrusion was both real, and in the context of a secondary school, a violation of the objectors’ rights.” And it reaffirmed its longstanding precedent dating back to Engel and Schempp that the public school context requires the Court to distinguish this contextual environment from other environments involving adults who are not susceptible to the same types of indirect social coercive pressures as students.

Santa Fe also incorporated the context of the special school environment and the context of the passage of the invocation policy at issue into its coercion analysis. The Court did not just evaluate the language of the policy in a vacuum; it evaluated its “election mechanism . . . in light of the history in which the policy in question evolved” to conclude that it “reflect[ed] a device the District put in place that determine[d] whether religious messages will be delivered at home football games.” Santa Fe also rejected an argument that there can be no impermissible Establishment Clause coercion at a non-compulsory football game by looking at the complete context of such a school event. Here, the Court stated that such an argument was “formalistic in the extreme” and ignored the context of the coercive social pressures exerted upon students to participate in the pregame prayers.

This type of complete contextual Establishment Clause coercion analysis is missing in Kennedy. A proper contextual analysis would have acknowledged the fact within the record that at least one parent had complained to the head football coach and on Facebook that they did not want their student-athlete participating in Kennedy’s religious activities when “[t]he whole prayer situation . . . became an issue.” This happened “after the controversy,” which indicates that it should have been considered even under an overly narrow October 2015 prayer perspective.

A complete and proper contextual analysis would have also acknowledged a statement by the district superintendent in the record that “[a]fter the issue with Mr. Kennedy arose, [he] received, either directly or through other

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564 See id. at 581.
565 Id. at 594.
566 See id. at 597 (citing Engel v. Vitale, 370 U.S. 421 (1962); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963)).
567 Contextual analysis was also central to the endorsement analysis in Santa Fe, but that would certainly not be a part of the Kennedy decision’s analysis given endorsement analysis’s alleged relegation to the annals of bad law by the Court. See supra text accompanying note 129.
569 See id.
570 Id. at 311–12.
571 Kennedy Joint Appendix, supra note 220, at 186.
572 Id.
District employees, input from some local parents and students who were critical of Mr. Kennedy’s actions, and whose children had participated in the team prayers only because they did not wish to separate themselves from the team.\footnote{Id. at 356.}

A complete coercion analysis would have also included the superintendent’s statement in the record that several students and parents thanked him for directing Kennedy to “cease praying on the field around the students” because they had been placed “in awkward situations where they did not feel comfortable declining to join with the other players in Mr. Kennedy’s prayers.”\footnote{Id. at 359.}

A complete contextual coercion analysis would recognize that all of these facts, which at the very least raise a question of material fact on coercion, dovetail with the story of a former BHS football player whose senior year Homecoming game was the same pivotal October 16 Homecoming game at the crux of the Kennedy case facts.\footnote{See Bremerton Community Members Amici Curiae Brief, supra note 369, at 2.} In an amici curiae brief, the football player explained how he viewed Kennedy’s “prayer time as any other order from a coach.”\footnote{Id. at 15.} As a result, “[f]or four years [he] knelt for [Kennedy] in solidarity as he prayed so there would be no objection to [him] playing football,”\footnote{Id.} even though prayer was not a part of his life.\footnote{Id. at 11.} Other non-religious students felt this same coercive pressure,\footnote{See id. at 16.} as the “prayer circle . . . was something that was expected.”\footnote{Id.}

When this amici curiae player did not participate, he was “persecuted” by the coaches, who showed animosity towards him in response.\footnote{Id. at 18.}

This type of social coercion is especially pernicious in the public school environment, let alone one in which the students are literally in the spotlight view of a grandstand of people. As a 35-year educator affirmed in the same Bremerton community member amici curiae brief:

[Y]oung people want to respect the adults in their lives and follow their examples. They also want to be accepted by their peers. When an adult pushes a student to do something, such as praying in front of a grandstand of people on their school football field while in school uniforms, it shames and embarrasses those who do not want to participate.\footnote{Id.}

Given these circumstances, it would have been incredibly difficult for Coach Kennedy’s players, unlike an elected adult legislator in a legislative
chamber, “to ward[] off the dual threats of religious indoctrination and peer pressure” by refusing to participate.\textsuperscript{583} This was an actuality in the past, and it was a reasonable concern for the district to deny Kennedy’s demand to continue his past prayer practices immediately after the end of the fourth quarter and before the conclusion of the school event.

None of this complete contextual establishment analysis, with its inclusion of social coercion concerns as required by \textit{Lee} and \textit{Santa Fe}, was incorporated into the \textit{Kennedy} majority opinion. Instead, the Court merely cabined off the facts for its coercion analysis into the unsupported vacuum of the three short October 2015 prayers. The Court determined there was no “record evidence that students felt pressured to participate in these prayers” and that none of his students participated in them.\textsuperscript{584} The Court emphasized that Kennedy was joined in prayer only by players from the opposing team rather than his team on October 16; he prayed alone on October 23; and he was joined by only a few members of the public in the October 26 prayer.\textsuperscript{585} The Court also determined that the case shared no similarities with \textit{Lee} or \textit{Santa Fe} because Kennedy’s October prayers “were not publicly broadcast or recited to a captive audience, [and] [s]tudents were not required or expected to participate.”\textsuperscript{586} As a result, the Court concluded there was “an absence of evidence of coercion in the record.”\textsuperscript{587}

While this coercion in a vacuum analysis certainly is easier, easy jurisprudence is not what the Court is constitutionally charged to do. Although its school prayer precedent required the Court to engage in a complete contextual analysis, the \textit{Kennedy} majority chose not to employ this transparent approach, leaving reasoned judgment by the wayside.\textsuperscript{588} Instead, the majority’s intentional choice not to apply its extant precedent obscured the complete story of the case once more, signaled a ready abandonment of the indirect coercion standard for school prayer Establishment Clause cases, further underscored the illegitimacy of its decision-making process, and set a harmful slippery slope precedent that will be weaponized as the basis for increased unconstitutional prayer practices in public schools in the future.\textsuperscript{589}

\begin{footnotes}
\footnotetext{583}{Scott W. Gaylord, \textit{When the Exception Becomes the Rule: Marsh and Sectarian Legislative Prayer Post-Sumnum}, 79 U. CIN. L. REV. 1017, 1032 (2011).}
\footnotetext{584}{Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2430, 2432 (2022).}
\footnotetext{585}{See id. at 2430.}
\footnotetext{586}{Id. at 2432.}
\footnotetext{587}{Id. at 2430.}
\footnotetext{589}{See Epstein, \textit{supra} note 166, at 2089 (discussing the dangers of “slippery slope” Establishment Clause jurisprudence).}
\end{footnotes}
IV. THE PERILOUS POTENTIAL FOR RAGING TORRENTS AGAINST SCHOOL PRAYER JURISPRUDENCE AFTER KENNEDY

In Kennedy, the Court stated that a natural reading of the First Amendment would “suggest the [Establishment, Free Speech, and Free Exercise] Clauses have ‘complementary’ purposes, not warring ones where one Clause is always sure to prevail over the others.”\textsuperscript{590} However, at the conclusion of the opinion, the Court determined that the school district had created a zero-sum game in denying Kennedy’s religious accommodation request based on a faulty determination that the Establishment Clause trumped the Free Speech and Free Exercise Clauses.\textsuperscript{591} The Court rejected such a trumping premise in the abstract and determined the school district had misconstrued the Establishment Clause, thereby infringing on Kennedy’s First Amendment rights.\textsuperscript{592} As a result, the Court found that Kennedy was entitled to summary judgment on his claims because:

Respect for religious expressions is indispensable to life in a free and diverse Republic—whether those expressions take place in a sanctuary or on a field, and whether they manifest through the spoken word or a bowed head. Here, a government entity sought to punish an individual for engaging in a brief, quiet, personal religious observance doubly protected by the Free Exercise and Free Speech Clauses of the First Amendment. And the only meaningful justification the government offered for its reprisal rested on a mistaken view that it had a duty to ferret out and suppress religious observances even as it allows comparable secular speech. The Constitution neither mandates nor tolerates that kind of discrimination.\textsuperscript{593}

Perhaps not surprisingly, this final framing and the Court’s implication in its holding stand as the last quiet encroachments on the Court’s extant school prayer precedent. Here, the Kennedy majority set up its own zero-sum game, elevating the “doubly protected” religious speech of a public school employee over a school district’s valid concerns that this was instead indirectly coercive prayer which engendered the type of divisiveness against which the Establishment Clause was designed to protect.\textsuperscript{594} In doing so, the Kennedy majority disregarded the public school’s unique constitutional environment, of

\textsuperscript{590} Kennedy, 142 S. Ct. at 2426 (citing Everson v. Bd. of Educ., 330 U.S. 1, 13, 15 (1947)).
\textsuperscript{591} See id. at 2432.
\textsuperscript{592} See id.
\textsuperscript{593} Id. at 2432–33.
\textsuperscript{594} See Marc Rohr, Tilting at Crosses: Nontaxpayer Standing to Sue Under the Establishment Clause, 11 GA. STATE U. L. REV. 495, 502 (1995) (discussing the “indirect coercion-unwanted exposure to religion by virtue of state action, even in the absence of official compulsion” that takes place with school prayer).
which the Court had been intentionally protective in its 75 years of preceding prayer precedent.\textsuperscript{595} \textit{Kennedy} also upended this precedent by refuting what the Court had previously stated time and time again—that proper enforcement of the Establishment Clause in public schools does not constitute hostility to religion.\textsuperscript{596} For the \textit{Kennedy} majority, a school district’s careful attempt to avoid violating the Establishment Clause by applying settled longstanding school prayer case law was the equivalent of requiring a rule that makes “it necessary for [the] government to be hostile to religion.”\textsuperscript{597}

The Court’s casting of the district’s actions as “ferret[ing] out and suppress[ing] religious observances” and its propping up of the myth that the school district requested a legal ruling that “any visible religious conduct by a teacher or coach should be deemed . . . impermissibly coercive on students” are dangerous. Unlike the majority’s characterization of the school district as anti-religious, the record demonstrates that it repeatedly attempted to apply the Establishment Clause as an “equal liberty provision” by respecting its students’ conscientious liberties and the coach’s religious convictions.\textsuperscript{598} The district made its decisions to ensure “the individual freedom of conscience” of its students and to uphold the “conviction [at the heart of the First Amendment] that religious beliefs worthy of respect are the product of free and voluntary choice.”\textsuperscript{599} The district’s reliance on the Court’s longstanding school prayer precedent for the basis of these decisions was necessary to avoid the genuine potential for “[a] state-created orthodoxy” that would put “at grave risk . . . freedom of belief and conscience [based on] religious faith [being] real, not imposed.”\textsuperscript{600} In doing so, the district continued to reflect the core principle of this pre-\textit{Kennedy} school prayer case law that centered on avoiding an unconstitutional “dilution of religion.”

However, the \textit{Kennedy} majority castigated the district for following the Court’s longstanding precedent, claiming that it was disrespectful to religious

\textsuperscript{595} See Martha McCarthy, \textit{Religion and Education: Whither the Establishment Clause?}, 75 IND. L.J. 123, 125 (2000) (“Schools have provided the battleground for some of the most notable Establishment Clause disputes, which is not surprising, given the special concern for protecting children from religious establishments.”).

\textsuperscript{596} See, e.g., Illinois ex rel. McCollum v. Bd. of Educ., 333 U.S. 203, 211–12 (1948) (“To hold that a state cannot consistently with the First and Fourteenth Amendments utilize its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals does not, as counsel urge, manifest a governmental hostility to religion or religious teachings.”); Engel v. Vitale, 370 U.S. 421, 443 (1962) (Douglas, J., concurring) (“The First Amendment leaves the Government in a position not of hostility to religion but of neutrality.”).

\textsuperscript{597} \textit{Kennedy}, 142 S. Ct. at 2430 (quoting Zorach v. Clauson, 343 U.S. 306, 314 (1952)).


\textsuperscript{600} Lee v. Weisman, 505 U.S. 577, 592 (1992).

expression.\textsuperscript{602} This aspect of the opinion is egregious wrong, as it provides fodder for the claim that a valid application of the Court’s pre-\textit{Kennedy} prayer Establishment Clause jurisprudence (that is still good law) is not only hostility toward religion but discrimination against religion. This is antithetical to the message the Court has conveyed for 75 years that a determination that coercive school prayer violates the Establishment Clause is neither anti-religious nor hostile to religion.\textsuperscript{603} The \textit{Kennedy} Court has failed the Constitution and the country by communicating the opposite message.

This is the last breach in the bulwark of precedential Establishment Clause protection for all American schoolchildren, and it will inflict a heavy toll. The culmination of these encroachments on the Court’s school prayer jurisprudence will be the release of a torrent of public and private actors flooding public schools with increased prayer and other religious practices along with the resulting divisiveness and strife against which the Establishment Clause was intended to protect. Sadly, this observation is neither hypothetical nor hyperbole.

Multiple state officials have already invoked \textit{Kennedy} as justification for clearly unconstitutional school prayer practices. For example, a South Carolina public school district representative claimed \textit{Kennedy} vindicated its policy of permitting students to pray over the loudspeaker at football games enacted in direct \textit{Santa Fe} nullification.\textsuperscript{604} The school board chairman who authored this prayer rule declared that the \textit{Kennedy} decision was “basically . . . the same thing as our school district policy.”\textsuperscript{605} Additionally, \textit{Kennedy} has been used to justify high school football coaches at public high schools continuing to lead audible prayers with students before games, which is a clear transgression of the First Amendment.\textsuperscript{606}

These examples demonstrate how this case will be used to argue for expanding school-led religious activities that do not jibe with the Court’s long-

\textsuperscript{602} See \textit{Kennedy}, 142 S. Ct. at 2432–33 (providing that the school district did not act in accordance with the principle that “[r]espect for religious expressions is indispensable to life in a free and diverse Republic”).

\textsuperscript{603} See \textit{Lee}, 505 U.S. at 598 (stating that its holding “express[es] no hostility” to religion); \textit{Santa Fe Indep. Sch. Dist. v. Doe}, 530 U.S 290, 294 (2000) (identifying the litigants who challenged the student-led invocations under the Establishment Clause as religious families).


\textsuperscript{605} Id.

established education law Establishment Clause jurisprudence. This potentiality is only magnified by the fact that there has already been significant non-compliance with the Court’s school prayer decisions based on accurate fact recitation and supported law applications. The aftermath of Engel was particularly instructive, where multiple school superintendents and state executives encouraged staff-led school prayer in open and express defiance of the Supreme Court’s decision. Rallying cries, like “[w]e will not pay any attention to the Supreme Court ruling,” were not uncommon. With Kennedy, the exuberance will be the same. However, the message will be the opposite: “We will pay attention to all that was quietly said and silently omitted in the Supreme Court’s ruling.”

The perils of the continued spinning out of Kennedy to uphold increased religious activities and prayer practices in public schools are legion. The abandonment of 75 years of school prayer jurisprudence that can be urged on the shoulders of Kennedy will inflict harm on schoolchildren, the special role that public schools play in American democracy, and the Court itself. The Court must not allow its quiet encroachments to evolve into raging torrents against the safeguards instilled within the original purpose of the Establishment Clause.

Consequently, an analytical U-turn from the Kennedy trajectory is required to avert the damages of divisiveness that will otherwise be inflicted upon all students, no matter their religious or conscientious beliefs. Undoubtedly, the most harm will be exacted upon a “minority of a minority constituency”—those “nonadherent schoolchildren to the majority view.”

607 See Swenson, supra note 235 (discussing the probability that schools and teachers will use Kennedy to “push[] the envelope” on leading student prayer in the classroom).

608 See Susan Welch & John Gruhl, Does Bakke Matter? Affirmative Action and Minority Enrollments in Medical and Law Schools, 59 Ohio St. L.J. 697, 719 n.96 (1998) (using the school prayer cases as a paradigmatic example of how decisions that are viewed as a contradiction of community norms “may be less likely to be fully implemented”).

609 See Lain, supra note 172, at 513.

610 See id. (quoting Court Decision—and the School Prayer Furor, NEWSWEEK, July 9, 1962, at 45; then quoting the Deputy Superintendent of Atlanta Public Schools).

611 See Steven Collis, Perspective: The Reckless Misrepresentation of the School Prayer Case, DESERET NEWS (July 5, 2022, 11:00 PM), https://www.deseret.com/2022/7/5/23191620/perspective-the-reckless-misrepresentation-of-the-school-prayer-case-football-coach-supreme-court (discussing the harm of state officials being emboldened to “use schools to impose their religion on others” through claims that the Court allows such actions via Kennedy).

612 See Noah Feldman, The Intellectual Origins of the Establishment Clause, 77 N.Y.U. L. REV. 346, 351 (2002) (“Liberty of conscience, then, was . . . the purpose that underlay the Establishment Clause when it was enacted.”); Stanley Ingber, Religion or Ideology: A Needed Clarification of the Religion Clauses, 41 STAN. L. REV. 233, 322 (1989) (arguing that the Establishment Clause ensured that “[g]overnment intrusion may not corrupt religious groups, but neither may religious groups wield excessive power over societal policy”).

613 The Powerful Problem, supra note 130, at 626.
These students are “a marginalized population at its extreme in constitutional decision-making” who require special protection in First Amendment analysis. Indeed, these children have historically suffered shocking “vitriol and violence” when resisting religious practices in public schools, and such harassment is virtually limitless in the age of social media.

The harms of weakened school prayer jurisprudence will not just affect these minority students, as Kennedy-style Establishment Clause analysis creates the exact strife based on divergence of religious beliefs that the Founders attempted to work against in the passage and ratification of the First Amendment. This will harm all students, and the Court will fail if it continues the path it blazed with Kennedy. Entire school communities, composed of students who lack political power, depend upon the non-political branch to safeguard First Amendment liberties within the schoolhouse in evaluating school prayer cases. The Court should not turn its back on this role.

Because “‘the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools,’” the potential for flashpoints and slippery slopes based on the Kennedy decision is particularly worrisome in the public school context. There are a variety of powerful and highly motivated organizations and individuals with significant financial resources that are driven to return explicitly Christian values and practices to the public schools, and they will likely use Kennedy to do so. These voices can now cite Kennedy to engage in divisive rhetoric to defend any legal action they

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614 Id.; see also Stanley Ingber, Socialization, Indoctrination, or the “Pall of Orthodoxy”: Value Training in the Public Schools, 1987 U. ILL. L. REV. 15, 38 (1987) (arguing that “outsiders, lacking political influence, most need the First Amendment to protect them from the tyranny and transient passions of the majority”).


616 See Nadine Strossen, Students’ Rights and How They Are Wronged, 32 U. RICH. L. REV. 457, 457 (1998) (“[T]he rights of our nation’s youth are always especially embattled—not surprisingly, since they are not yet eligible to vote and, therefore, lack political power.”).


618 See Driver, supra note 6, at 213 (arguing that “Kennedy threatens to render [public schools] the hotbeds of divinity”).

619 See, e.g., Mike Hixenbaugh, How a Far-Right, Christian Cellphone Company ‘Took Over’ Four Texas School Boards, NBC NEWS (Aug. 25, 2022, 8:00 AM), https://www.nbcnews.com/news/us-news/-christian-cell-company-patriot-mobile-took-four-texas-school-boards-ncna44583 (“Patriot Mobile, a Christian conservative wireless provider that donated hundreds of In God We Trust signs to Texas school districts pursuant to a Texas law that requires the conspicuous display in public schools of donated national motto signs, has been engaged in an intentional effort to install school board members who ascribe to their ‘mission from God to restore conservative Christian values at all levels of government—especially in public schools.’”).
deem “express[es] hostility to religion, in violation of the Free Exercise Clause.” One need look no further for such rhetoric than statements already made by Kennedy’s advocates during the litigation equating prior school prayer precedent as treating prayer like “the new pornography” and those who disagreed with Kennedy’s position as being “the Godless.” These inflammatory statements play into the larger culture war factions battling over the meaning of the Establishment Clause in the public schools and “enlist[ing] the federal courts to play a central part in their skirmishes.” With Kennedy, the Court has appeared to declare its side.

This is perilous error. The Court should instead return to its properly neutral role and stop any further fanning of these flames, even if it insists on solely applying original meaning to do so. Contrary to the Kennedy holding, proper originalism requires the same core holding for future cases: school-sponsored prayer transgresses the Establishment Clause because its inherent divisiveness does not align with the core purposes of the First Amendment. Just as Madison was not anti-religious, a continued judicial application of his insistence “on state neutrality between religions and between religion and non-religion” is not anti-religious. Instead, it reflects the original purposes of the

620 Elizabeth S. Anderson & Richard H. Pildes, Expressive Theories of Law: A General Restatement, 148 U. PA. L. REV. 1503, 1546 (2000); see also Mark Satta, Unclear Hostility: Supreme Court Discussions of “Hostility to Religion” from Barnette to American Legion, 68 BUFF. L. REV. 641, 650 (2020) (“Advocates of expansions of religious free exercise rights seem to gravitate toward the argument that the perceived infringements on those rights are instances of hostility to religion.”).


622 Promise Keepers Interview, supra note 1, at 1:24.

623 Esbeck, supra note 151, at 32.


Religion Clauses, as Madison advocated for such neutrality to avoid the harms of divisiveness, to assure liberties of conscience, and to preserve the inviolable spheres of religion and government.

And “[i]n no activity of the State is it more vital to keep out [these] divisive forces than in its schools.” The Court must not take an ideological side in religious conflict related to school prayer to preserve the essential role of “America’s public schools [as] the nurseries of democracy.” These schools also inculcate the civic values of the American republic, which must include respect for the liberties enshrined within the Establishment Clause. Consequently, the Court’s longstanding school prayer precedent makes clear that the public school requires special constitutional interpretation and especially vigilant scrutiny of Establishment Clause concerns in school prayer cases.

This is because the public schools are “[d]esigned to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous

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629 See Patricia E. Curry, James Madison and the Burger Court: Converging Views of Church-State Separation, 56 Ind. L.J. 615, (1981) (discussing Madison’s view in the Memorial and Remonstrance that religious establishment should not be permitted because it “promote[s] faction” and “is fundamentally divisive”); Rene Reyes, Justice Souter’s Religion Clause Jurisprudence: Judgments of Conscience, 43 Conn. L. Rev. 303, 311 (2010) (discussing Madison’s conception of liberty of conscience as requiring freedom from coercive religious practices); Francisco Valdes, Piercing Webs of Power: Identity, Resistance, and Hope in LatCrit Theory and Praxis, 33 U.C. Davis L. Rev. 897, 913 n.49 (2000) (quoting The Federalist No. 10, at 18 (James Madison) (Roy P. Fairfield ed., 1966)) (“The divisive and vexatious power of human faith in organized religions prompted James Madison to cite this phenomenon as one of the reasons for a system of government that separates and disperses political power: ‘different opinions concerning religion’ cause humans to ‘vex and oppress each other.’”).

630 See M. Elisabeth Bergeron, “New Age” or New Testament?: Toward A More Faithful Interpretation of “Religion,” 65 St. John’s L. Rev. 365, 369 (1991) (“James Madison, however, understood that religious and secular interests alike were advanced by diffusing and decentralizing power; both religion and government could reach their independent goals only if each were allowed to flourish in its own sphere.”).


633 Michele Estrin Gilman, “Charitable Choice” and the Accountability Challenge: Reconciling the Need for Regulation with the First Amendment Religion Clauses, 55 Vand. L. Rev. 799, 871 (2002); Bobbitt, supra note 185, at 763.

democratic people.”

Consequently, they “must keep scrupulously free from entanglement in the strife of sects.” This requires a constitutional application of the First Amendment by school leadership and federal courts concerning religious exercises in schools. The Supreme Court must lead the way in fulfilling this protective duty.

By applying proper liberties-recognitive analysis of school prayer issues, the Court can ensure that the Constitution still applies within the schoolhouse gate.

Finally, if not for the preservation of the public school as a unique constitutional environment in which to establish clear boundaries of the Establishment Clause, then the Court should at least pull back from its quiet encroachments in *Kennedy* for its own purposes. This type of avoidance jurisprudence that lacks complete constitutional reasoning results in intensely negative public perceptions of outcome-based decision-making. Following the 2021–22 Supreme Court term, a significant percentage of Americans—44%—believed that the Justices brought too much of their individual religious views into how they decide cases. If the Court continues this trajectory of perceived results-oriented jurisprudence in the school prayer context, it could permanently undercut American trust in a judicial foundation already sitting on shifting sands. Unlike *Kennedy*’s pick-and-choose facts and law approach, it needs to adopt a reasons-based approach to protect itself as an institution against the perceived and actual delegitimization of its constitutional decision-making and to maintain its judicial authority.

In conclusion, the *Kennedy* majority has endorsed a paradigmatic zero-sum game that significantly exceeds the bounds of *Everson*’s quiet revolution. *Kennedy*’s quiet breaches of neutrality in the Court’s longstanding school prayer

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635 *McCollum*, 333 U.S. at 216–17 (Frankfurter, J., concurring).

636 *Id.*

637 See Stuart Chinn, *Finding Common Ground Across Race and Religion: Judicial Conceptions of Political Community in Public Schools*, 2017 UTAH L. REV. 531, 584 (2017) (arguing that “at least one crucial adhesive mechanism has been the creation of a common culture within the public school that binds diverse students together”).


precedent and the Madisonian-forewarned raging torrents that have taken up the
Kennedy banner have the perilous potential to harm all American schoolchildren, the essential foundations of American public education, and the Court as a governmental institution. Consequently, it is incumbent upon the Court to pull back from this trajectory and mitigate these constitutional harms.

V. CONCLUSION

The Court’s Establishment Clause jurisprudence is no stranger to intense criticism and controversy. In that respect, Kennedy, at first glance, is just one more controversial case in this line of the Court’s First Amendment decision-making. However, Kennedy is an outlier in that it breaks with so many foundational aspects of 75 years of appropriate stare decisis in public school and religious activities cases, in which the Court repeatedly upheld Madisonian neutrality as “an ideal principle of democratic government.” Indeed, an extended examination of Kennedy’s successive quiet encroachments on the Court’s school prayer precedent reveals that the case can and will be harnessed to inflict significant damage on a range of individuals and institutions in contravention of the core meaning and purposes of the First Amendment.

With Kennedy, the Court has laid the groundwork for a playbook in which an interpretive reliance on a particular perspective of history and tradition can be utilized to erode the unconstitutionality of school prayer. However, this type of constitutional interpretation runs counter to the multi-faceted Madisonian neutrality at the foundation of education law Establishment Clause; breaks with the Court’s precedential anti-majoritarian interpretations of the First Amendment in school law; harms the legitimacy of the Court as an institution of American government; and carries particularly pernicious consequences as applied to the public school environment given schools’ charge to inculcate all American

641 See, e.g., Doe ex rel. Doe v. Elmbrook Sch. Dist., 687 F.3d 840, 872 (7th Cir. 2012) (Posner, J., dissenting) (criticizing the Supreme Court’s Establishment Clause precedent as “formless, unanchored, subjective, and provid[ing] no guidance”); Frederick Mark Gedicks, Incorporation of the Establishment Clause Against the States: A Logical, Textual, and Historical Account, 88 IND. L.J. 669, 670 (2013) (arguing the Court’s Establishment Clause jurisprudence is “under perpetual clouds of instability, illegitimacy, and controversy”).


643 See supra Part II.


students with the fundamental values of civic democracy. Therefore, this faulty jurisprudence matters not just for academic debate, but for the actual harm it has the potential to inflict on various American constituencies. For all these reasons, the Court should not continue the detrimental unraveling of stare decisis that Kennedy began. Instead, the Court must stop the continued erosion of the Establishment Clause in the context of school prayer when it is inevitably faced with decision-making involving these types of religious activities in public schools in the future by prioritizing constitutional justice through principled decision-making over an ideological agenda.


648 See Derek W. Black, When Religion and the Public-Education Mission Collide, 132 YALE L.J. FORUM 559, 559 (2022) (using Kennedy as an example of “how unabashedly and consistently this Court has been willing to capsize conventional wisdom and precedent in recent years”).