ESTABLISHMENT CLAUSE JURISPRUDENCE AND THE CONSTITUTIONAL LIMITS ON RELIGION IN PUBLIC SCHOOLS

Maya Gardner*

I. INTRODUCTION

In *Kennedy v. Bremerton School District*, the Supreme Court concluded that a school district unconstitutionally violated a high school football coach's Free Exercise rights by recommending that he not be rehired after he refused to stop engaging in mid-field prayer.[1] The Court denounced the school district's assertion that its actions were justified in order to prevent a potential Establishment Clause violation and summarily dismissed the notion that the coach's actions could have a coercive effect on students.[2]

Kennedy is consistent with the Court's recent trend of strengthening Free Exercise rights while weakening the constitutionally required boundaries between church and state.[3] However, the case represents a departure from existing school prayer jurisprudence, leaving questions regarding what remains of the Establishment Clause, how school districts should adjust policies regarding religious exercise by employees, and the extent to which governing bodies may authorize, require, or restrict religious expression in public schools.

Before *Kennedy* was decided, several states passed laws that seem to challenge the status quo—and perhaps test the boundaries of Establishment Clause jurisprudence—regarding religion in public schools. At least twenty-six states have considered bills that would require the national motto, "In God We Trust," to be displayed in public schools.[4] In 2022, South Carolina became one of seven states to pass the legislation, requiring all public schools to display the national motto in a "prominent place."[5]

---

*. J.D. Candidate, University of South Carolina Joseph F. Rice School of Law, May 2026; B.A. Sociology, Clemson University, December 2022. I would like to thank Professor Derek Black for the invaluable insight and direction throughout this process. I would also like to thank my parents, Marty and Kelly Gardner, for their unwavering love and support.

1. *See* 597 U.S. 507, 512–21 (2022).

2. *Id.* at 536.

3. *See, e.g.*, Am. Legion v. Am. Humanist Ass'n, 588 U.S. 19, 63 (2019); Town of Greece v. Galloway, 572 U.S. 565, 589–90 (2014); Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 466 (2017); Espinoza v. Mont. Dep't of Revenue, 591 U.S. 464, 487 (2020); Carson *ex rel.* O.C. v. Makin, 596 U.S. 767, 781 (2022).

4. Frank S. Ravitch, *How 'In God We Trust' Displays in Public Schools Are Used to Push Christian Nationalism*, FREE SPEECH CTR.: THE CONVERSATION (Feb. 7, 2024), https://firstamendment.mtsu.edu/post/how-in-god-we-trust-displays-in-public-schools-are-used-to-push-christian-nationalism/ [https://perma.cc/5JU3-Q45K].

5. S.C. CODE ANN § 59-1-325 (Supp. 2024).

Following *Kennedy*, efforts to revitalize school prayer have become more emboldened.[6] Three states have passed legislation authorizing school districts to adopt a policy permitting school chaplains to provide services to students.[7] Further, Louisiana passed a law requiring the Ten Commandments, along with several other "historical documents," to be displayed in each public school classroom.[8] Most recently, Oklahoma's State Superintendent of Public Instruction ("OSPI") directed educators to incorporate the Bible into the curriculum beginning in fifth grade, citing the historical significance of the religious text.[9]

In an effort to understand the constitutional limits on religion in public schools, this Note analyzes the historical development of Establishment Clause jurisprudence, contextualizes the doctrinal significance of *Kennedy*, and draws conclusions regarding the probable fate of controversial state laws according to the Court's precedent.

Following *Kennedy*, courts must examine practices that implicate Establishment Clause concerns in light of the nation's history and traditions. A historical analysis of the relationship between religion and public schools reveals that the principle of anti-divisiveness was fundamental in shaping a system of public education designed to safeguard religious diversity and promote civic unity.[10] With these competing interests in mind, public school policies that implicate Establishment Clause concerns must be evaluated with regard to the policy's coercive effects, relation to long-held traditions, and impacts on the effective diffusion of civic education, in addition to binding precedent.[11]

First, recent policies allowing public schools to employ school chaplains violate the Establishment Clause according to *Illinois ex rel. McCollum v.*

---

6. *See, e.g.*, Evie Blad, *How States Are Testing the Church-State Divide in Public Schools*, EDUCATION WEEK (June 28, 2024), https://www.edweek.org/policy-politics/how-states-are-testing-the-church-state-divide-in-public-schools/2024/06 [https://perma.cc/89DZ-M2WX].

7. *See* FLA. STAT. ANN. § 1012.461 (West, Westlaw through 2024 2d Reg. Sess.); LA. STAT. ANN. § 17:3011-14 (Westlaw through 2024 Reg. Sess.); TEX. EDUC. CODE ANN. § 23.001 (2018) (West, Westlaw through 4th called sess. of 88th leg.).

8. LA. STATE. ANN. § 17:2124(B)(1)–(3) (Westlaw through 2024 Reg. Sess.), *invalidated* by Roake v. Brumley, No. 24-517-JWD-SDJ, 2024 WL 4746342, at *90 (M.D. La. Nov. 12, 2024). A similar bill was introduced in South Carolina in 2023. H.R. 4485, 125th Gen. Assemb., 1st Reg. Sess. (S.C. 2023).

9. Memorandum from Ryan Walters, St. Superintendent of Pub. Instruction, Okla. State Dep't Educ., Immediate Implementation of Foundational Texts in Curriculum (June 27, 2024) (on file with S.C. L. REV.) [hereinafter Walters, Immediate Implementation of Foundational Texts in Curriculum]. The directive requires "immediate and strict compliance." *Id.*

10. *See* Laats, *infra* note 178, at 359–60.

11. *See* JUSTICE & MACLEOD, *infra* note 176, at 10.

Board of Education.[12] Specifically, these policies wield the state's authority to advance religion through publicly funded institutions—official conduct which falls squarely within the prohibitions of the Establishment Clause. Similarly, laws requiring public schools to display the Ten Commandments along with other historical documents in each classroom are prohibited according to *Stone v. Graham*, are not consistent with any broader history or tradition within public schools, and serve the impermissible purpose of inducing students to read, appreciate, and perhaps obey the religious doctrine.[13]

Further, the OSPI's directive to incorporate the Bible into public school curricula violates the Establishment Clause by presenting an unbalanced and far-reaching study of the Bible that is better suited to advance a distinctly Christian worldview than to provide students with a more well-rounded secular education. While the directive fairly recognizes the historical significance of the Bible to the nation's development, relying on the tradition of incorporating religious literature into the public school curriculum to rebut constitutional concerns, the directive ultimately represents a top-down effort to impose the state's preferred religious values onto citizens rather than a sincere effort to bolster secular education or recognize widely held religious beliefs of the broader community.

Finally, laws authorizing public schools to offer elective courses on the Bible do not offend the Establishment Clause in the absence of evidence that the class is religious rather than academic in nature. In contrast to the OSPI's directive, permitting local school boards to offer elective courses on the Bible in an effort to tailor the curriculum to the widespread beliefs of community members is entirely in accord with the history of religion in public schools.[14] Likewise, laws requiring schools to display the national motto, "In God We Trust," are unlikely to offend the Establishment Clause due to the nation's history of displaying the motto in a nationalistic rather than religious manner.[15]

12. *See* 333 U.S. 203, 211 (1948).

13. *See* 449 U.S. 39, 41 (1980) (per curiam).

14. *See* JUSTICE & MACLEOD, *infra* note 176.

15. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 31 (2004) (Rehnquist, C.J., concurring).

II. INCORPORATION AND EARLY INTERPRETATIONS OF THE ESTABLISHMENT CLAUSE

The Establishment Clause was first applied to the states through the Fourteenth Amendment in 1947.[16] The following year, in *Illinois ex rel. McCollum v. Board of Education*, eight members of the Court held that Illinois' "released time" program for religious instruction violated the Establishment Clause.[17] However, the Court upheld New York's released time program only four years later in *Zorach v. Clauson.*[18] In deciding both *McCollum* and *Zorach*, the justices drew conclusions about the purpose and meaning of the Establishment Clause with reference to the America's founding principles and historical practices.[19]

A. Released Time Programs

McCollum and *Zorach* demonstrate how the Court applied a historical analysis to reach two different conclusions regarding two similarly structured released time programs.[20] In *McCollum*, the Court held that a released time program allowing students to receive weekly religious instruction from religious teachers who visited public school classrooms at no cost to schools violated the Establishment Clause.[21] The 8-to-1 decision featured several opinions: Justice Black delivered the opinion of the Court, Justice Frankfurter wrote a concurring opinion in which three justices joined, Justice Jackson wrote a concurring opinion, and Justice Reed dissented.[22] The Black opinion reasoned that, although the religious instruction was optional and occurred at no cost to the school, the use of "the tax-supported public school system to aid religious groups to spread their faith … falls squarely under the ban of the First Amendment."[23] The opinion emphasized that the state had a compulsory education law, allowed religious instructors to teach in regular classrooms during the school day, and enforced attendance for students whose parents

16. Everson v. Bd. of Educ., 330 U.S. 1 (1947). *Everson* marked the end of a decades long process of incorporating the First Amendment against the states. Bruce E. Auerbach, *Incorporation of the First Amendment*, FREE SPEECH CENTER (Jan. 1, 2009), https://firstamendment.mtsu.edu/article/incorporation-of-the-first-amendment/ [https://perma.cc/9EJT-C5BY].

17. 333 U.S. at 210. A "released time" program generally refers to a state or local policy which allows parents to choose whether or not their children may receive weekly religious instruction during the regular school day. *Id.* at 222–23.

18. 343 U.S. 306, 312 (1952).

19. *See McCollum*, 333 U.S. at 218; *Zorach*, 343 U.S. at 314–15.

20. *See McCollum*, 333 U.S. at 231–32; *Zorach*, 343 U.S. at 313–14.

21. *McCollum*, 333 U.S. at 206, 210.

22. *Id.* at 212.

23. *Id*. at 210.

consented to the instruction.[24] Further, the opinion rejected the contention that prohibiting use of the "public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals . . . manifest[s] a governmental hostility to religion . . . ."[25]

The Frankfurter opinion analyzed whether the released time program violated the Establishment Clause using a historical analysis.[26] The opinion describes how religious education, once common in the small, church-based schools of the founding era, did not take root as states established public school systems and compulsory education laws.[27] Rather, state constitutions prohibited the provision of public funds for parochial schools, legislatures confined public school systems to secular education, and the duty of providing religious education was relegated to the home and church.[28] Churches, feeling that schools monopolized the youths' attention, responded by advocating for "released time" programs, which increased in popularity during the early twentieth century.[29]

In light of the nation's history of maintaining secular public schools, the Frankfurter opinion concluded that the released time program in question violates the Establishment Clause by using the "inherent pressure" of the public school system to benefit religious sects.[30] Further, the opinion expresses the particular importance of maintaining separation of church and state in public schools, stating that public schools represent both "the symbol of our democracy and the most pervasive means for promoting our common destiny."[31]

In his lone dissent, Justice Reed follows his own historical analysis to a strikingly different conclusion.[32] Justice Reed's conclusions about the meaning of the Establishment Clause are worth exploring, as they are nearly identical to the Court's most recent jurisprudence. For one part, the dissent argues that the "close association of church and state in American society," deems certain "[w]ell-recognized and long-established" practices acceptable due to their place in our "tradition and culture."[33] Further, the dissent narrowly defines unconstitutional aid to religious institutions as "purposeful assistance

24. *Id*. at 205, 209.
25. *Id.* at 211.
26. *See id.* at 213.
27. *See id.* at 213–15.
28. *See id.* at 214–15.
29. *Id.* at 224.
30. *Id.* at 227.
31. *Id.* at 231. Both opinions apply only to the specific released time program in question. *See id.*
32. *Id.* at 238–39.
33. *Id.* at 239, 250.

directly to the church itself" or to a religious group serving an ecclesiastical function, thus rejecting the contention that the Establishment Clause prohibits "incidental advantages that religious bodies, with other groups similarly situated, obtain as a by-product of organized society."[34] Finally, Justice Reed argues that "the history of past practices" is determinative in applying the Establishment Clause rather than being one portion of a broader analysis.[35]

Four years after *McCollum*, the Court upheld New York's released time program in *Zorach*.[36] The facts of *Zorach* are nearly identical to those in *McCollum*: participation in the program required a written request from a parent, schools enforced attendance of the religious classes with the help of reports by religious instructors, and students who did not participate received secular instruction.[37] However, whereas the released time program in *McCollum* allowed students to receive religious instruction in the classroom, the program in *Zorach* allowed students to leave during the regular school day to attend religious instruction offsite.[38] As a result, the six justice majority upheld the program, noting that "[n]o one is forced to go to the religious classroom and no religious exercise or instruction is brought to the classrooms of the public schools."[39]

The three dissenting justices each emphasized the coercive effect of the released time program. First, Justice Black argued that the Establishment Clause was intended to prohibit any religious sect from utilizing the coercive power of the state, reasoning that the Framers understood the need for religious people to avoid the oppressive results of religious conflict.[40] Second, Justice Frankfurter described the coercive effects of the program on parents and children alike, arguing that parents will likely feel pressure to enroll their

---

34. *Id.* at 248–49. *Cf.* Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 466 (2017); Espinoza v. Mont. Dep't of Revenue, 591 U.S. 464, 476 (2020); Carson *ex rel*. O.C. v. Makin, 596 U.S. 767, 781 (2022).

35. *McCollum*, 333 U.S. at 256. In a concurring opinion, Justice Jackson candidly described the limits of legal reasoning in applying the Establishment Clause:

> It is idle to pretend that this task is one for which we can find in the Constitution one word to help us as judges to decide where the secular ends and the sectarian begins in education. Nor can we find guidance in any other legal source. it [sic] is a matter on which we can find no law but our own prepossessions.

Id. at 237–38.

36. Zorach v. Clauson, 343 U.S. 306, 315 (1952).

37. *Id.* at 308.

38. *Id.* at 308–09.

39. *Id.* at 311. The majority understood the released time program to be an appropriate accommodation of the "spiritual needs" of a historically religious people. *Id.* at 314. Further, the majority argued that such accommodations are warranted both by the practical limitations of separating church and state and by the fundamental principle of free exercise. *See id.*

40. *See id.* at 319.

children for fear of social judgement.[41] Lastly, Justice Jackson reasoned that the indirect coercion of the released time program was only one step removed from mandatory church attendance, arguing that the released time program in question utilizes coercive elements nearly identical to those in *McCollum*.[42]

B. School Prayer

Debates about the proper role and constitutional limits of religious exercise in public schools have not ceased since *Everson*, although public fervor has waxed and waned.[43] In 1962, the Court captured the public's attention in its seminal ruling against school prayer.[44] In *Engel v. Vitale*, the Court held that daily recitation of a non-sectarian, state-written prayer by New York public school students violated the Establishment Clause.[45] The majority opinion offered two primary justifications for holding school prayer unconstitutional: the Establishment Clause was intended to restrain historically pervasive religious conflict, and "a union of government and religion tends to destroy government and to degrade religion."[46]

Engel inspired considerable public outrage as "an affront to God, civic virtue, and the American way," with more than 75% of Americans as well as numerous governors and state legislatures condemning the Court's decision."[47] The Court was accused of secularizing public life, demonstrating an undemocratic display of judicial overreach, and condemning an innocuous prayer.[48] However, the majority opinion distinguished the state-written prayer in *Engel* from historical documents or anthems that refer to God, stating that

41. *Id.* at 321.

42. *See id.* at 323–25.

43. *See generally* Laats, *infra* note 177.

44. Engel v. Vitale, 370 U.S. 421 (1962).

45. *Id.* at 424. The challenged state written prayer reads, "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." *Id.* at 422.

46. *See id.* at 431–36; *see also* William P. Marshall, *The Constitutionality of School Prayer: Or Why* Engel v. Vitale *May Have Had it Right All Along*, 46 CAP. U. L. REV. 339, 345–46 (2018).

47. Corinna Barrett Lain, *God, Civic Virtue, and the American Way: Reconstructing Engel*, 67 STAN. L. REV. 479, 482 (2015). Every governor except one endorsed a resolution to overturn *Engel* by constitutional amendment, and thirty-two state legislatures called for a constitutional convention. *Id.* at 512–13.

48. *Id.* at 508–09.The Court may have anticipated this last criticism, as the majority opinion justifies its determination that the "relatively insignificant" government endorsement of religion violates the Establishment Clause in part by quoting James Madison's *Memorial and Remonstrance against Religious Assessments*: "It is proper to take alarm at the first experiment on our liberties . . . ." *Engel*, 370 U.S. at 436.

"[s]uch patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise" of school prayer.[49]

III. ESTABLISHMENT CLAUSE JURISPRUDENCE CONCERNING SCHOOL PRAYER

Despite fervent condemnation of the Supreme Court, *Engel* added little to Establishment Clause jurisprudence.[50] *Engel*, consistent with prior First Amendment questions, was decided based on an analysis of our nation's history and traditions.[51] Over the next several decades, the Court would articulate several additional standards for evaluating alleged Establishment Clause violations, including (1) the "secular purpose" requirement, (2) the three-pronged *Lemon* test, (3) the endorsement test, and (4) an analysis of coercive effects.[52]

A. The "Secular Purpose" Requirement

The Court reaffirmed *Engel* in *School District of Abington Township v. Schempp*.[53] In *Schempp*, the Court addressed the constitutionality of a Pennsylvania law requiring public schools to begin each day by reading "ten verses from the Holy Bible," followed by a recitation of the Lord's Prayer and the Pledge of Allegiance.[54] Although the law permitted students to opt-out of the daily Bible reading and recitation, Edward Schempp, the father of two children in the Pennsylvania public school system and a member of the Unitarian faith, expressed concern that doing so could cause his children to be perceived as un-American or even immoral, and further, that his children

49. *Engel*, 370 U.S. at 436 n.21.

50. *See* Marshall, *supra* note 46, at 342–43.

51. *See* Daniel Chen, *Kennedy v. Bremerton School District: The Final Demise of Lemon and the Future of the Establishment Clause*, 2022 HARV. J.L. & PUB. POL'Y PER CURIAM 1, 1–2 (2022). In fact, the Court did not cite a single case as precedent. Lain, *supra* note 47, at 502.

52. Joanne C. Brant, *Sullivan Lecture 2016: Engel: Divisiveness or Coercion: A Response to Professor Marshall*, 46 CAP. U. L. REV. 373, 373–75 (2018). Establishment Clause jurisprudence is often criticized as contradictory and unprincipled. One scholar describes Establishment Clause jurisprudence as "an overstuffed chamber, replete with tests that the Court uses rarely but cannot bear to discard; well-used tests that are widely loathed; and tests that are modified in some settings but not in others." *Id.* at 373–74. Another scholar attributes inconsistent outcomes of establishment challenges in federal courts to the Supreme Court's adoption of "a multiplicity of theoretical approaches that resist distillation into a single, coherent theme" and provision of "the vaguest generalities in articulating adjudication standards[.]" Michael Heise & Gregory C. Sisk, *Religion, Schools, and Judicial Decision Making: An Empirical Perspective*, 79 U. CHI. L. REV. 185, 211 (2012).

53. Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 205 (1963).

54. *Id.* at 205–06, 208.

would miss important school-related announcements that followed the daily recitations.[55]

Justice Clark, writing for the majority, emphasized the "exalted" place of religion in American society,[56] citing prior decisions in which the Court recognized that "[t]he history of man is inseparable from the history of religion"[57] and that Americans "are a religious people whose institutions presuppose a Supreme Being."[58] Conversely, the Court highlighted the role of the Establishment Clause in preserving religious freedom, a principle that is also "strongly imbedded [sic] in our public and private life" as a direct result of our national heritage.[59] As such, the Court articulated a new standard for analyzing whether a state action violates the Establishment Clause: the state must demonstrate "a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[60] Accordingly, the Court held that the decidedly "religious character" of Pennsylvania's law violated the Establishment Clause.[61]

Moreover, the Court rejected the assertion that prohibiting religious exercises established a "religion of secularism" in schools which communicated hostility to religion and preference for non-believers.[62] Rather, the Court explained that the First Amendment requires neutrality towards religion, re-iterating the distinction that occupied one footnote in *Engel*: "Nothing we have said here indicates that . . . such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment."[63]

B. The Three-Pronged Lemon *Test*

The Court expanded upon its "secular purpose" test in *Lemon v. Kurtzman*, incorporating the requirement into a three-pronged test for analyzing whether a state action violates the Establishment Clause.[64] In *Lemon*, the Court held that a state law reimbursing private, parochial schools for costs related to secular educational services, including "teachers' salaries,

55. *Id.* at 205, 209 n.3.
56. *Id.* at 226.
57. *Id.* at 212 (quoting Engel v. Vitale, 370 U.S. 421, 434 (1962)).
58. *Id.* at 212 (quoting Zorach v. Clauson, 343 U.S. 306, 313 (1952)).
59. *Id.* at 214.
60. *Id.* at 222.
61. *Id.* at 224.
62. *Id.* at 225.
63. *Id.*; Engel v. Vitale, 370 U.S. 421, 435 n.21 (1962).
64. *See* 403 U.S. 602, 612–13 (1971).

textbooks, and instructional materials," violated the Establishment Clause.[65] The Court reasoned that it is impractical to expect that public funds will be used solely for secular purposes, and further, that any attempt by the state to oversee the use of public funds by parochial schools will necessarily require "excessive and enduring entanglement between state and church."[66] The Court went one step further, articulating a test intended to prohibit "sponsorship, financial support, and active involvement of the sovereign in religious activity."[67] According to the *Lemon* test, a state action must have "a secular legislative purpose," a "primary effect" that "neither advances nor inhibits religion," and must not result in "an excessive government entanglement with religion."[68]

C. The Endorsement Test

The endorsement test was first applied in *County of Allegheny v. ACLU*.[69] In *Allegheny*, the Court adopted the endorsement test as a "sound analytical framework for evaluating government use of religious symbols," stating that "[e]very government practice must be judged in its unique circumstances to determine whether it [endorses] religion."[70] The endorsement test asks whether a reasonable person would fairly understand a government display of religious symbols to be an endorsement of religion.[71] Applying the test, the Court held that a creche displayed in a county courthouse violated the Establishment Clause,[72] while a Chanukah menorah displayed at the entrance

65. *Id.* at 606–07. *Lemon* involved two state laws, one in Pennsylvania and one in Rhode Island, each of which afforded funds to nonpublic, parochial schools for secular purposes. *Id.* at 606.

66. *Id.* at 619.

67. *Id.* at 612. The Court refers to these state actions as "the three main evils against which the Establishment Clause was intended to afford protection[.]" *Id.*

68. *Id.* at 612–13. The *Lemon* test has come under harsh criticism. Justice Scalia compared the *Lemon* test to "some ghoul in a late night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, . . . [and] stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys . . . ." Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring). In *Kennedy*, the Court described the *Lemon* test as "'ambitiou[s],' abstract, and ahistorical . . . ." Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 510 (2022) (citation omitted) (alteration in original).

69. 492 U.S. 573, 597 (1989). The endorsement test was first articulated in Justice O'Connor's concurring opinion in *Lynch v. Donnelly* in an effort to clarify the third prong of the *Lemon* test. *Id.* at 595; Lynch v. Donnelly, 465 US 668, 692 (1984) (O'Connor, J., concurring).

70. *Allegheny*, 492 U.S. at 595 (quoting *Lynch*, 465 U.S. at 694) (alterations in original).

71. *Id.* at 620.

72. *Id.* at 580. A creche is a "visual representation of the scene in the manger in Bethlehem shortly after the birth of Jesus." *Id.*

of a city building alongside a Christmas tree and a sign commemorating freedom and liberty did not.[73] The Court reasoned that the former endorses a "patently Christian message," whereas the Menorah, Christmas tree, and sign "must be understood as conveying the city's secular recognition of different traditions for celebrating the winter-holiday season."[74]

D. Coercive Effect

Lastly, the Court held that the coercive effects of public school policies were determinative of an Establishment Clause violation in both *Lee v. Weisman* and *Sante Fe Independent School District v. Doe*.[75] In *Lee*, the Court held that a public school violated the Establishment Clause by inviting a rabbi to say a nonsectarian invocation and benediction to commemorate a middle school graduation ceremony.[76] The Court reasoned that students are especially vulnerable to "subtle coercive pressures" and had "no real alternative" by which to "avoid the fact or appearance of participation" in the invocation.[77] Critically, while the majority held that "the government may no more use social pressure to enforce orthodoxy than it may use more direct means,"[78] the dissent argued that constitutionally significant coercion requires the "force of law and threat of penalty."[79]

Similarly, in *Santa Fe*, the Court struck down a policy permitting high school students to elect a student council chaplain to say a prayer over the school's public address system before each varsity football game.[80] Again, the Court reasoned that the "pregame prayers bear 'the imprint of the State and thus put school-age children who objected in an untenable position,'"[81] noting that football players, cheerleaders and band members have an obligation to attend such after school events.[82] Further, the Court rejected the state's argument that the policy did not amount to a perceived or actual endorsement of religion, stating that policy requires the principal to provide "advice and direction" in conducting student chaplain elections, is understood by students

73. *Id.* at 621–22. The sign read, "[d]uring this holiday season, the city of Pittsburgh salutes liberty. Let these festive lights remind us that we are the keepers of the flame of liberty and our legacy of freedom." *Id.* at 580.

74. *Id.* at 601, 620.

75. Lee v. Weisman, 505 U.S. 577, 588, 599 (1992); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 301–02 (2000).

76. *Lee*, 505 U.S. at 581, 599.

77. *Id.* at 588.

78. *Id.* at 594.

79. *Id.* at 640 (Scalia, J., dissenting) (emphasis in original).

80. *Santa Fe*, 530 U.S. at 294, 301.

81. *Id.* at 305 (quoting *Lee*, 505 U.S. at 590).

82. *See id.* at 307–08.

to encourage religious messages, and permits such messages to be delivered at "school sponsored function[s]" using "the school's public address system[.]"[83]

IV. A GRADUAL RETURN TO INTERPRETATION BY REFERENCE TO "HISTORY AND TRADITION"

Although the Supreme Court did not return to the question of school prayer for more than two decades following *Santa Fe*, it built upon its Establishment Clause jurisprudence in cases regarding government displays of religious symbols and legislative prayer.[84]

A. Government Display of Religious Symbols

The Court has heard three cases regarding whether a public display of the Ten Commandments violates the Establishment Clause, each of which resulted in a 5-to-4 split.[85] First, in *Stone v. Graham*, the Court issued a per curiam decision concluding that a state law requiring a copy of the Ten Commandments to be posted in each public school classroom failed under *Lemon*.[86] Later, the Supreme Court heard companion cases regarding public displays of the Ten Commandments outside of the public school context.[87]

In *Stone*, the five justice majority held that the statute had "no secular legislative purpose[]" and therefore failed under the first prong of *Lemon*.[88] Unlike the lower courts, the majority refused to accept the "avowed" secular purposes offered by the state, stating that although religious texts such as the Bible may be used "in an appropriate study of history, civilization, ethics, [or] comparative religion," display of the Ten Commandments serves "no such educational function."[89] Four justices dissented: Justice Stewart would affirm the state Supreme Court's holding, Chief Justice Burger and Justice Blackmun would grant certiorari and decide the case on the merits, and Justice

83. *Id.* at 306–07.

84. The Court also addressed the provision of public funds to religious institutions in *Trinity Lutheran*, *Espinoza*, and *Carson*. *See* Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449 (2017); Espinoza v. Mont. Dep't of Revenue, 591 U.S. 464 (2020); Carson *ex rel.* O.C. v. Makin, 596 U.S. 767 (2022). For an in-depth discussion of Establishment Clause jurisprudence regarding government aid, see generally Ira C. Lupu & Robert W. Tuttle, *The Remains of the Establishment Clause*, 74 HASTINGS L.J. 1763 (2023).

85. *See* McCreary County v. ACLU, 545 U.S. 844 (2005); Van Orden v. Perry, 545 U.S. 677 (2005); Stone v. Graham, 449 U.S. 39 (1980) (per curiam).

86. 449 U.S. at 39–41.

87. *Van Orden*, 545 U.S. 677; *McCreary*, 545 U.S. 884.

88. *Stone*, 545 U.S. at 41.

89. *Id.* at 41–42.

Rehnquist, the only justice to issue a dissenting opinion, gave credence to the statute's purported secular purpose and criticized the majority's "cavalier summary reversal[.]"[90]

More than two decades after *Stone*, the Court took up two Establishment Clause challenges to government displays of the Ten Commandments in companion cases *McCreary County v. ACLU of Kentucky* and *Van Orden v. Perry*.[91] In *McCreary*, the five justice majority held that two counties in Kentucky ("the counties") violated the Establishment Clause by issuing mandates requiring "large, gold-framed copies" of the Ten Commandments to be displayed in each respective county courthouse.[92] After the ACLU filed suit to challenge the legislative action, the counties expanded the mandate by requiring a number of historical documents to be posted alongside the Ten Commandments for the stated purpose of educating the public on America's founding principles.[93] However, applying *Lemon*, the majority reasoned that the counties' "manifest objective" was religious rather than secular.[94] Thus, the majority concluded that the mandate failed to pass to first prong of *Lemon* and violated the First Amendment's demand for "governmental neutrality between religion and religion, and between religion and nonreligion."[95]

The four justice dissent denounced *Lemon* and refuted that the First Amendment demands neutrality.[96] Following a historical analysis, the dissent concluded that the Establishment Clause permits government endorsement of

---

90. *Id.* at 44, 47.

91. *McCreary*, 545 U.S. 844; *Van Orden*, 545 U.S. 681.

92. *McCreary*, 545 U.S. at 851, 881.

93. *Id.* at 852–3. After the ACLU filed suit, the counties revised the mandate to require the following documents to be displayed alongside the Ten Commandments:

> The documents were the "endowed by their Creator" passage from the Declaration of Independence; the Preamble to the Constitution of Kentucky; the national motto, "In God We Trust"; a page from the Congressional Record of February 2, 1983, proclaiming the Year of the Bible and including a statement of the Ten Commandments; a proclamation by President Abraham Lincoln designating April 30, 1863, a National Day of Prayer and Humiliation; an excerpt from President Lincoln's "Reply to Loyal Colored People of Baltimore upon Presentation of a Bible," reading that "[t]he Bible is the best gift God has ever given to man"; a proclamation by President Reagan marking 1983 the Year of the Bible; and the Mayflower Compact.

Id. at 854 (alteration in original). After receiving additional legal counsel, the counties changed the displays a third time without taking further legislative action. The final displays, titled "The Foundations of American Law and Government Display," included the following documents: the Magna Carta, the Declaration of Independence, the Bill of Rights, the lyrics of the Star Spangled Banner, the Mayflower Compact, the National Motto, the Preamble to the Kentucky Constitution, and a picture of Lady Justice." *Id.* at 856.

94. *Id.* at 850–51.

95. *Id.* at 860.

96. *Id.* at 893, 900 (Scalia, J., dissenting) (claiming that the "principle that the government cannot favor religion over irreligion" is "demonstrably false").

religion.[97] Alternatively, the dissent asserted that the display manifests a secular purpose to objective observers, reasoning that Americans are well accustomed to public displays acknowledging the role of religion in the nation's "legal and governmental heritage[.]"[98]

In *Van Orden v. Perry*, the majority held that a six-foot monument portraying the Ten Commandments did not violate the Establishment Clause.[99] The monument was first erected in 1961 and represents one of "17 monuments and 21 historical markers" surrounding the Texas State Capitol.[100] Mirroring the dissent's reasoning in *McCreary*, the majority begins with an analysis of how the government has historically acknowledged the role of religion in American life.[101] After conceding that the Ten Commandments represent an inherently religious doctrine, the majority insists that "[s]imply having religious content or promoting a message consistent with a religious doctrine" does not offend the Establishment Clause.[102] Then, the majority refers to *Stone* as an example of the appropriate limits imposed by the Establishment Clause, stating that the Court "found that the Kentucky statute had an improper and plainly religious purpose," specifically "[i]n the classroom context."[103]

In *American Legion v. American Humanist Association*, the Court clarified the standard for analyzing government displays of religious symbols in a 7-to-2 decision which expounded the shortcomings of *Lemon* and articulated the Court's history and tradition analysis.[104] There, the Court held that a thirty-two-foot Roman Cross erected in 1925 to commemorate the sacrifice of World War I soldiers did not violate the Establishment Clause, reasoning that the cross had developed an independent secular significance.[105]

---

97. *Id.* at 893–94. The dissent concludes that a historical analysis demonstrates that the Establishment Clause permits government endorsement not only of religion but of monotheism specifically. *Id.* at 894.

98. *Id.* at 906.

99. 545 U.S. 677, 681 (2005).

100. *Id.*

101. *Id*. at 686.

102. *Id*. at 690.

103. *Id.* Unlike *McCreary*, which featured only one concurring opinion authored by Justice O'Connor, *Van Orden* features concurring opinions by Justice Thomas, Justice Breyer, and Justice Scalia, as well as dissenting opinions by Justice Stevens, Justice O'Connor, and Justice Souter. The dissenting opinions mirror the reasoning put forward by the majority in *McCreary*, including that the monument evinces a solely religious purpose to the objective observer and that the Establishment Clause prohibits government endorsement of religion. *See McCreary*, 545 U.S. at 881; *Van Orden*, 545 U.S. at 692 (Scalia, J., concurring), 692 (Thomas J., concurring), 698 (Breyer, J., concurring in the judgment), 706 (Stevens, J., dissenting), 736 (O'Connor, J., dissenting), 737 (Souter, J., dissenting).

104. *See* 588 U.S. 19, 52–56, 60–63 (2019).

105. *Id.* at 38–39.

The majority discussed the weaknesses of *Lemon's* "secular purpose" requirement at length, citing the difficulty of determining the original purpose of a long standing monument or practice, the potential for the practice to take on a new meaning over time, and the likelihood that striking down a long standing practice will be perceived as hostile to religion, whereas the Establishment Clause demands neutrality.[106] Rather than applying *Lemon* or the endorsement test, the Court reasoned that the Establishment Clause must be interpreted to include long-standing government practices which recognize "the important role that religion plays in the lives of many Americans."[107] Likewise, the majority concluded that forcibly removing the long-standing monument "would not be neutral and would not further the ideals of respect and tolerance" promoted by the First Amendment.[108]

B. Legislative Prayer

In *Town of Greece*, the Court held that the practice of beginning each monthly board meeting with prayer delivered by local clergymen did not violate the Establishment Clause.[109] The prayer was delivered on a volunteer basis by clergymen from local congregations.[110] Although the town maintained that a volunteer of any faith, including an atheist, would be provided an opportunity to say a prayer, nearly every board meeting, including all meetings between 1999 and 2007, opened with prayer delivered by a Christian minister.[111] The town did not review or otherwise control the content of the prayers, which included a range of religious and secular elements.[112] The plaintiffs asserted that the sectarian nature of the prayer and coercive effect of the practice violated the Establishment Clause.[113]

106. *Id.* at 52–56.

107. *Id.* at 63.

108. *Id.* at 66.

109. Town of Greece v. Galloway, 572 U.S. 565, 569–70 (2014). The majority in *Town of Greece* relied heavily on *Marsh v. Chambers*. *Id.* at 570; Marsh v. Chambers, 463 U.S. 783 (1983). In *Marsh*, the Court held that a state legislature's practice of beginning each session with prayer by a paid chaplain does not violate the Establishment Clause. *Marsh*, 463 U.S. at 786. Applying a history and tradition analysis, the Court reasoned that similar actions by the First Congress (such as establishing a committee in each house to facilitate the election of paid chaplains charged with offering prayer at the beginning of each session) in the days before ratification of the First Amendment clearly indicated that lawmakers understood legislative prayer to be permissible under the Establishment Clause. *Id.* at 788–89.

110. *Town of Greece*, 572 U.S. at 571.

111. *Id.*

112. *Id.*

113. *Id.* at 572.

First, the Court rejected the argument that the Establishment Clause permits only nonsectarian prayer, stating instead that any practice "that was accepted by the Framers and has withstood the critical scrutiny of time and political change" cannot be understood to violate the First Amendment.[114] Thus, following a history and tradition analysis, the Court concluded that the town's policy was consistent with the long standing practice of legislative prayer.[115] The Court dismissed the plaintiff's assertion that "subtle coercive pressures" rendered the practice unconstitutional, noting that attendees were not dissuaded from leaving the room or arriving after the prayer was delivered.[116] Further, the Court held that unlike in *Lee*, where attendees were impressionable students with no real choice but to attend their middle school graduation ceremony, attendees in *Town of Greece* were adults with a desire to weigh in on local issues.[117]

V. OVERTURNING *LEMON* IN *KENNEDY V. BREMERTON* (2022)

A. The Facts of Kennedy

In *Kennedy*, the Court held that Bremerton School District ("District") unconstitutionally infringed on a high school football coach's ("Kennedy") Free Exercise rights by recommending that he not be rehired after Kennedy refused to stop his practice of demonstrative prayer at the fifty-yard line,

114. *Id.* at 577.

115. *Id.* at 584.

116. *Id.* at 588. In addition to *Town of Greece* and *American Legion*, several recent Supreme Court decisions concerning the provision of public funds to religious institutions have demonstrated a shift from a separationist approach to an accommodationist approach. *See* Lupu & Tuttle, *supra* note 84, at 1805–10. Thus, the Court has been increasingly concerned with protecting Free Exercise rights and has been less inclined to find a violation of the Establishment Clause when a practice fails to maintain a strict separation of church and state. *See id.* at 1811; Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 453–54, 467 (2017) (holding that the state violated the Free Exercise Clause by denying a church's application for grant funding solely due to the applicant's religious character); Espinoza v. Mont. Dep't of Revenue, 591 U.S. 464, 476, 487 (2020) (holding that the state violated the Free Exercise Clause by prohibiting families from using private scholarships to attend private parochial schools where contributions to private scholarship funds were awarded with tax credits); Carson *ex rel.* O.C. v. Makin, 596 U.S. 767, 771, 781 (2022) (holding that the state violated the Free Exercise Clause by prohibiting parents from using public funds received through a school choice program to pay tuition at private parochial schools).

117. *Town of Greece*, 572 U.S. at 590. Before distinguishing *Lee* from the case at issue, the Court noted that "[f]our Justices dissented in Lee," seemingly questioning the strength of *Lee's* precedential value. *See id*. Similarly, the Court noted that the "[f]our dissenting Justices" in *Allegheny* were concerned that the endorsement test would "condemn a host of traditional practices" that do not violate the Establishment Clause as it was understood by the Framers. *See id*. at 579–80.

engaged with media to publicize the conflict, declined to participate in the interactive process of determining appropriate accommodations for his desired religious exercise, yet refrained from directly coercing students to join in prayer.[118]

As an assistant coach, Kennedy's job duties included supervising students during school-sponsored activities and serving as a "mentor and role model" for student-athletes.[119] In addition, Kennedy was required to demonstrate "sportsmanlike conduct" and "maintain positive media relations" in accordance with the presumption that school officials were "constantly being observed by others[.]"[120] The District was made aware of Kennedy's mid-field prayer through a positive comment by the coach of an opposing team.[121] Shortly after the District initiated an inquiry into the practice, Kennedy engaged in mid-field prayer at the conclusion of a game while his team kneeled around him, despite being told that he "should not be conducting prayer with players" by the District's athletic director that same evening.[122]

In addition to leading students in prayer at the fifty-yard line following football games, Kennedy routinely prayed with students in the locker room prior to games, carrying out a tradition of locker room prayer that preceded him.[123] Although Kennedy never directly asked students to join him in mid-field prayer, a majority of the team would ultimately join him after customarily reporting to the fifty-yard line to shake hands with the opposing team.[124]

Shortly after the athletic director observed Kennedy leading students in prayer, the superintendent instructed Kennedy not to engage in "religious expression, including prayer" with students.[125] The superintendent affirmed the students' right to engage in prayer, but made clear the Kennedy was prohibited from "suggest[ing], encourage[ing] (or discourag[ing]), or supervis[ing]" prayer.[126] Finally, the school stated that Kennedy's religious exercise must remain "nondemonstrative (i.e., not outwardly discernible as religious activity)" to avoid the appearance of endorsement that could conflict with the religious neutrality demanded by the Establishment Clause.[127]

---

118. *See* Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 512–13, 551, 554 (2022).

119. *Id*. at 547–48 (Sotomayor, J., dissenting).

120. *Id*. at 548.

121. *Id*. at 515 (majority opinion).

122. *Id*. at 550 (Sotomayor, J., dissenting)..

123. *Id*. at 515 (majority opinion). Kennedy also invited coaches and student-athletes from the opposing team to join him in prayer. *See id*. at 548 (Sotomayor, J., dissenting).

124. *Id.* at 549.

125. *Id*. at 516 (majority opinion).

126. *Id*. (alterations in original).

127. *Id.*

As a result, Kennedy "felt pressured to abandon his practice of saying his own quiet, on-field postgame prayer," and, through counsel, informed the District that he would continue to engage in the mid-field prayer to conform with his "sincerely-held religious beliefs[.]"[128] While the District maintained that Kennedy was forbidden from overtly acting in a manner that a reasonable observer would understand as endorsing prayer while acting in his capacity as coach,[129] it invited him to engage in an interactive process to identify appropriate accommodations in light of his sincerely held religious beliefs.[130]

Instead, Kennedy engaged in mid-field prayer during three subsequent games.[131] At the first game, reporters and attendees jumped fences to join or record Kennedy's mid-field prayer, thus requiring the District "[t]o secure the field" by alerting parents and the public that access to the field was restricted to student-athletes and District employees.[132] Accordingly, the District notified Kennedy that "further violations . . . would be grounds for discipline or termination."[133] Kennedy engaged in mid-field prayer at two subsequent games and was consequently placed on administrative leave.[134] The head coach of the team "recommended Kennedy not be rehired" due to repeated violations of district policy, failure to cooperate with administration, "fail[ure] to supervise student athletes after games" and actions that resulted in "negative relations between parents, students, community members, coaches, and the school district[.]"[135]

Kennedy ultimately took legal action against the District, asserting that the disciplinary action violated his First Amendment rights of Free Speech and Free Exercise.[136] The district court concluded the District's actions were "narrowly tailored to its Establishment Clause concerns" and granted the District's motion for summary judgment.[137] The circuit court, which agreed that the appearance of endorsement and potential for coercion justified the District's response, affirmed.[138]

---

128. *Id.* at 516–17.
129. *Id*. at 517–18.
130. *Id*. at 554 (Sotomayor, J., dissenting).
131. *Id*. at 519–20 (majority opinion).
132. *Id*. at 553 (Sotomayor, J., dissenting).
133. *Id.* at 554.
134. *Id.* at 554–55.
135. *Id.* at 555–56. The head coach resigned from his position after eleven years citing fear for his safety, and "[t]hree of five other assistant coaches did not reapply." *Id.* at 556.
136. *Id*. at 520 (majority opinion).
137. *Id*. at 557 (Sotomayor, J., dissenting).
138. *See id*. at 521 (majority opinion).

B. The Majority's Free Exercise Analysis

The Court begins by discussing Kennedy's Free Speech and Free Exercise claims, stating that the clauses "provide[] overlapping protection for expressive religious activities[]" consistent with "the Framers' distrust of government attempts to regulate religion and suppress dissent."[139] After concluding that the burden shifted to the District in regard to both claims,[140] the Court asked whether the District's actions were "narrowly tailored" to a "compelling [government] interest."[141] It is at this point that the Court's analysis substantially diverged from that of the lower courts as well as the dissent.

The Court rejected the contention that the District's Establishment Clause concerns justified disciplinary action.[142] First, it rejected the notion that Kennedy's Free Exercise rights conflicted with the District's obligations under the Establishment Clause, instead asserting that the clauses serve "complementary" rather than "warring" purposes.[143] Second, the Court criticized the lower court's application of *Lemon* and the endorsement test, stating that "this Court long ago abandoned *Lemon* and its endorsement test offshoot" because the "abstract, and ahistorical approach" of both tests fail to produce reliable results.[144] Relatedly, the Court clarified the limits of the Establishment Clause: the clause cannot be employed as a "modified heckler's veto" to suppress religious exercise due to "perceptions" or "discomfort," does not universally require government entities to censor private religious speech, and does not require the government to "purge from the public sphere" anything that an objective observer could reasonably understand to be an endorsement of religion.[145]

---

139. *Id.* at 523–24.

140. *Id.* at 531–32. In regard to the Free Exercise claim, the Court held that Kennedy effectively demonstrated that the District's directive infringed on his ability to "engage in a sincerely motivated religious belief." *Id.* at 526. Specifically, the Court noted that "[a]t the District's request, [Kennedy] voluntarily discontinued the school tradition of locker room prayers and his postgame religious talks to students[,]" and repeatedly stated that he would be willing to wait until the players left the field to say a "short, private, personal" prayer. *Id*. at 525. Thus, the "contested exercise" and apparent cause for disciplinary actions is limited to Kennedy's "decision to persist in praying quietly without his players" in the three games preceding his suspension. *Id.* at 525–26. Further, in regard to the speech claim, the Court concluded that Kennedy's prayer constituted private speech because the practice was not within the scope of Kennedy's job duties. *Id*. at 530–31.

141. *Id.* at 532.

142. *See id*. at 532–33.

143. *Id.*

144. *Id.* at 534.

145. *Id*. at 534–35; *see also* Feiner v. New York, 340 U.S. 315, 320–21 (1951) (describing how it was the reaction to petitioner's speech, not the speech itself, which caused his arrest).

After abandoning *Lemon* and the endorsement test, the Court briefly explains that Establishment Clause challenges must be interpreted "by reference to historical practices and understandings."[146] Thus, any application of the Establishment Clause must "accor[d] with history and faithfully reflec[t] the understanding of the Founding Fathers."[147] Citing both *Town of Greece* and *American Legion*, the Court assured that this "focu[s] on original meaning and history" is consistent with the Court's Establishment Clause jurisprudence.[148]

The Court recognized that the government may not compel citizens to engage in religious observance, participate in a religious exercise, or attend church, but concludes that the District, having found no evidence of direct coercion, did not raise a judicially cognizable concern.[149] Although the Court spends one short paragraph addressing coercion, a footnote expanding upon the particular "religious establishments the Framers sought to prohibit" suggests that the majority would require coercion to carry the "force of law or threat of penalty."[150]

C. The Dissent's Establishment Concerns

The dissent, delivered by Justice Sotomayor and joined by Justices Breyer and Kagan, characterizes both the facts of the case and the Court's Establishment Clause precedent quite differently.[151] First, the dissent

146. *Id.* at 535 (quoting Town of Greece v. Galloway, 572 U.S. 565, 576 (2014)).

147. *Kennedy*, 597 U.S. at 535–36 (quoting *Town of Greece*, 572 U.S. at 577) (alterations in original).

148. *Id.* at 536 (quoting *Town of Greece*, 572 U.S. at 575).

149. *Id.* at 536–37.

150. *See id*. at 537 & n.5; Lee v. Weisman, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting) (criticizing the majority's recognition of "state-induced 'peer-pressure' coercion[,]" instead asserting that the Framers intended to protect against "coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*") (emphasis in original). In addition to citing to Justice Scalia's dissent in *Lee*, the footnote also cites to a concurring opinion from Justice Gorsuch that enumerates six traits of "founding-era religious establishments[:]" (1) government control of church doctrine and personnel, (2) mandatory church attendance, (3) penalties for religious dissent, (4) restrictions on dissenters' political participation, (5) financial support for the church, and (6) employing churches to carry out civil functions. Shurtleff v. City of Boston, 596 U.S. 243, 285–86 (2022) (Gorsuch, J., concurring). Lastly, the footnote cites to Professor Michael McConnell's historical retelling of mandatory church attendance and public financial support present in certain states prior to America's founding. Michael McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2144–46 (2003).

151. One scholar remarks that the majority and the dissent presented the facts so differently that "one could conclude that the Justices were discussing different cases." Steven K. Green,

criticizes the majority's approach of extensively addressing Kennedy's Free Exercise and Free Speech claims while dismissing the District's establishment concerns as baseless.[152] In minimizing the District's concerns, the Court "reject[ed] longstanding concerns surrounding government endorsement of religion" and applied a "toothless version of the coercion analysis, [which] faile[d] to acknowledge the unique pressures faced by students when participating in school-sponsored activities."[153] Further, the dissent reiterated observations made by the District Court: the "slow accumulation of players joining Kennedy suggests exactly the type of vulnerability to social pressure that makes the Establishment Clause vital in the high school context."[154]

Moreover, the dissent contests that *Lemon* and its endorsement offshoot were long ago abandoned, noting that the Court's criticism of *Lemon* in *American Legion*, which the majority cites as evidence of *Lemon's* abandonment, discusses the shortcomings of *Lemon* specifically as applied to "longstanding monuments, symbols, and practices."[155] Likewise, the dissent calls attention to the Court's reasoning in *Town of Greece*, which dismissed concerns regarding coercion in part by distinguishing *Lee*, which involved children at a middle school graduation ceremony rather than adults attending their town's monthly board meetings.[156] Ultimately, the dissent insists that the religion clauses "often exert conflicting pressures" while nonetheless "express[ing] complementary values,"[157] and that the majority's decision, made possible only by upholding Free Exercise rights without sufficiently considering Establishment Clause concerns, represents "no victory for religious liberty."[158]

First Amendment Imbalance: Kennedy v. Bremerton School District, 99 NOTRE DAME L. REV. REFLECTION 269, 271 (2024). While the majority focuses on the events immediately preceding Kennedy's suspension, the dissent considers the breadth of Kennedy's interactions with the District, beginning with the circumstances that led the District to launch an inquiry into his practices. *Id*. at 271–72. Moreover, the facts that were present in both opinions were characterized quite differently. Referring to Kennedy's conduct in his final three games, the majority described a "brief, quiet, personal religious observance," while the dissent explained that Kennedy knelt to pray mid-field, under the stadium lights, with coaches and student-athletes gathered around him, and made no objection as media reporters and members of the public jumped fences to join him, resulting in "severe disruption to school events." *Kennedy*, 597 U.S. at 543, 546, 553.

152. *Kennedy*, 597 U.S. at 546 (Sotomayor, J., dissenting).

153. *Id.* at 546–47.

154. *Id.* at 557.

155. *Id*. at 571 (quoting Am. Legion v. Am. Humanist Ass'n, 588 U.S. 19, 52 (2019)).

156. *Id.* at 570.

157. *Id*. at 568 (quoting Cutter v. Wilkinson, 544 U.S. 709, 719 (2005) (alterations in original)).

158. *Id.* at 579.

D. Kennedy*'s Effect on the Establishment Clause*

The Court expressly abandoned *Lemon* and the endorsement test,[159] but the extent to which abandoning *Lemon* strayed from existing Establishment Clause jurisprudence is contested. The majority asserts that the Court has "often criticized or ignored *Lemon*" in the past two decades.[160] Indeed, in light of *Lemon's* weaknesses as a blanket rule for Establishment Clause cases, the Court has developed several tests targeted towards specific areas of controversy.[161] Further, the Court's history and tradition test is not entirely new, but rather was commonly used to analyze establishment challenges from 1947, when the Establishment Clause was first incorporated against the states, until 1971, when *Lemon* was first articulated.[162]

Although *Lemon* failed in many respects, the test served an important purpose. Specifically, *Lemon* is a product of Justice Warren Burger's efforts to identify judicially cognizable steps towards religious establishments.[163] Thus, in *Kennedy*, the Court rolled back protections previously attributed to the Establishment Clause, recognizing only the lowest common denominator

159. *See id*. at 534 (majority opinion) (noting that *Lemon* and its progeny had long ago been cast aside).

160. *Id.* at 535 n.4.

161. *See* Jessalyn McAlister, *Religious Flea-Flicker at the Fifty-Yard Line:* Kennedy v. Bremerton School District *and the Establishment Clause*, 13 HOUSTON L. REV. 1, 11 (2022). *But see* Firewalker-Fields v. Lee, 58 F.4th 104, 121 (4th Cir. 2023) ("The Fourth Circuit has long used the three-pronged *Lemon* test. . . as a one-size-fits-all Establishment Clause test."). Some categories of specialized tests include (1) government-sponsored prayer (applying a coercion analysis); (2) religious exemptions from neutral, generally applicable laws (deferring to the statutory protections of the RFRA and RLUIPA); (3) government-sponsored religious symbols (applying the endorsement test); and (4) provision of public funds to religious institutions (applying the status-use distinction). *See* Marci A. Hamilton & Michael McConnell, *The Establishment Clause*, NAT'L CONST. CTR., https://constitutioncenter.org/the-constitution/amendments/amendment-i/interpretations/264 [https://perma.cc/P64J-Y4WM]. However, the Court's jurisprudence has shifted in recent years even with respect to these more targeted tests. *See, e.g.*, Am. Legion v. Am. Humanist Ass'n, 588 U.S. 19, 48–51, 60 (2019) (criticizing the *Lemon* test, and the more nuanced endorsement test that grew from it, and deferring to history and tradition analysis); Carson *ex rel.* O.C. v. Makin, 596 U.S. 767, 787–88 (2022) ("[A]ny status-use distinction lacks meaningful application not only in theory, but in practice as well.").

162. *See* Chen, *supra* note 51, at 1–2; Everson v. Bd. of Ed. 330 U.S. 1, 15 (1947).

163. *See* Richard W. Garnett, *Religion, Division, and the First Amendment*, 94 GEO. L.J. 1667, 1685 (2006). Justice Burger reasoned that the Establishment Clause must prohibit concrete steps towards an establishment of religion in order to protect against the "principal evil" of political divisiveness along religious lines. *See id*. at 1688. While the Court has never held that the interest in avoiding political divisiveness is sufficient to render state action unconstitutional under the Establishment Clause, this "anti-divisiveness" rationale was discussed at length in *Engel*'s historical analysis of the intentions behind the Establishment Clause. *See* Engel v. Vitale, 370 U.S. 421, 429–30 (1962); *see also* Marshall, *supra* note 46, at 345–46.

of state actions that scholars have identified as religious establishments.[164] Additionally, the Court declined to consider individual harms such as psychological coercion and alienation which have consistently been cited in school prayer cases as justifications for finding an Establishment Clause violation beyond the application of *Lemon*.[165]

Following *Kennedy*, federal district courts have looked to cases such as *Town of Greece* and *American Legion* in constructing an appropriate framework for determining whether a challenged practice violates the Establishment Clause.[166] Most importantly, a challenged practice is likely constitutional within the original meaning of the Establishment Clause if the practice is "consistent with" and "fits within" traditions that existed when America was founded or when the First Amendment was incorporated against the states.[167] Thus, a court must determine (1) the nature and scope of the purported tradition, and (2) whether the challenged practice is consistent with that tradition. Additionally, evidence of coercion or endorsement may be considered "for the limited purpose of deciding whether historical evidence is similar enough to the challenged practice to establish consistency."[168] While these familiar tools may highlight useful distinctions, determining the outcome of an Establishment Clause claim ultimately requires a case-by-case, fact-intensive analysis rather than application of a rigid standard or test.[169]

A historical practice may nonetheless offend the Establishment Clause if the practice is "sectarian, discriminatory or coercive."[170] The Court has not clarified what state actions are sufficiently coercive to present a constitutional issue, but it has certifiably lowered the threshold the Court maintained for half

164. *See Kennedy*, 597 U.S. at 536–37, 537 n.5.

165. *See* Marshall, *supra* note 46, at 341, 354–57.

166. *See* Town of Greece v. Galloway, 572 U.S. 565 (2014); *Am. Legion*, 588 U.S. 19.

167. *See* Roake v. Brumley, No. 24-517-JWD-SDJ, 2024 WL 4746342, at *5 (M.D. La. Nov. 12, 2024) ("[A] close reading of *Kennedy* and Fifth Circuit precedent shows that the standard remains whether the practice at issue 'fits within' or is 'consistent with a broader tradition.'"); *see also* Hilsenrath *ex rel*. C.H. v. Sch. Dist. of the Chathams, 698 F.Supp.3d 752, 762 (D. N.J. 2023) ("To evaluate an Establishment Clause claim in a manner that is 'consistent with a historically sensitive understanding of the Establishment Clause,' [this Court] must determine whether [the plaintiff's] case bears the 'hallmarks of a religious establishments the Framers sought to prohibit when they adopted the First Amendment.'") (quoting *Kennedy*, 597 U.S. at 537); Firewalker-Fields v. Lee, 58 F.4th 104, 122 (4th Cir. 2023) ("Historical practice and understanding 'must' play a central role in teasing out what counts as an establishment of religion.").

168. *Roake*, 2024 WL 4746342, at *60 (quoting Freedom From Religion Found., Inc. v. Mack, 49 F.4th 941, 954 n.20 (5th Cir. 2022)).

169. *See Kennedy*, 597 U.S. at 545.

170. *Roake*, 2024 WL 4746342, at *5. Specifically, the Court in *Kennedy* declined to discuss the potential for coercion in the form of psychological or social pressure. *Kennedy*, 597 U.S. at 536–37, 537 n.5.

a century.[171] Moreover, it replaced *Lemon* with the amorphous and manipulable history and tradition test, which, despite the majority's insistence, is certain to present challenges for any government body attempting to predict whether an action offends the Establishment Clause.[172]

Although the majority opinion briefly discusses Establishment Clause concerns, it conspicuously lacks any reference to the substantial precedent recognizing the particular importance of maintaining a separation of church and state within American public schools.[173] Meanwhile, several states have passed legislation authorizing or requiring public schools to incorporate religious texts into the curriculum for educational purposes.[174] The following Section explores how the Court's Establishment Clause jurisprudence may be applied to such policies.

VI. CONSTITUTIONALITY OF LEGISLATION REGARDING RELIGION IN PUBLIC SCHOOLS

A. The History and Tradition of Religion in Public Schools

Unraveling the historical relationship between religion and public schools is an immense challenge. In the colonial area, most of the schools established to serve elite children were controlled by state-supported churches and

171. *See Kennedy*, 597 U.S. at 546–47 (Sotomayor, J., dissenting).

172. At best, the Court's history and tradition analysis represents an honest display of judicial minimalism wherein the Court has stopped short of attempting to establish a comprehensive standard in anticipation of future opportunities to address the question. *See* Chen, *supra* note 51, at 12. At worst, this new test inherently favors Christianity, functionally protects Christian dominance, and reinforces the growing rhetoric of Christian victimhood that has produced both legal campaigns to repeal civil rights afforded to LGBT individuals as well as dangerous movements which subvert democracy in an effort to guarantee Christian dominance. *See* Ann L. Schiavone, *A "Mere Shadow" of a Conflict: Obscuring the Establishment Clause in* Kennedy v. Bremerton, 61 DUQ. L. REV. 40, 41 (2023) (arguing that the history and tradition analysis is inherently biased towards Christianity); Lupu & Tuttle, *supra* note 84, at 1798 (arguing that the Court's reasoning in *Town of Greece* and *American Legion* serves to protect Christian dominance); Hannah Bailey*, A New Minority in the Courts: How the Rhetoric of Christian Victimhood and the Supreme Court Are Transforming the Free Exercise Clause*, 73 SYRACUSE L. REV. 199, 204 (2023) (arguing that Christian legal campaigns use the narrative of Christian victimhood in Free Exercise claims to justify infringement of civil liberties including LGBTQ rights and reproductive freedom); Ruiqian Li and Paul Froese, *The Duality of American Christian Nationalism: Religious Traditionalism versus Christian Statism*, 62 J. SCI. STUDY RELIGION 770, 775 (2023) (arguing that the increased prevalence of Christian nationalism indicates a shift from a society-centric religious traditionalism to a state-centric religious statism).

173. *See Kennedy*, 597 U.S. at 546–47.

174. *See, e.g.*, S.C. CODE ANN. § 59-29-230 (authorizing an elective course concerning the history and literature of the Old Testament era and the New Testament era).

provided a primarily religious education.[175] Despite the disestablishment of churches and the growth of a prototypical public education system following the American Revolution, secular education included "broad acceptance of the suitability of religious materials in the classroom."[176] When the Supreme Court decided *Schempp* in 1963, Bible reading in public schools was part of life in at least thirty-seven states, including twelve which mandated the activity.[177] However, the cultural dominance of Judeo-Christian principles obscures a more fundamental philosophy guiding the development of public schools: anti-divisiveness.[178]

Reformers of the common school movement, the architects of systems that resemble our modern institutions, insisted upon nonsectarianism as a method by which public schools could effectively provide civic education to a religiously diverse nation.[179] Although nonsectarianism represented the lowest common denominator of religious beliefs for the overwhelming majority of students throughout the nineteenth century, substantial migration at the turn of the century resulted in religious pluralism trending ever upward.[180] The Frankfurter opinion in *McCollum,* undertaking a historical analysis, describes how public education initially incorporated religious principles and doctrines common to the citizens it served, while at the same time prioritizing policies permitting the most effective diffusion of secular education.[181] Similarly, in *Engel*, the majority drew a parallel between the Framers' fear of political conflict arising from religious establishments and the anti-divisiveness principle central to the development of public education.[182] In both *McCollum* and *Engel*, the majority recognized that despite the ubiquitous presence of religion in public schools, a historical

175. BENJAMIN JUSTICE, THE WAR THAT WASN'T 19 (2012).

176. *See* BENJAMIN JUSTICE & COLIN MACLEOD, HAVE A LITTLE FAITH: RELIGION, DEMOCRACY, AND THE AMERICAN PUBLIC SCHOOL 11 (2016).

177. Adam Laats, *Our Schools, Our Country: American Evangelicals, Public Schools, and the Supreme Court Decisions of 1962 and 1963*, 36 J. RELIGIOUS HIST. 319, 321–22 (2012). Eleven of the states that mandated daily Bible reading in public schools did so between 1913 and 1930. *Id*. at 322.

178. *See* JUSTICE & MACLEOD, *supra* note 176, at 10–11 (". . . [I]n cases where there was no common ground, school officials have generally turned to subtraction to resolve religious controversy."); Adam Laats, *SCOTUS, Schools, and History*, 64 HIST. EDUC. Q. 357, 360 (2024) ("When religious ideas were seen as divisive and inimical to the creation of new generations of citizens, those ideas were relegated to private institutions, not public ones.").

179. *See* Lain, *supra* note 47, at 486–87. One historian highlights that "in an overwhelmingly Protestant nation, civil control meant religious education for practical purposes." JUSTICE, *supra* note 175, at 20.

180. *See* Lain, *supra* note 47, at 485–94.

181. *See* Illinois *ex rel*. McCollum v. Bd. of Educ., 333 U.S. 203, 214–18 (1948).

182. *See* Engel v. Vitale, 370 U.S. 421, 429–30 (1962).

analysis demonstrates that policies allowing or endorsing religion have been consistently reshaped to serve the goal of effective civic education.[183]

Thus, while religious education has had a strong and persistent influence in our nation's history, the "story of religion in American public schools . . . [reflects] a complex, ongoing negotiation over how to provide public education that balances competing values and interests in a manner acceptable to all citizens."[184] Moreover, balancing the accommodation of religious beliefs with the need to establish a system of public education that can effectively prepare citizens is not just a policy choice. Rather, these closely held interests reflect the bounds of the First Amendment's protection of religious expression on one hand, and prohibition on state-imposed religious orthodoxy on the other. The following sections will analyze various public school policies with respect to the Court's precedent, coercive effects, and the guiding principle of anti-divisiveness.[185]

B. School Chaplains

Between 2023 and 2024, three states passed legislation authorizing schools to establish a policy that would allow chaplains to "provide support[], services, and programs" to public school students.[186] No matter which standard is applied, these policies unequivocally violate the Establishment Clause.

First, the policies fail according to *McCollum* and *Zorach*. In both cases, the Court's holding follows from a historical analysis consistent with the standard articulated in *Kennedy* and untouched by *Lemon*.[187] In *McCollum*, the fact that optional religious instruction was offered to students in regular public school classrooms was determinative of an Establishment Clause violation even though the classes were provided at no cost to the schools.[188] Here, two states authorize schools to employ certified chaplains, and all three states allow school chaplains to provide services to students through the "tax-

183. *See McCollum*, 333 U.S. at 214–18; *Engel*, 370 U.S. at 429–30.

184. JUSTICE & MACLEOD, *supra* note 176, at 10.

185. The principle of anti-divisiveness reflects concerns about the practical issues of imposing religious beliefs of the majority onto minority groups in public schools and cannot be reduced to a "heckler's veto" permitting a dissatisfied minority group to override the will of the majority. *Cf.* Feiner v. New York, 340 U.S. 315, 320–21 (1951) (noting that it was not the petitioner's use of loud sound equipment or derogatory remarks that caused his arrest, but "[r]ather it was the reaction which it actually engendered").

186. FLA. STAT. ANN. § 1012.461 (West, Westlaw through 2024 2d Reg. Sess.); LA. STAT. ANN. § 17:3011-14 (Westlaw through 2024 Reg. Sess.); TEX. EDUC. CODE ANN. § 23.001 (2018) (West, Westlaw through 4th called sess. of 88th leg.).

187. See *McCollum*, 333 U.S. at 211–12; Zorach v. Clauson, 343 U.S. 306, 314–15 (1952).

188. *See McCollum*, 333 U.S. at 227–28, 231.

established and tax-supported public school[s] system."[189] Further, none of the statutes specify that the "support, services or programs" provided by school chaplains must be secular, thereby allowing local authorities to provide for optional religious instruction indistinguishable from the released time program struck down by eight justices in *McCollum*.[190] Moreover, even if states prohibited school chaplains from espousing religious principles, the law unconstitutionally favors religion over irreligion by inviting certified chaplains, solely on account of their status as clergymen, to provide certain services to public school students while denying the same opportunity to members of the public who have not been ordained for religious duties.

Second, looking no further than the lowest common denominator of what may be considered an "establishment" of religion, these statutes employ the coercive machinery of the state to advance religion in precisely the manner that the First Amendment was designed to prohibit. For one part, the statutes allow religious officers to carry out civil functions historically fulfilled by qualified school counselors, a characteristic of religious establishments that was identified by Justice Gorsuch in his *Shurtleff* concurrence and cited by the court in *Kennedy*.[191] Additionally, the coercion is no further removed from mandatory church attendance than the "released time" instruction in *McCollum*.[192] Critically, the state mandates and enforces school attendance, and Americans no doubt expect—consistent with the promises of the First Amendment—that compulsory education "will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family."[193]

Accordingly, state laws authorizing schools to employ or accept volunteer school chaplains are prohibited by the Establishment Clause.

189. *Id.* at 210.

190. *See id.* at 209–10.

191. *See* Shurtleff v. City of Boston, 596 U.S. 243, 285–86 (2022) (Gorsuch, J., concurring) (noting that employing churches to carry out civil functions would qualify as a "founding era religious establishment"); *see also* H.R. JOURNAL, 88th Leg., Reg. Sess., at 5281 (Tex. 2023) (providing testimony before the Texas Legislature that the "bill is clear that [school chaplains] can either come in and work along with the counselors, in place of, or whatever the school best sees fit to serve their students and teachers").

192. *See McCollum*, 333 U.S. at 216–17.

193. Edwards v. Aguillard, 482 U.S. 578, 584 (1987).

C. Ten Commandments

In June of 2024, Louisiana passed a law requiring public schools to display the text of the Ten Commandments in all public school classrooms.[194] Similar bills, including three that would require the Ten Commandments to be displayed in every classroom, have had varying degrees of success in Utah, Arizona, Texas, South Carolina, Georgia, and West Virginia.[195]

Louisiana's statute (H.B. 71) includes a statement of legislative intent which—apparently anticipating constitutional challenges—makes a case as to why the law should be upheld.[196] The statement, which cites both *Van Orden* and *American Legion*, asserts that the "historical role of the Ten Commandments" reflects the Framer's view that civic morality is a necessary part of a functional self-government, and explains that the Ten Commandments serve an important educational function as "part of our state and national history, culture, and tradition."[197] The text of H.B. 71 requires the Ten Commandments to be accompanied by a "context statement" which includes three paragraphs describing how the "Ten Commandments were a

194. Evie Blad, *Louisiana Uses History, Pop Culture to Defend School Ten Commandments Mandate*, EDUCATION WEEK (Aug. 7, 2024), https://www.edweek.org/policy-politics/louisiana-uses-history-pop-culture-to-defend-ten-commandments-mandate/2024/08 [https://perma.cc/59QZ-XXQS]; LA. STATE. ANN. § 17:2124(B)(1)–(3) (Westlaw through 2024 Reg. Sess.), *invalidated* by Roake v. Brumley, No. 24-517-JWD-SDJ, 2024 WL 4746342, at *90 (M.D. La. Nov. 12, 2024).

195. George Petras, *Louisiana Requires Ten Commandments in Schools: Where Do Other States Stand?*, USA TODAY (June 27, 2024), https://www.usatoday.com/story/graphics/2024/06/27/louisiana-ten-commandments-law-visualized/74154902007/ [https://perma.cc/7DTA-XPAU]; H.R. 269, 65th Leg., 2024 Gen. Sess. (Utah 2024) (as codified at UTAH CODE ANN. § 53G-10-302 (West, current through 2024 4th Sp. Sess.)) (requiring "a thorough study of historical documents" including the Ten Commandments); S. 1151, 56th Leg., 2d Reg. Sess. (Ariz. 2024) (authorizing teachers or administrators to read or post copies of the Ten Commandments, failed by governor's veto); S. 1515, 88th Leg., Reg. Sess. (Tex. 2023) (requiring a copy of the Ten Commandments to be displayed in every classroom, passed in the Senate but failed in the House); H.R. 4485, 125th Gen. Assemb., 1st Reg. Sess. (S.C. 2023) (requiring the Ten Commandments to be displayed in a "conspicuous place" in every classroom, introduced in the House with the support of forty-one representatives but died in committee); H.D. 5302, 86th Leg., Reg. Sess. (W.V. 2024) (requiring the Ten Commandments to be displayed in a "conspicuous place" in every classroom, introduced in the Senate but died in committee); S. 501, 2024 Leg., Reg. Sess. (Ga. 2024) (authorizing schools to display the Ten Commandments in each classroom, introduced with the support of twenty-four senators but died in chamber). Additionally, four representatives in the South Carolina state legislature pre-filed a bill for the 126th session that would require elementary, middle, and secondary schools to ensure that a poster or framed copy of the Ten Commandments is posted in every classroom. H.R. 3217, 126th Gen. Assemb., 1st Reg. Sess. (S.C. 2025).

196. LA. STATE. ANN. § 17:2124(A) (Westlaw through 2024 Reg. Sess.), *invalidated by Roake*, 2024 WL 4746342, at *5.

197. LA. STATE. ANN. § 17:2124(A)(4)–(5).

prominent part of American public education for almost three centuries."[198] Finally, the bill directs public schools to comply with the bill's requirements by soliciting private donations rather than using public funds.[199]

Requiring public schools to display the Ten Commandments fails with respect to the Court's precedent, the nation's history and tradition, and the coercive effects of the mandate. First, H.B. 71 fails according to *Stone v. Graham*.[200] In *Stone*, the Court issued a 5-to-4 per curiam decision holding that a state law requiring the Ten Commandments to be displayed in every public school classroom violates the Establishment Clause because the law had a primarily religious rather than secular purpose.[201] Although the Court applied the first prong of *Lemon* in writing the per curiam decision, *Stone* is on point regarding the potential Establishment Clause violation presented by H.B. 71 and remains binding until it is overturned by the Supreme Court.[202]

Second, even if *Stone* did not control this controversy, H.B. 71 does not pass the history and tradition analysis because the mandate is not consistent with any broader national tradition. Rather, "there is no evidence of a longstanding, let alone unbroken, historical acceptance and practice of widespread, permanent displays of the Ten Commandments in public schools."[203] Although the state has argued that H.B. 71 is consistent with the nation's history and traditions due to the influence of the Ten Commandments on America's founding, development, and culture, this broad and abstract influence does not support the conclusion that a state mandate requiring public

198. *Id.* § 17:2124 (B)(3). In examples of classroom displays endorsed by the Governor, the context statement appears in "fine print" at the bottom of each posterboard. *See* Blad, *supra* note 194.

199. LA. STATE. ANN. § 17:2124(B)(5)(a)–(b).

200. *See* Stone v. Graham, 449 U.S. 39, 42–43 (1980) (per curiam).

201. *Id.* at 41. The statute in *Stone* is "legally indistinguishable" from H.B. 71: both laws required the Ten Commandments to be displayed in every public elementary and secondary school classroom, had comparable size requirements, required a brief context statement, encouraged districts to implement the law with the help of private donations, did not attempt to integrate the Ten Commandments appropriately into the curriculum, and required the Ten Commandments to be central to the display. *Roake*, 2024 WL 4746342, at *4–5. Unlike in *Stone*, H.B. 71 specified a Protestant version of the Ten Commandments. *See id.* at *18. Additionally, both cases included evidence of a religious intent by the legislature. For example, Representative Horton, who served as the primary author and sponsor of H.B. 71, explained to the House Education Committee that "[i]t is so important that our children learn what God says is right and what He says is wrong[.]" *Id.* at *45. Even more telling, Governor Landry asked his supporters to help him "not only defend – but ADVANCE – the Judeo-Christian values that this nation was built upon" in reference to H.B. 71. Patrick Wall, *Jeff Landry Vows to Defend 'Judeo-Christian Values' After Ten Commandments Lawsuit*, THE TIMES-PICAYUNE (June 25, 2024), https://www.nola.com/news/politics/jeff-landry-lawsuit-ten-commandments-judeo-christian/article_0555d6e6-3314-11ef-863e-1b07594ff87c.html [https://perma.cc/8S4C-X7ZM].

202. *Roake*, 2024 WL 4746342, at *47.

203. *Id*. at *49.

schools to post a copy of the Ten Commandments in every public elementary and secondary school classroom can "coexis[t] with the principles of disestablishment and religious freedom."[204]

Lastly, the presence of coercion distinguishes H.B. 71 from *Van Orden* and *American Legion*. The Court has consistently demonstrated a particular respect for the separation of church and state in American public schools due to the coercive effects of compulsory attendance laws and the inherent susceptibility of school-age children.[205] While Louisiana's legislature cited *Van Orden* to support the bill, that same case suggested that the historical significance of the Ten Commandments was not sufficient to protect such a display from an Establishment Clause challenge within the context of public schools.[206] Similarly, the Court distinguished the legislative prayer in *Town of Greece* from the invocation and benediction in *Lee* precisely due to the well-recognized coercive elements of public schools.[207] And although the Court's focus on the Free Exercise claim in *Kennedy* effectively subjugated the school district's Establishment Clause concerns, *Kennedy* does not indicate that the Court has abandoned its long-standing concern for Establishment Clause transgressions "in the classroom context[.]"[208] The Court described this coercive effect in addition to the impermissible state purpose in *Stone*: "[i]f the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments[,]" and that "is not a permissible state objective under the Establishment Clause."[209]

Although H.B. 71's statement of legislative intent refers to *Van Orden* and *American Legion* to justify its mandate based on the religious doctrine's place in the nation's history and tradition, H.B. 71 more clearly reflects the facts of *McCreary*. The history and tradition test has been invoked in two distinct ways: construed narrowly, the test gives weight to the long-standing existence of a particular monument or practice, and construed broadly, the test uses a historical analysis to determine (or perhaps more accurately, to relitigate) the fundamental meaning and purpose of the Establishment

204. Town of Greece v. Galloway, 572 U.S. 565, 578 (2014) (quoting Marsh v. Chambers, 463 U.S. 783, 786 (1983)).

205. *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 592–93 (1992) (collecting cases); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 312 (2000).

206. *See* Van Orden v. Perry, 545 U.S. 677, 690–91 (2005).

207. *Town of Greece*, 572 U.S. at 590.

208. *See Van Orden*, 545 U.S. at 690; Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 523–43 (2022).

209. Stone v. Graham, 449 U.S. 39, 42 (1980) (per curiam).

Clause.[210] In *Van Orden* and *American Legion*, the Court upheld long-standing monuments featuring the Ten Commandments and a Roman Cross, whereas in *McCreary*, the Court held that a county's recent decision to post a copy of the Ten Commandments in the county courthouse violated the Establishment Clause.[211]

Thus, the Court's precedent suggests that H.B. 71 has an unconstitutionally coercive effect on students, and the role of the Ten Commandments in our nation's history and traditions does not shield H.B. 71 from being held unconstitutional under the Establishment Clause.

D. Teaching the Bible

1. Oklahoma's Directive

In June of 2024, Oklahoma's State Superintendent of Public Instruction ("OSPI") issued a directive to local superintendents requiring "all Oklahoma schools" to "incorporate the Bible, which includes the Ten Commandments" into the curriculum.[212] The brief memorandum states that "[t]he Bible is one of the most historically significant books and a cornerstone of Western Civilization" that should be included in the "study of history, civilization, ethics, comparative religion, or the like[.]"[213]

Shortly after issuing the directive, the OSPI published "Instructional Support Guidelines for Teachers," a five page document describing the ways in which teachers must incorporate the Bible into the curriculum.[214] The guidelines specify a number of existing social studies standards which must

---

210. Am. Legion v. Am. Humanist Ass'n, 588 U.S. 19, 66 (2019); *Kennedy*, 597 U.S. at 546–47 (Sotomayor, J., dissenting).

211. *See supra* notes 91-108 and accompanying text. The majority in *McCreary* applied *Lemon* and held that the county's recent display of the Ten Commandments unconstitutionally advanced religion. McCreary County v. ACLU, 545 U.S. 844, 873–74 (2005). But the narrow construction of the history and tradition test does not simply function as a grandfather clause for longstanding monuments. Rather, the Court explains in *American Legion* that long-standing religious symbols can gain secular significance regardless of whether the initial act was intended to advance religion. *Am. Legion*, 588 U.S. at 39. Time-earned secular significance consequently weighs against finding the monument to be unconstitutional. *Id.* at 66.

212. Walters, Immediate Implementation of Foundational Texts in Curriculum, *supra* note 9; Evie Blad, *How Oklahoma's Superintendent Wants Schools to Teach the Bible*, EDUCATION WEEK (July 24, 2024), https://www.edweek.org/teaching-learning/how-oklahomas-superintendent-wants-schools-to-teach-the-bible/2024/07 [https://perma.cc/4HG8-G4JL].

213. Walters, Immediate Implementation of Foundational Texts in Curriculum, *supra* note 9.

214. Memorandum from Ryan Walters, St. Superintendent of Pub. Instruction, Okla. State Dep't Educ., OSDE Instructional Support Guidelines for Teachers (July 24, 2024) (on file with S.C. L. REV.) [hereinafter Walters, OSDE Instructional Support Guidelines for Teachers].

include a study of the Bible, requiring teachers to highlight the Bible's influence on Western Civilization, American history, literature, art, and music.[215] Further, the guidelines describe four strategies for implementing the instruction: textual analysis of the Bible, comparative studies, reference to "historical documents and speeches" that reference the Bible, and classroom discussions about the "historical and literary" aspects of the Bible.[216] Finally, the guidelines require teachers to remain neutral, respect diverse religious beliefs, communicate with parents, and emphasize the "historical, literary and secular value" of the Bible rather than "preaching, proselytizing or indoctrination."[217]

The OSPI's directive has been controversial, and two lawsuits have been filed challenging the constitutionality of the directive.[218] A well-constructed argument on historical grounds could be tailored to either conclusion, but a fact-intensive analysis ultimately demonstrates that the directive resembles a top-down effort to impose the state's preferred religious values onto citizens rather than a reasonable accommodation of diverse religious beliefs.

While the mandate purports to require teachers to incorporate a secular study of the Bible into the public school curricula where appropriate, both the memorandum and subsequent guidelines for implementation reveal underlying assumptions that are more consistent with instilling a fundamentally Christian worldview than with facilitating critical assessments of how the Bible relates to history, literature, culture, or other major world religions.[219] The brief memo states that the directive "is not merely an educational directive but a crucial step in ensuring our students grasp the *core values* and historical context of our country."[220] This statement conveys that incorporating the Bible into the curriculum is not merely (or even primarily) intended to provide students with a more well-rounded education, but rather

215. *Id.*

216. *Id.*

217. *Id.*

218. *See* Complaint for Declaratory and Injunctive Relief at 1, Price v. Oklahoma, No. CJ-24-151 (Okla. June 27, 2024) (alleging that Walter's Bible directive violates the Establishment Clause of the United States Constitution and Article 2, Section 5 of the Oklahoma Constitution); Petitioner's Reply Brief in Support of Application for Assumption of Original Jurisdiction and Petition for Declaratory and Injunctive Relief and/or a Writ of Mandamus at 1, Walke v. Walters, No. MA-122592 (Okla. Nov. 22, 2024) (asking Oklahoma Supreme Court to block the Bible education mandate).

219. *See* Laura Ansley, *The Role of the Bible in the Founding of the United States and Religious Mandates in Public Schools*, PERSPECTIVES ON HISTORY (Aug. 1, 2024), https://www.historians.org/perspectives-article/the-role-of-the-bible-in-the-founding-of-the-united-states-and-religious-mandates-in-public-schools/ [https://perma.cc/4GCU-UGBE].

220. Walters, Immediate Implementation of Foundational Texts in Curriculum, *supra* note 9 (emphasis added).

seeks to ensure that students understand Christianity and Christian values to be the core of our national identity and culture. Additionally, the guidelines instruct teachers to discuss how "biblical principles have shaped the foundational aspects of Western societies, such as the concepts of justice, human rights, and the rule of law[.]"[221] Notably, the guidelines do not require or recommend that teachers discuss certain negative influences that the Bible has had on Western Civilization, such as use of the Bible to justify slavery or maintain oppressive patriarchal structures.[222]

In addition to this unbalanced, particularly favorable teaching of the Bible's influence on Western Civilization, the directive promotes a Christian worldview rather than a genuine understanding of the Bible's influence on history and literature by requiring the curricula to include the Bible as the foundation and touchstone of numerous academic disciplines. Specifically, the guidelines require the Bible to be incorporated into lessons about Western Civilization, American history, canonical literature, literary techniques, art history, and music.[223] By highlighting the role of the Bible in each of these disciplines, the directive improperly favors and advances Christianity. Thus, while the guidelines instruct teachers not to promote or favor any particular religious beliefs, the directive and guidelines do just that.[224]

Ultimately, the uncritical and far-reaching study of the Bible described by the OSPI's memorandum and guidelines is better suited to advance religion than to bolster secular education. The OSPI has indicated that advancing Judeo-Christian values is, in fact, the purpose of the directive. For example, in September of 2023, the OSPI stated that he "will bring God back to schools and prayer back in schools in Oklahoma" at a Family Research Council meeting.[225]

Despite the fact that the mandate calls for a secular study of the Bible in relation to existing standards, the OSPI's actions are in truth more coercive than the daily Bible reading shot down in *Schempp* as well as the invocation shot down in *Lee*, even though these earlier cases both involved a religious exercise.[226] By purporting to be an academic and secular addition to the curriculum while ultimately advancing Christianity by providing an

221. Walters, OSDE Instructional Support Guidelines for Teachers, *supra* note 214.

222. *See id.*

223. *Id.*

224. Also, this instruction appears at the end of the guidelines as one of four "legal considerations." *Id.*

225. Caleb Gayle, *Could This Tiny School Break Down the Wall Between Church and State?*, N.Y. TIMES (Dec. 12, 2024), https://www.nytimes.com/2024/12/12/magazine/religion-oklahoma-public-schools.html [https://perma.cc/H7KV-R5ZL].

226. Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 210–11 (1963); Lee v. Weisman, 505 U.S. 577, 586 (1992).

unbalanced, uncritical understanding of the Bible's influence to impressionable students, the OSPI has effectively removed any option for parents or students to opt-out—an option that was available to the plaintiffs in *Schempp* and *Lee*.

In sum, by presenting a distinctly Christian worldview to students who are in the process of constructing a basic framework for understanding the world around them, the directive has a coercive effect that is prohibited by the Establishment Clause.

2. Old and New Testament Classes

In the last twenty years, at least twelve states have passed legislation authorizing public schools to teach elective courses on the Bible.[227] Many states require the state board of education to promulgate standards for schools that choose to offer such courses, and about half specify that schools may offer courses on the history and text of the Old Testament, the New Testament, or both.[228] Such laws often specify that religion courses must be taught in an objective or neutral manner, that teachers may not require students to study a specific version of the Bible, and that the purpose of the courses is to highlight the historic and literary value of the religious texts as well as their influence on Western Civilizations.[229]

Despite recent legislation authorizing public schools to teach elective Bible courses, Bible courses in public schools are not new.[230] Like released time programs, elective Bible courses vary with respect to curriculum, course length, and administration.[231] District courts have historically applied *Lemon* to the facts of challenged Bible courses, often finding that the course content,

---

227. ALA. CODE § 16-40-20(a) (Westlaw through 2024 Reg. Sess.); ARIZ. REV. STAT. ANN. § 15-717.01(C) (Westlaw through 2024 2nd Reg. Sess.); ARK. CODE ANN. § 6-16-145(a)(1) (West, Westlaw through 2024 legislation); GA. CODE ANN. § 20-2-148(a)(1) (West, Westlaw through 2024 Reg. Sess.); KY. REV. STAT. ANN. § 156.162(1) (West, Westlaw through 2024 Reg. Sess.); LA. STAT. ANN. § 17:282(A) (Westlaw through 2024 Reg. Sess.); MO. ANN. STAT. § 170.341(1) (West, Westlaw through 2024 Reg. Sess.); OKLA. STAT. ANN. tit. 70 § 11-103.11(A) (West, Westlaw through 2024 2nd Reg. Sess.); S.C. CODE ANN. § 59-29-230(A) (2020); W. VA. CODE ANN. § 18-2-9(a) (West, Westlaw through 2024 legislation). In addition, four states authorize schools to offer courses featuring a comparative study or survey of world religions. 24 PA. STAT. AND CONS. STAT. § 15-1515(a) (Westlaw through 2024 Act 96); IND. CODE ANN. § 20-30-6.1-1(a) (West, Westlaw through 2024 2nd Reg. Sess.); VA. CODE ANN. § 22.1-202.1 (West, Westlaw through 2024 legislation).

228. *E.g.*, ALA. CODE § 16-40-20 (Westlaw through 2024 Reg. Sess.).

229. *See, e.g.*, S.C. CODE ANN. § 59-29-230(A) (2020).

230. *See, e.g.*, Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 205 (1948) (plurality opinion).

231. *See supra* notes 17, 37, 227-229 and accompanying text.

curriculum, or instructional materials fail to demonstrate a secular purpose or unconstitutionally advance religion.[232]

As long as elective Bible courses can fairly be defined as academic instruction rather than religious exercises, Bible course offerings will not implicate, must less offend, the Establishment Clause. Additionally, elective courses are far removed from the Court's conception of coercion by force or funds. Rather, any argument that elective Bible courses are coercive must rest on the sort of state-induced "psychological" coercions or "peer-pressure" that several Supreme Court justices have suggested does not constitute a judicially cognizable Establishment Clause concern.[233]

Indeed, elective courses on the Bible are a reasonable reflection of the Bible's influence on United States history, government, and culture, as well as the broader history of the Western world. Although state-level legislation authorizes schools to offer such courses, curriculum decisions are ultimately left to school districts, thus empowering school boards to tailor the curriculum

232. *See, e.g.*, Wiley v. Franklin, 497 F. Supp. 390, 396 (E.D. Tenn. 1980) (granting a motion to enjoin a Bible course where videos of previous lessons demonstrated intent to convey a religious rather than literary or historical message); Crockett v. Sorenson, 568 F. Supp. 1422, 1430–31 (W.D. Va. 1983) (holding that a Bible teaching program violated the Establishment Clause when the evidence suggested that the program was taught in a religious rather than objective manner); Doe v. Human, 725 F. Supp. 1503, 1504, 1506, 1507 (W.D. Ark. 1989) (holding that voluntary Bible classes attended by 96% of elementary school children failed under the first two prongs of *Lemon* due to religious elements and coercive effects which unconstitutionally advance religion); Herdahl v. Pontotoc Cnty. Sch. Dist., 933 F. Supp. 582, 591–99 (N.D. Miss. 1996) (holding that an elective Bible course created by local Protestant churches, taught by a pastor, and presented from a Christian perspective failed under all three prongs of *Lemon*, as well as under the endorsement and coercion tests); Gibson v. Lee Cnty. Sch. Bd., 1 F. Supp. 2d 1426, 1429, 1434 (M.D Fla. 1998) (granting a request for preliminary injunction regarding an advanced Bible course that included instruction on the resurrection of Jesus Christ as recounted in the New Testament); Doe v. Porter, 370 F.3d 558, 562–63 (6th Cir. 2004) (granting summary judgment to plaintiffs where the defendant school district's "Bible Education Ministry" courses failed under all three prongs of *Lemon*); *cf. FFRF and Parent End 75 Years of Bible Classes in Mercer County Schools, WV*, FREEDOM FROM RELIGION FOUNDATION (May 16, 2022), http://ffrf.org/legal/court-victories/ffrf-parent-sue-to-end-75-years-of-bible-classes-in-w-va-school-system/ [https://perma.cc/V24A-Z37L] (discussing how one lawsuit challenging a West Virginia school district's "Bible in the Schools" program of instruction resulted in district agreeing to permanently suspend the program).

233. *See supra* note 150 and accompanying text. A federal district court in West Virginia articulated eight guidelines for Bible courses offered by public schools to ensure compliance with the Establishment Clause: (1) supervision and control by the school board; (2) hiring and firing procedures consistent with other courses; (3) state-controlled teacher certification; (4) no inquiry into the faith of teacher applicants; (5) curriculum and teaching materials prescribed by school board; (6) course offered as an elective along with other reasonable alternatives; (7) private contributions with "no strings attached" may be solicited to fund the course; and (8) course should be taught in an objective manner with no attempt to indoctrinate children regarding the truth or falsity of the biblical materials. *Crockett*, 568 F. Supp. at 1431.

to the local community.[234] Such a system of local control which responds to the widespread beliefs of community members is entirely in accord with the history of religion in public schools.[235]

E. Displaying the National Motto

In 2022, South Carolina became one of seven states to pass legislation requiring public schools to display the national motto, "In God We Trust," in a prominent place.[236] Even absent the Court's recent trend of emphasizing Free Exercise claims while dismissing Establishment Clause concerns, these laws are likely to be upheld. In *Engel*, the Court specifically distinguished historical documents or national anthems that contain references to a Supreme Being, stating that "[s]uch patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise" displayed through recitation of the state-written Regent's prayer.[237]

Indeed, the Court reaffirmed this holding in a series of concurring opinions in *Elk Grove Unified School District v. Newdow*.[238] In *Elk Grove*, the

234. The religious composition or local traditions of a school district will likely predict the demand for such elective courses. Several statutes allow school districts to offer elective courses on broader religious history. *See, e.g.*, ALA. CODE § 16-40-20(a)(4) (Westlaw through 2024 Reg. Sess.). Elective courses on other religious texts pertinent to the local population may be permitted by statute as well. *See, e.g.*, GA. CODE ANN. § 20-2-148(g) (West, Westlaw through 2024 Reg. Sess.).

235. *Cf.* Laats, *supra* note 177, at 359 (identifying individual beliefs as a complicating factor in articulating what ideas were "universal truths" to be taught versus religious doctrines to be prohibited).

236. S.C. CODE ANN. § 59-1-325(A)(1) (Supp. 2024). The national motto was adopted by Congress in 1956. *See* Act of July 30, 1956, Pub. L. No. 84-851, 70 Stat. 732 (codified as amended at 36 U.S.C. § 302). Although Protestantism dominated American culture for much of our nation's history, eventually giving way to Judeo-Christian dominance in response to rising religious pluralism, it was the Cold War that inspired Congress to adopt the national motto. Lain, *supra* note 47, at 492, 497. In its fight against the oppressive, atheistic Soviet Union, Americans turned to God. Thomas C. Berg, *The Story of School Prayer Decisions: Civil Religion Under Assault*, *in* FIRST AMEND. STORIES 191, 195 (Richard Garnett & Andrew Koppelman eds., 2011). Between 1952 and 1956, as Cold War tensions rose, Congress instituted a National Day of Prayer, added "under God" to the Pledge of Allegiance, and declared "In God We Trust" to be the national motto. Lain, *supra* note 47, at 497. A 1954 congressional report explained that adding "under God" to the pledge was necessary "to deny the atheistic and materialistic conceptions of communism with its attendant subservience of the individual." Berg, *supra* note 236, at 195–96 (quoting H.R. Rep. No. 83-1693, at 1–2 (1954)).

237. Engel v. Vitale, 370 U.S. 421, 436 n.21 (1962).

238. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 18, 33, 45 (2004). The Supreme Court agreed to hear *Elk Grove* after the Ninth Circuit Court of Appeals held that leading students in the pledge of allegiance, which refers to "one nation, under God," violates the Establishment Clause. *Id.* at 4–5. Although the Court held that the respondent lacked standing,

Court indicated that a state's practice of leading students in the pledge of allegiance—including the verse "one nation, under God"—does not violate the Establishment Clause.[239] In both *Elk Grove* and *American Legion*, the Court emphasized that long-standing monuments and practices can take on meaning beyond their religious significance.[240] Moreover, the Court rejected the notion that religious significance is determinative of an Establishment Clause violation, stating that "our national culture allows public recognition of our Nation's religious history and character."[241]

Thus, policies requiring schools to display the national motto are likely to be upheld under the Establishment Clause.

VII. CONCLUSION

While the Court's recent Establishment Clause jurisprudence does not allow for policies authorizing the use of school chaplains, requiring display of the Ten Commandments, or saturating the public school curriculum with references to the history and influence of the Bible, states may succeed in more moderate efforts to bring God back into public schools.[242] In truth, whether the Court's most recent jurisprudence represents a "victory for religious liberty"[243] can only be informed by our own prepossessions regarding whether the presentation of Judeo-Christian principles in public schools is consistent with the freedom of conscience protected by the First Amendment. More pertinently, with the renewed focus on history and

several justices addressed the constitutionality of the practice in a series of concurring opinions. *Id.* at 5, 18, 33, 45. Chief Justice Rehnquist, joined by Justice O'Connor, specifically cited the national motto as one of several examples which support the conclusion that "our national culture allows public recognition of our Nation's religious history and character." *Id.* at 30 (Rehnquist, J., concurring). Further, the Chief Justice explained that *Lee* is distinguishable from the present case because recitation of the pledge of allegiance is a patriotic exercise, and the inclusion of the phrase "under God" does not convert it into a religious exercise comparable to the nondenominational benedictions in *Lee*. *Id.* at 31. According to Justice O'Connor, ceremonial deism includes expressions that are so deeply rooted in the nation's history as to be ubiquitous, resulting in a shared understanding of the expression's legitimate and nonreligious purpose. *Id.*

239. *Id.* at 18 (Rehnquist, J., concurring).

240. *Id.* at 37 (O'Connor, J., concurring); Am. Legion v. Am. Humanist Ass'n, 588 U.S. 19, 39 (2019).

241. *Elk Grove*, 542 U.S. at 30 (Rehnquist, J., concurring).

242. *See* Adam Laats, *The Supreme Court Has Ushered In a New Era of Religion at School*, THE ATL. (July 15, 2022), https://www.theatlantic.com/ideas/archive/2022/07/supreme-court-religion-schools-prayer-kennedy-carson/661365/ [https://perma.cc/W63U-MBLC] (discussing how the Supreme Court has opened the door for schools to become "excessively entangled with religion").

243. Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 579 (2022) (Sotomayor, J., dissenting).

tradition, the Supreme Court will continue to relitigate the purpose and meaning of the Establishment Clause with respect to public schools. By carefully weighing the conflicting interests that underpinned the development of public education,[244] the Court can distinguish between reasonable accommodation of religious beliefs and legitimate attempts to Christianize the state.

244. *See supra* notes 184-185 and accompanying text.