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SCOTUS Sours on Lemon: Kennedy and Prayer in Public School

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SCOTUS SOURS ON *LEMON*: *KENNEDY* AND PRAYER IN PUBLIC SCHOOL

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INTRODUCTION

In less than three pages, the Supreme Court, in *Kennedy v. Bremerton School District,* abandoned decades of precedent and fundamentally altered Establishment Clause analysis.[1] Further, the Court's decision ignored the appellate court's analysis and in doing so, acted entirely against its Establishment Clause precedent for students in school settings, leaving open the possibility of teacher-led prayer in public schools even when it pressures students to partcipate.[2] In *Kennedy*, the Supreme Court held that public high school football coach Joseph Kennedy's ("Coach Kennedy") act of leading midfield, post-game prayers was protected by the Free Exercise and Free Speech clauses of the First Amendment.[3] In rejecting the school district's defense of potential Establishment Clause liability, the Court fundamentally changed how similar First Amendment issues are decided.[4] Specifically, the Court repudiated the preexisting *Lemon* test, a decades old practice created to aid in deciding Establishment Clause issues, and replaced it with a new "historical practices and understandings" test.[5] This new test requires courts and school districts alike to determine whether an action violates the Establishment Clause "by reference to historical practices and understandings" which "faithfully reflec[t] the understanding of the Founding Fathers."[6]

While the abandonment of *Lemon* is not shocking given its inconsistent application, prescribing a historical practice test to resolve Establishment Clause issues involving prayer in schools is hugely

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[1] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427-29 (2022).

[2] *See infra* Section VII.B.

[3] *Kennedy*, 142 S. Ct. at 2415-16.

[4] *See infra* Part VII.

[5] *Kennedy*, 142 S. Ct. at 2428.

[6] *Id.*

problematic for two reasons.[7] First, the Court's limited use of a historical practice test in Establishment Clause jurisprudence provides little guidance to lower courts and school districts alike.[8] Second, the use of the historical practice test in Establishment Clause jurisprudence has been inconsistent given the changes in its analysis over such a short period of time.[9] Beyond the issues associated with a historical practice test, by focusing solely on direct coercion the Court's analysis fails to adhere to its own decades-long articulated belief that students face far greater direct and indirect pressures to participate in religious activities when led by a teacher, coach, or school official.[10] The Courts' focus on direct coercsion is especially frightening given the facts in the record demonstrating the pressures these student-athletes faced.[11] Further, in its analysis, the Court removes Coach Kennedy's actions from the context in which they occurred.[12] The Court limits its inquiry to three football games that occurred in October of 2015, instead of focusing on Coach Kennedy's seven-year practice of leading prayers both on the field and in the locker room.[13] This improper focus conflicts with the Court's long-held belief that Establishment Clause issues need to be resolved within the context of their occurrence.[14]

Part I examines the First Amendment and briefly outlines the tests courts apply in deciding Free Speech, Free Exercise, and Establishment Clause issues.[15] Part II examines the creation and evolution of the *Lemon* test.[16] Part III discusses the use and disuse of the *Lemon* test as well as the creation of alternative Establishment Clause tests.[17] Part IV examines the development of the Court's consideration of students in cases involving the Establishment Clause.[18] Part V surveys the expansion of the Court's history-based inquiry in Establishment Clause cases.[19] Part VI outlines the facts of *Kennedy v. Bremerton School District* and the majority's analysis.[20] Part VII is broken down into two

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[7] *See infra* Parts III, VII.
[8] *See infra* Section VII.A.
[9] *See infra* Section VII.A.
[10] *See infra* Section VII.B.
[11] *See infra* Section VII.B.
[12] *See infra* Section VII.B.
[13] *Kennedy*, 142 S. Ct. at 2422.
[14] *See infra* Section VII.B.
[15] *See infra* Part I.
[16] *See infra* Part II.
[17] *See infra* Part III.
[18] *See infra* Part IV.
[19] *See infra* Part V.
[20] *See infra* Part VI.

sections that discuss the problems with the Court's analysis in *Kennedy*. Section VII.A explains the issues for lower courts and school boards caused by the adoption of a historical practice test given its short and inconsistent use in Establishment Clause cases.[21] Section VII.B argues that the Court's failure to adhere to precedent protecting students from indirect religious pressures fundamentally changes how courts will consider the impact of religion on students in Establishment Clause cases.[22]

I. THE FIRST AMENDMENT

The First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech."[23] The *Kennedy* case represents the trifecta of First Amendment claims as it involves the Establishment Clause, the Free Exercise Clause, and the Free Speech Clause.[24] While the Free Speech and Free Exercise claims decided in *Kennedy* are outside the scope of this Comment, a discussion of the Court's processes for deciding those claims is important to understand how the Court reaches the Establishment Clause issue in *Kennedy*.[25]

When it comes to free speech in schools, the Court has held that "[n]either students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[26] However, this does not mean that teachers, or coaches, are completely unrestricted in their speech.[27] While private citizens enjoy the full protections of the Free Speech Clause, government employees, like coaches and teachers, are "paid in part to speak on the government's behalf and convey its intended messages."[28] This means that a public school, for instance, "has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations."[29] First Amendment Free Speech cases involving government employees, like coaches or teachers, require courts to find the "balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of

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[21] *See infra* Part VII.A.
[22] *See infra* Part VII.B.
[23] U.S. CONST. amend. I.
[24] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2416 (2022).
[25] *Id.* at 2426.
[26] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).
[27] *See* Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).
[28] *Kennedy*, 142 S Ct. at 2423.
[29] Garcetti v. Ceballos, 547 U.S. 410, 418 (2006).

the public services it performs through its employees."[30] The reason for such a balancing inquiry is because statements made by government employees on "matters of public concern must be accorded First Amendment protection."[31] Consequently, when examining Free Speech violations, courts must engage in a two-step inquiry.[32] "The first [step] requires determining whether the employee spoke as a citizen on a matter of public concern."[33] If a court finds that the answer is "no," then the employee's speech is not protected under the First Amendment.[34] Part of this inquiry focuses on if the speech was made pursuant to the employee's "professional responsibilities."[35] Government employers are able to restrict "speech that owes its existence to a public employee's professional responsibilities . . . ."[36] If, however, the answer is "yes" to the court's first inquiry, then it must determine "whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public."[37] The only limitations a government employer can utilize if the employee is considered a citizen speaking to "matters of public concern" are ones "necessary for their employers to operate efficiently and effectively."[38]

The Free Exercise Clause, like the Free Speech Clause, also requires an inquiry into the state's restrictions.[39] Any rule or "law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny."[40] The Court has held that the principles of "[n]eutrality and general applicability are interrelated, and . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied."[41] Neutrality involves determining if the purpose of the "law is to infringe upon or restrict practices because of [a petitioner's] religious motivation . . . ."[42] General applicability involves the idea that the laws are not selective in how they are applied

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[30] *Pickering*, 391 U.S. at 568.
[31] *Id.* at 574.
[32] *Garcetti*, 547 U.S. at 418.
[33] *Id.*
[34] *Id.*
[35] *Id.* at 421.
[36] *Id.* at 421-22.
[37] *Id.* at 418.
[38] *Id.* at 419.
[39] *See* Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah, 508 U.S. 520, 546 (1983).
[40] *Id.*
[41] *Id.* at 531.
[42] *Id.* at 533.

because the government "cannot in a selective manner impose burdens only on conduct motivated by religious belief . . . ."[43]

While the Free Speech and Free Exercise clauses protect an individual's rights, the Establishment Clause acts more as a prohibition against government action.[44] The Court has famously held that:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*.[45]

Establishment Clause jurisprudence has been, and will continue to be, "complex and often divisive."[46] This is especially true in cases involving religion in public schools, an area of law which has acted as the catalyst for the Court's Establishment Clause development and its attempts to construct a comprehensive test.[47]

II. DEVELOPMENT OF THE *LEMON* TEST

The advent of the Court's Establishment Clause jurisprudence traces back to *Everson v. Board of Education*, a 1947 case challenging a New Jersey law allowing schools to pay for transportation costs to and from public and private schools.[48] While the Court upheld the law on

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[43] *Id.* at 542-43.

[44] U.S. CONST. amend. I. ("Congress shall make no law respecting an establishment of religion . . . .").

[45] Everson v. Bd. Of Ed., 330 U.S. 1, 15-16 (1947).

[46] Amanda Harmon Cooley, *Framers' Fidelity and Thicket Theory in Educational Establishment Clause Jurisprudence*, 58 SAN DIEGO L. REV. 1, 8 (2021).

[47] *Id.* at 9.

[48] *Everson*, 330 U.S. at 3, 5.

the grounds that it did not advance religion, it reaffirmed the principle that the First Amendment required "a wall of separation between Church and State."[49] However, the Court would not commence formulating a test to handle Establishment Clause challenges until the 1960s and 1970s. Beginning with *School District of Abington Township v. Schempp*, the Court revisited religion's role in the classroom, and a test started to emerge.[50] The Court reviewed challenges to a Pennsylvania law requiring public schools to read passages from a Christian Bible at the start of each day and a Baltimore City rule requiring students to read from a Christian Bible and/or recite a prayer at the start of the school day.[51] Finding principles of separation of church and state deeply embedded in the Court's precedent, the Court created a two-pronged test focusing on the purpose and effect of the state action.[52] In order to avoid violating the Establishment Clause, the Court found that "there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[53] In holding that the requirements of the Pennsylvania and Baltimore City schools were unconstitutional, the Court noted that "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."[54]

In 1968, the Court continued to develop its two-pronged "purpose and effect" analysis in *Board of Education v. Allen*.[55] The Court upheld the challenged practice of allowing public school boards to lend textbooks purchased by the state to students attending private and parochial schools at no cost.[56] The Court evaluated whether the primary purpose of the state action was to advance or inhibit religion.[57] Finding that the state action was focused on advancing educational opportunities and that there was no effect of advancing religion, the Court upheld the law.[58] Then, in *Walz v. Tax Commission*, when examining a challenge to laws that provided tax exemptions for property that was used or owned by religious groups for worship, the Court expanded the focus of

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[49] *Id.* at 16-18 (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878)).
[50] 374 U.S. 203, 205, 222 (1963).
[51] *Id.* at 205, 211.
[52] *Id.* at 222.
[53] *Id.*
[54] *Id.* at 221, 223-24.
[55] 392 U.S. 236, 243 (1968).
[56] *Id.* at 238.
[57] *Id.* at 243-45.
[58] *Id.* at 243-44.

its analysis under the effects prong.[59] The Court concentrated on whether the effect of the law created "excessive government entanglement with religion."[60] Applying this expanded inquiry, the Court found that the tax exemption laws' effect did not create excessive government entanglement because exemptions for the religious organizations created "minimal and remote involvement between church and state . . . ."[61] The Court also found that the purpose prong was not violated.[62] It reasoned the exemptions were granted to all places of religious worship, and found the legislative purpose was not to establish or support a specific religion.[63] Because the exemptions were granted to all places of religious worship, the Court found that the legislative purpose was not to establish or support a specific religion.[64] After determining there was no violation of the purpose prong, the Court examined whether the effect of the law created "excessive government entanglement . . . ."[65] It found that the effect was not government entanglement because exemptions for religious organizations created "minimal and remote involvement between church and state . . . ."[66]

The confluence of the Court's three modes of analysis came in 1971 when the Court finalized its Establishment Clause test in *Lemon v. Kurtzman*.[67] In *Lemon*, the Court entertained a challenge to Rhode Island and Pennsylvania statutes that provided public funding for religious schools.[68] The Rhode Island statute provided a fifteen percent salary supplement for non-public school teachers, so long as the school had an "average per-pupil expenditure on secular education" that was below the average in public schools.[69] Further, for a teacher to be eligible, that teacher "must teach only those subjects that are offered in the State's public schools" and futher, "must use 'only teaching materials which are used in the public schools.'"[70] Additionally, teachers are required to "agree in writing 'not to teach a course in religion for so long as or during such time as he or she receives any salary supplements' under the

[59] 397 U.S. 664, 666, 674 (1970).
[60] *Id.* at 674.
[61] *Id.* at 676.
[62] *Id.* at 672-73.
[63] *Id.*
[64] *Id.*
[65] *Id.* at 674.
[66] *Id.* at 676.
[67] 403 U.S. 602, 612-13 (1971).
[68] *Id.* at 606.
[69] *Id.* at 607.
[70] *Id.* at 608.

Act."[71] The Pennsylvania act authorized the superintendent of public instruction to purchase educational services from nonpublic schools by directly reimbursing those schools for teacher salaries, textbooks, and materials.[72] However, reimbursement was restricted for specific secular subjects, and the funds could not pay for any material that had religious teachings.[73]

By incorporating and consolidating precedent, the Court articulated a three-prong test requiring that (1) the government action have a secular purpose; (2) that its principal effect be one that is neutral towards religion; and (3) that the action "must not foster an 'excessive government entanglement with religion.'"[74] In analyzing the two statutes at issue, the Court only reviewed the acts under the excessive entanglement prong, focusing on the character of the benefiting institutions, the nature of the aid provided by the state, and the relationship formed between the religious institution and the state.[75] The Court agreed with the lower court's view of parochial schools as "an integral part of the religious mission" of their religious institutions.[76] The Court explained that a teacher at "a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral."[77] As such, the Court reasoned that the statues in question created excessive entanglement prohibited by the third prong because it would require the state to actively supervise the subject matter taught by teachers as well as track the funding and expenditures at parochial schools to ensure compliance with the statutes.[78] Overall, the Court found that the failure under the excessive entanglement prong meant both statutes violated the Establishment Clause and were unconstitutional.[79]

III. (DIS)USE OF *LEMON* AND DEVELOPMENT OF OTHER ESTABLISHMENT CLAUSE TESTS

After the creation of the *Lemon* test, up until 1992, there was consistent application of "basic [*Lemon*] principles in resolving

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[71] *Id.*
[72] *Id.* at 609-11.
[73] *Id.* at 610.
[74] *Id.* at 612-613 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).
[75] *Id.* at 614-15.
[76] *Id.* at 616.
[77] *Id.* at 618.
[78] *Id.* at 616-21.
[79] *Id.* at 607, 613-14.

Establishment Clause disputes."[80] As Justice Blackmun stated in his concurrence in *Lee v. Weisman*, "[s]ince 1971, the Court has decided 31 Establishment Clause cases. In only one instance, the decision of *Marsh v. Chambers*, . . . has the Court not rested its decision on the basic principles described in *Lemon*."[81] However, even though the *Lemon* test was consistently used, there was disagreement on if it was the best test to decide Establishment Clause issues and when its use was appropriate.[82] At one point, Justice Scalia went as far as to compare the *Lemon* test to a "ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried . . . ."[83] The Court at different times has expressed similar, though less descriptive, sentiments in questioning the *Lemon* test's strict application in Establishment Clause cases. In *Hunt v. McNair*, a South Carolina taxpayer brought suit seeking to enjoin the state from issuing bonds to a religious college.[84] The Court applied the *Lemon* test to uphold the state's ability to issue the bonds, but also, unenthusiastically noted they were in "full recognition that [the *Lemon* test's prongs] were no more than helpful signposts . . . ."[85] More recently, the Court, in two different cases about the display of the Ten Commandments on government property, applied *Lemon* in one case to find it violated the Establishment Clause while purposely ignoring *Lemon* in the other.[86] In *Van Orden v. Perry*, the Court examined a challenge to monuments erected around the Texas Capitol, one of which was a six foot high statute of the Ten Commandments.[87] In concluding that the monument was constitutional, the Court found that "Whatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds."[88] However, in the same year, the Court also decided *McCreary County v. ACLU of Kentucky*, in which it examined a challenge to the actions of two different counties who displayed the Ten

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[80] Lee v. Weisman, 505 U.S. 577, 603 (1992).

[81] *Id.* at 603 n.4 (Blackmun, J., concurring) (internal citations omitted).

[82] *See* Wallace v. Jaffree, 472 US 38, 68-70 (O'Connor, J., concurring) (noting that since the creation of the *Lemon* test, the Court had already modified the test or not used it and suggesting the endorsement test is a better test for the issue at hand); *id.* at 110 (Rehnquist, J., dissenting) ("The three-part test has simply not provided adequate standards for deciding Establishment Clause cases, as this Court has slowly come to realize.").

[83] Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring).

[84] 413 U.S. 734, 735-36 (1973).

[85] *Id.* at 741.

[86] *See infra* text accompanying notes 87-90.

[87] 545 U.S. 677, 681 (2005).

[88] *Id.* at 686.

Commandments inside their county courthouses.[89] The Court applied *Lemon* to find that the display was unconstitutional and upheld the lower court's ruling.[90]

This confusion and situational rejection of *Lemon* resulted in a period of inconsistent Establishment Clause analysis. In 1983, in *Marsh v. Chambers*, the Court created an exception to its Establishment Clause jurisprudence as it considered the constitutionality of formally leading prayer at the start of legislative sessions.[91] Instead of applying *Lemon*, the Court held that prayer before legislative sessions did not violate the Establishment Clause because such prayers had an "unbroken history of more than 200 years . . . ."[92] The Court reasoned that practices from the first Congress left "no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society."[93] The following year, in *Lynch v. Donnelly*, Justice O'Connor, in her concurring opinion, introduced a variation of the *Lemon* test: the endorsement test.[94] In *Lynch*, the Court analyzed a challenge to the constitutionality of a nativity scene on government property.[95] This variation of the *Lemon* test focused on if the "government's actual purpose is to endorse or disapprove of religion" and if "irrespective of [the] government's actual purpose, the practice under review in fact conveys a message of endorsement . . . ."[96] Part of the purpose of the endorsement test was to examine if "an objective observer acquainted with the text, legislative history, and implementation of the statute, would perceive [an act as] state endorsement . . . ."[97] This test also led to inconsistent application. Some cases applied the endorsement test on its own as a method of analyzing constitutional challenges, while others applied the endorsement test along with the *Lemon* test.[98]

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[89] *See generally* 545 U.S. 844, 850-59 (2005).

[90] *Id.* at 864-66, 881.

[91] 463 U.S. 783, 784 (1983); *id.* at 796 (Brennan, J., dissenting).

[92] *Id.* at 792.

[93] *Id.*

[94] 465 U.S. 668, 692 (1984) (O'Connor, J., concurring).

[95] *Id.* at 671 (majority opinion).

[96] *Id.* at 670-71, 690 (O'Connor, J., concurring).

[97] Wallace v. Jaffree, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring).

[98] *Compare* Edwards v. Aguillard, 482 U.S. 578, 585-95 (1987) (applying the *Lemon* test and endorsement test to strike down a Louisiana statute requiring schools to teach creationist theories if the school also taught theories of evolution) *and* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 395-96 (1993) (applying the *Lemon* test and endorsement test to hold that use of the school property to show religious films after hours does not violate the Establishment Clause) *with* Zelman v. Simmons Harris, 536 U.S. 639, 655-56 (2002) (applying the endorsement test to uphold a school tuition voucher program).

In 1989, in *County of Allegheny v. Greater Pittsburgh ACLU*, Justice Kennedy, concurring in part and dissenting in part, criticized both the *Lemon* test and the endorsement test.[99] There, the Court considered a challenge to a religious display of a crèche[100] on government property during the holidays.[101] Justice Kennedy found that the Establishment Clause is meant to forbid the government from coercing a person to participate in religious exercise.[102] He argued that coercion does not only need to be in the form of "tax in aid of religion or a test oath," but that "[s]ymbolic recognition or accommodation of religious faith may violate the Clause in an extreme case."[103] Coercion analysis has taken on variations based on how different Justices define it. For example, Justice Scalia and Justice Thomas have argued that a common form of coercion focuses on the "coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*."[104] However, the Court's coercion analysis has also included indirect coercion, especially when examining religion in schools.[105]

IV. JURISPRUDENCE OF INDIRECT COERCION IN SCHOOL ESTABLISHMENT CLAUSE CASES

Despite inconsistent use of its Establishment Clause tests, the Court soon came to a consensus view of the pressures faced by students in Establishment Clause cases looking at "psychological coercion" or indirect coercion.[106] No matter which test it applied, the Court began to recognize the coercive pressures faced by students in schools. For example, in *Stone v. Graham*, the Court, applying *Lemon*, found an act requiring schools to display the Ten Commandments unconstitutional.[107] While the Court's primary holding rested on the fact that the act failed the secular purpose prong of *Lemon*, the Court noted the influence that posting the Ten Commandments would have on students.[108] The Court found that the effect of having the Ten Commandments

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[99] 492 U.S. 573, 655-57, 668-69 (1989) (Kennedy, J., concurring in part and dissenting in part).

[100] The Court describes the crèche as "a visual representation of the scene in the manger in Bethlehem shortly after the birth of Jesus, as described in the Gospels of Luke and Matthew." *Id.* at 580 (majority opinion) (internal citations omitted).

[101] *Id.* at 578-82.

[102] *Id.* at 660 (Kennedy, J., concurring in part and dissenting in part).

[103] *Id.* at 661.

[104] Lee v. Weisman, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting) (emphasis in original).

[105] *See infra* Part IV.

[106] *Lee*, 505 U.S. at 593-94 (majority opinion). *See also id.* at 636 (Scalia, J., dissenting).

[107] 449 U.S. 39, 39, 41-43 (1980).

[108] *Id.* at 41-42.

displayed would "be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments."[109]

Justice O'Connor, just a few years later, reiterated the importance of keeping state sponsored religious practices out of schools because of the susceptibility of students and the power schools have over them.[110] In *Wallace v. Jaffree*, the Court considered a challenge to a 1981 Alabama statute that authorized a one-minute moment of silence for meditation at the start of each school day.[111] In finding that the statute violated the Establishment Clause, the Court broke away from a strict application of the *Lemon* test by using both *Lemon* and the endorsement test.[112] Justice Stevens, writing for the 5-4 majority, found that the statute violated the Establishment Clause for failing to meet the secular purpose prong of the *Lemon* test.[113] In striking down the law, the Court noted that the First Amendment protects "individual freedom of conscience," like religious beliefs, when they "are the product of free and voluntary choice . . . ."[114] Further, Justice O'Connor, concurring, noted that there is an important distinction between prayers directed at adults, who are not as "readily susceptible to unwilling religious indoctrination" and prayers directed at school children, who are.[115] Then, in *Edwards v. Aguillard*, the Court reiterated the influence that schools have over students, but also paid particular attention to how the relationships students form with each other and with their teachers can create indirect pressures on students to conform.[116] The Court again applied a joint *Lemon* and endorsement analysis to strike down a statute which prohibitedteaching evolution-based theories without also teaching creation-based theories.[117] The Court emphasized that "[t]he State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure."[118]

By the 1990s, in *Lee v. Weisman*, the Court focused its analysis on the coercive effects of the religious practice of prayer in school.[119] The Court examined a policy from Rhode Island allowing its public high

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[109] *Id.* at 42.
[110] Wallace v. Jaffree, 472 U.S. 38, 81 (1985) (O'Connor, J., concurring).
[111] *Id.* at 40 (majority opinion).
[112] *See generally id.* at 56-61 (applying the *Lemon* test and endorsement test).
[113] *Id.* at 56.
[114] *Id.* at 53.
[115] *Id.* at 81 (O'Connor, J., concurring).
[116] 482 U.S. 578, 582-85 (1987).
[117] *Id.* at 587-89, 592-94, 596-97.
[118] *Id.* at 584.
[119] 505 U.S. 577, 587 (1992).

schools and middle schools to invite clergy to give prayers at graduation ceremonies.[120] A local public school invited a rabbi to give a prayer at the graduation despite objections from the respondent, a parent of a student attending the graduation.[121] The Court found that the challenged policy violated the principle that the "government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith . . . .'"[122] The Court noted that there were "heightened concerns with protecting [students'] freedom of conscience from subtle coercive pressure . . . ."[123] These "subtle coercive pressures" were prevalent in schools because the students were left with no other option than to participate.[124] The Court stated that it was an "undeniable fact . . . that the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction."[125] Further, the Court noted there does not need to be direct coercion, but that "prayer exercises in public schools carry a particular risk of indirect coercion."[126] The majority noted that "[t]his pressure, though subtle and indirect, can be as real as any overt compulsion."[127]

In 2000, the Court again expressed concern for prayer at non-compulsory school events, specifically at extracurricular football games.[128] In *Santa Fe Independent School District v. Doe*, the particular practice at issue occurred at a Texas high school where students elected a student chaplain who would lead a prayer before football games held at the school.[129] The Court applied the *Lemon* test, the endorsement test, and a coercion analysis and found that the prayer was a violation of the Establishment Clause.[130] The Court articulated that, despite the lack of a compulsory attendance requirement, there were still coercive pressures on students effectively required to attend, such as cheerleaders and band members.[131] Further, the Court noted that many students view attending events such as football games "as part of a complete educational

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120 *Id.* at 580.
121 *Id.* at 581.
122 *Id.* at 587 (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984) (alteration in original).
123 *Id.* at 592.
124 *Id.* at 588.
125 *Id.* at 593.
126 *Id.* at 592.
127 *Id.* at 593.
128 Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 294 (2000).
129 *Id.* at 294-98.
130 *Id.* at 307-17.
131 *Id.* at 311.

experience."[132] This perspective would have the effect of putting students in the uneasy position of choosing between attending and facing a "personally offensive religious ritual[] . . . ."[133] The Court reasoned that the school could not require students to "forfeit his or her rights and benefits" of attending the football game in order to avoid "state-sponsored religious practice."[134] Additionally, the issue was not just that the prayer was given by the student over a loudspeaker, which was controlled by the school officials, but also that the ceremony was taking place at a "school-sponsored function conducted on school property."[135] The Court also noted that the school's colors and insignia were likely on display, and the presence of band members and cheerleaders dressed in school uniforms likely added to the perception by members of the audience that the prayer was approved by the school itsself.[136] For all of these reasons, the Court found that the practice of a student chaplain leading prayer before football games at a public high school was unconstitutional.[137]

V. EMERGENCE OF THE HISTORY BASED INQUIRY

While the 1980s through the early 2000s saw varying use of the *Lemon* test, the endorsement test, and the coercion test, the historical analysis undertaken in *Marsh* remained an exception to the Court's Establishment Clause jurisprudence.[138] Over time, there was an emergence of Justices who felt that the proper test for any Establishment Clause issue focused on the history and traditions of the country as they related to the challenged action. For example, in *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, while the majority applied an endorsement test to religious displays on government property,[139] Justice Kennedy, concurring and dissenting in part, disagreed with the application of the endorsement test.[140] Instead, he argued the proper inquiry for

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[132] *Id.*

[133] *Id.* at 312.

[134] *See id.* (quoting Lee v. Weisman, 505 U.S. 577, 596 (1992)).

[135] *Id.* at 307-08.

[136] *Id.*

[137] *Id.* at 301.

[138] *See supra* notes 82-85 and accompanying text.

[139] 492 U.S. 573, 597 (1989). The majority held that the one display, a creche outside of the courthouse during the holiday season, violated the Establishment Clause, while the second display, a Christmas tree, menorah, and sign placed near by the display by a government office building, did not violate the Establishment Clause since they were a secular representation of the holiday season. *Id.* at 601, 617-20.

[140] *Id.* at. 668-69 (Kennedy, J., concurring in part and dissenting in part).

Establishment Clause violations is with "reference to historical practices and understandings."[141] Though Justice Kennedy did not advocate for a test purely based on history, and instead advocated for a direct coercion test that also considers historical practices and understandings, his opinion represents an early push for a more history focused inquiry. Indeed, in 1992, Justice Scalia, joined by three other Justices in his dissent in *Lee v. Weisman*, articulated the position that prayer at graduation ceremonies is consitutional.[142] Justice Scalia reasoned that such prayer fits within the country's history of prayer at public celebrations and ceremonies going back to the country's founding, using presidential inaugurations as an example.[143]

It was not until the 2000s that a more dramatic shift towards a historical practice and traditions-based analysis occurred. In *Van Orden v. Perry*, the Court inched closer towards the acceptance of a history and tradition test when examining a challenge to a six-foot-tall monument outside the Texas State capitol featuring the Ten Commandments.[144] A plurality of the Court found that the monument did not violate the Establishment Clause when compared to the context of the history of religious traditions in the country.[145] The plurality opined that the *Lemon* framework was not useful to analyze passive monuments like the one in that case and instead looked to the nature of the monument in the history of the country.[146] The plurality, while not specifically using a pure history and traditions test, spent much of its opinion outlining the historical tradition of acceptance of religion and the Ten Commandments in the country's history.[147]

In 2014, the Court looked again at a challenge to prayer given before town meetings in *Town of Greece v. Galloway*.[148] The town had a practice of calling local congregations until a minister who could attend the town meeting to give a prayer was found.[149] From 1999 to 2007, every minister who led a prayer was Christian.[150] The *Galloway* Court found that there was not a violation of the Establishment Clause when considering the historical practices and traditions of legislative prayer

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[141] *Id.* at 670.
[142] 505 U.S. 577, 631-32, 636 (1992) (Scalia, J., dissenting).
[143] *Id.* at 632-34.
[144] 545 U.S. 677, 681, 686 (2005) (plurality opinion).
[145] *Id.* at 690-92.
[146] *Id.* at 686.
[147] *Id.* at 686-92.
[148] 572 U.S. 565, 569-70 (2014).
[149] *Id.* at 570-71.
[150] *Id.* at 571.

in the country's history.[151] The majority noted that the line the Court must draw between permissible and impermissible government action in relation to the Establishment Clause "is one which accords with history and faithfully reflects the understanding of the Founding Fathers."[152] Just five years later, the Court again used historical practices as the guiding inquiry in *American Legion v. American Humanist Association*.[153] The challenge there was to a large Latin cross built in the 1920s to honor World War I soldiers.[154] The cross, located on public property, was maintained and cared for with state funds.[155] Once again delivering a plurality opinion, the Court held that *Lemon* should not be applied to cases involving monuments.[156] Instead, there should be "a presumption of constitutionality for long standing monuments, symbols and practices."[157] The majority's historical inquiry focused on the meaning of the cross when it was built.[158] In describing the historical practice of legislative prayer, the Court found "[t]he practice begun by the First Congress stands out as an example of respect and tolerance for differing views, an honest endeavor to achieve inclusivity and nondiscrimination, and a recognition of the important role that religion plays in the lives of many Americans."[159] The Court then held that "categories of monuments, symbols, and practices with a longstanding history follow in that tradition . . . [and] are likewise constitutional."[160]

VI. DEATH OF *LEMON* – *KENNEDY V. BREMERTON SCHOOL DISTRICT*[161]

The *Lemon* test received the final nail in its proverbial coffin in *Kennedy v. Bremerton School District*.[162] There, Coach Kennedy, a high school football coach, was suspended, and ultimately terminated, for leading post-game prayers on the fifty-yard line of the football field of

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[151] *Id.* at 584, 591-92.

[152] *Id.* at 577 (quoting Sch. Dist. of Abington Twp. v. Schempp, 374 U. S. 203, 294 (1963) (Brennan, J., concurring)).

[153] 139 S. Ct. 2067, 2082-85 (2019).

[154] *Id.* at 2074.

[155] *Id.* at 2078.

[156] *Id.* at 2081-82.

[157] *Id.*

[158] *Id.* at 2089.

[159] *Id.*

[160] *Id.*

[161] Part VI details the Court's opinion in Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022), focusing on the First Amendment claims brought by the Petitioner and the repudiation of the *Lemon* test in favor of history-based inquiry.

[162] 142 S. Ct. 2407, 2428 (2022).

a public high school in Washington State.[163] He later sued the school district, arguing that his termination on these grounds violated the Free Speech and Free Exercise clauses.[164] Over a seven year period, Coach Kennedy conducted on-field prayer following each of the school's football games.[165] While Coach Kennedy's prayer started as a solitary prayer, over time, more and more players joined him on the field to the point where the prayers began to include most of the team.[166] At times, the prayers involved coaches and players from the opposing team as well.[167] Further, Coach Kennedy began to incorporate "short motivational speeches with his prayer when others were present."[168] Coach Kennedy participated in, as the Court pointed out in its opinion, a tradition predating his tenure in which members of the team would pray inside the locker room as well.[169] The school district learned of the on-field prayer in September of 2015, when an opposing coach reached out to tell the school district he thought it was "cool" that Coach Kennedy was allowed to conduct group prayers on the field.[170] The school district then contacted Coach Kennedy to inform him that he needed to cease giving motivational talks to players that included religious references.[171] Thereafter, Coach Kennedy ended team prayers inside the locker room, but informed the school district that he would not end his practice of praying on the field.[172] Coach Kennedy again prayed on the field on October sixteenth, against the direction of the school district.[173] Just before the game on October twenty-third, the school district again reached out to Coach Kennedy to let him know that he needed to end the practice of praying on the field.[174] However, after the football games ended on both October twenty-third and twenty-sixth, Coach Kennedy again prayed on the field at the fifty-yard line.[175] Following the October twenty-sixth game, the school district placed him on administrative leave.[176] It was not until the football season ended when Coach Kennedy's employment

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[163] *Id.* at 2418-19; *id.* at 2434 (Sotomayor, J., dissenting).
[164] *Id.* at 2419 (majority opinion).
[165] *Id.* at 2416.
[166] *Id.*
[167] *Id.* at 2416, 2438.
[168] *Id.* at 2416.
[169] *Id.* at 2417.
[170] *Id.* at 2435 (Sotomayor, J., dissenting).
[171] *Id.* at 2416-17 (majority opinion).
[172] *Id.* at 2417.
[173] *Id.* at 2417-18.
[174] *Id.* at 2418.
[175] *Id.* at 2418-19.
[176] *Id.*

contract was not renewed following a "poor performance evaluation" that "advised against rehiring" him.[177]

Writing for a 6-3 majority, Justice Gorsuch opined that Coach Kennedy's speech was protected under the Free Exercise and Free Speech clauses.[178] Instead of considering all of the events and circumstances surrounding Coach Kennedy's prayer, the majority limited the scope of inquiry to only three games in October 2015, after which the school district asked Coach Kennedy to cease actions that could be considered endorsing religion.[179] The Court viewed the protection offered by the Free Exercise Clause and the Free Speech Clause as overlapping.[180] In so holding, the Court found that Coach Kennedy demonstrated that the school district's actions of disciplining him following three games in October of 2015 were neither neutral nor generally applicable as required by Free Exercise jurisprudence.[181] The majority characterized Coach Kennedy's prayer as a "sincerely motivated religious exercise" which he conducted "briefly and by himself" on the field.[182] The Court held that because the school district admitted its policy was not generally applicable or neutral, and allowed other coaching staff to leave their on-the-field responsibilities to handle personal matters, Coach Kennedy had proved his burden of establishing a Free Exercise Clause violation.[183]

As for the Free Speech issue, because Coach Kennedy is considered a government employee, these First Amendment claims are complicated and nuanced because government employees are, in essence, conveying the government's message when they speak.[184] Applying those principles, the Court found that Coach Kennedy, during the three prayers in October of 2015, was not speaking "'within the scope' of his duties as a coach."[185] Specifically, the Court found he was not speaking pursuant to the school district's policies or requirements, or providing discussion to his players within the scope of the game itself, meaning

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[177] *Id.* at 2419.

[178] *Id.* at 2433.

[179] *Id.* at 2422.

[180] *Id.* at 2421.

[181] *Id.* at 2421-23 (quoting Emp. Div., Dep't. of Hum. Res. of Or. v. Smith, 494 U.S. 872, 879-81 (1990)). *See also supra* notes 39-43 and accompanying text (discussing the Free Exercise Clause inquiry used by courts).

[182] *Kennedy*, 142 S. Ct. at 2422.

[183] *Id.* at 2422-24.

[184] *Id.* at 2423. *See also supra* notes 26-38 and accompanying text (discussing the Free Speech Clause inquiry used by courts).

[185] *Id.* at 2424.

the prayer was not in the scope of his duties.[186] Moreover, the timing of the prayer, after the game on the fifty-yard line, while students could have been engaged in other activities, further supported the Court's conclusion that Coach Kennedy's speech was not within the scope of his responsibilities as a coach.[187] The Court rejected the school board's argument that even though Coach Kennedy "served as a role model" and that coaches and teachers are considered "vital role models," that what "coaches say in the workplace [is] government speech subject to government control."[188] In sum, the Court determined that Coach Kennedy was speaking as a private citizen "on a matter of public concern".[189]

Because the Court found Coach Kennedy established a claim under both the Free Speech and Free Exercise clauses, the burden switched to the school district to show that its restrictions on Coach Kennedy's First Amendment rights met the highest level of constitutional scrutiny—strict scrutiny.[190] To pass strict scrutiny, the school district needed to show that the restrictions served a compelling interest and were narrowly tailored to further that interest.[191] The school district claimed that its interest was to avoid an Establishment Clause violation.[192] More specifically, the school district claimed it did not want to be viewed as endorsing a religion.[193] To this end, the Court both rejected this claim and repudiated the very jurisprudence the school district relied on to make this claim: the *Lemon* test and endorsement test.[194] In doing so, the Court claimed that it long ago had abandoned both tests because they represented an "abstract, and ahistorical approach to the Establishment Clause . . . ."[195] Instead, the Court held that an Establishment Clause issue needs to be interpreted by "'reference to historical practices and understandings.'"[196] The Court noted "[a]n analysis

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186 *Id.*

187 *Id.* at 2425.

188 *Id.* The Court engages in a parade of horribles arguing that if his role as a vital role model meant that the government could control any of his speech in the workplace then "a school could fire a Muslim teacher for wearing a headscarf in the classroom or prohibit a Christian aide from praying quietly over her lunch in the cafeteria." *Id.*

189 *Id.* n.2.

190 *Id.* at 2426.

191 *Id*.

192 *Id.*

193 *Id.* at 2426-27.

194 *Id.* at 2427-28.

195 *Id.* at 2427.

196 *Id.* at 2428 (quoting Town of Greece v. Galloway, 572 U.S. 565, 576 (2014)).

focused on original meaning and history . . . has long represented the rule rather than some 'exception . . . .'"[197]

Alternatively, the school district argued that if there was not an Establishment Clause violation, it was justified in disciplining Coach Kennedy because his actions were coercive toward students.[198] The Court found that this claim also could not stand because Coach Kennedy's "private religious exercise did not come close to crossing any line one might imagine separating protected private expression from impermissible government coercion."[199] The Court claimed to find absolutely no evidence of coercion in the record, relying on the fact that it contained no evidence that Coach Kennedy ever directly asked students to pray with him.[200] Here, the Court stated that it had long held that "'secondary school students are mature enough . . . to understand that a school does not endorse,' let alone coerce them to participate in, 'speech that it merely permits on a nondiscriminatory basis.'"[201] The Court found that the school district punished Coach Kennedy for the prayer on the field, prayer that he argued he would have been more than happy to do alone when the team had already exited the field.[202]

The Court also rejected the school district's evidence that the coach had "authority and influence over the students," and that such authority and influence certainly could have impacted the students in favor of praying with him.[203] Further, the majority declined to consider evidence that parents had told the school district their children felt the need to pray because they did not want to be away from the team stating that it was inadmissible hearsay.[204] The Court again examined only the three games from October 2015, finding that no Bremerton students joined Coach Kennedy's prayers – though the majority noted that members from the general public and opposing teams joined him instead.[205]

Confoundingly, the Court held that this case is distinguishable from *Lee* and *Santa Fe*.[206] The Court distinguished *Lee* on the grounds that it involved "'[a] clerical membe[r]' who publicly recited prayers 'as part of [an] official school graduation ceremony' because the school had

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[197] *Id.* (quoting *Town of Greece*, 572 U.S. at 575). In making this claim, the Court cites to four cases, three of which come from before *Lemon*, and one decided within the last ten years. *Id.*

[198] *Id.* at 2428-29.

[199] *Id.* at 2429.

[200] *Id.* at 2429-31.

[201] *Id.* at 2430 (quoting Bd. of Educ. v. Mergens, 496 U.S. 226, 250 (1990) (plurality opinion)).

[202] *Id.* at 2429-30, 2433.

[203] *Id.* at 2430-31.

[204] *Id.* at 2430.

[205] *Id.*

[206] *Id.* at 2431-32.

'in every practical sense compelled attendance and participation in' a 'religious exercise.'"[207] Similarly, the Court distinguished *Santa Fe* on the grounds that "[t]he prayers for which Mr. Kennedy was disciplined were not publicly broadcast or recited to a captive audience. Students were not required or expected to participate."[208]

The Court concluded its analysis of the school district's arguments by finding no practical conflict between any of the clauses in the First Amendment as the school district argued.[209] The majority noted the conflict between the Establishment Clause and the other clauses was only a "mere shadow" as it was created by a misconstruction of the Establishment Clause on the school district's part.[210] Further, the school district's fear of "phantom constitutional violations" did not justify it to create an actual violation of Coach Kennedy's First Amendment rights.[211]

VII. PROBLEMS WITH *KENNEDY*'S IMPACT ON ESTABLISHMENT CLAUSE QUESTIONS IN SCHOOLS

The Court in *Kennedy* repudiated *Lemon* and its off-shoot endorsement test from the Court's Establishment Clause analysis.[212] Given its inconsistent use, the articulated dislike by some of the Justices, and the use of other analyses, it is perhaps not surprising the Court would endeavor to change *Lemon*.[213] However, in abandoning it entirely, the Court fundamentally changed the way courts and schools will analyze Establishment Clause questions, and may even have paved the way for Christian prayer on public grounds by public employees, even when that prayer indirectly coerces others to do the same.[214] As such, two main problems arise from the less than three pages dedicated to *Lemon*'s death.[215]

First, the Court adopted the historical practice test for all Establishment Clause-based questions without providing any guidance on how lower courts and government entities should employ the test.[216]

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[207] *Id.* at 2431 (quoting Lee v. Weisman, 505 U.S. 577, 580, 598 (1992) (alteration in original)).
[208] *Id.* at 2432.
[209] *Id.*
[210] *Id.* (quoting Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 308 (1963) (Goldberg, J., concurring)).
[211] *Id.*
[212] *Id.* at 2427-28.
[213] *See supra* Part III.
[214] *See infra* Part VII. *See also Kennedy*, 142 S. Ct. at 2434 (Sotomayor, J., dissenting).
[215] *See infra* Part VII.
[216] *Kennedy*, 142 S. Ct. at 2450 (Sotomayor, J., dissenting).

Notably, even the Court's previous Establishment Clause cases in which any sort of history-based inquiry or test is applied provide conflicting information on what actually matters in solving these issues.[217] Second, in applying the history-based inquiry here, the Court failed to undertake any robust (even non-superficial) analysis as to coercion, failing to address the Court's previous concerns with the pressures faced in public schools and further limiting its analysis which removed Coach Kennedy's actions from its years long context.[218] As such, the *Kennedy* Court addressed only what can be termed as "direct coercion" or coercion that focused solely on if the students were asked or forced by Coach Kennedy to pray with him.[219] In doing so, the Court failed to consider the evidence in the record, and failed to make a coercion analysis a robust part of the history and tradition inquiry.[220]

A. Problem One: A Historical Inquiry with No History

After abandoning the *Lemon* and endorsement tests, the Court settled on a test that focuses on "historical practices and understandings."[221] The Court's guidance for lower courts and governments to use this new approach is to have them examine an act to see if it is in line "with history and faithfully reflec[ts] the understanding of the Founding Fathers."[222] While this provides little guidance and requires that judges and school administrators alike become historians, it is not as if the Court's past Establishment Clause cases applying a historical approach offer any insight.[223] Determining what constitutes "historical practices" is murky, and further exacerbated by the limited use of the test in the realm of Establishment Clause jurisprudence.

For example, how far back must a lower court or school look to decide if a practice is permissible because of its continuity? What if the practice does not date back to the founding? In *Marsh v. Chambers*, the Court relied on "unbroken history of more than 200 years" focusing solely on the practice of legislative prayer.[224] Then, in *American Legion*, the Court examined the practice of using state resources to help maintain

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[217] *See infra* Section VII.A.

[218] *See infra* Section VII.B.

[219] *Kennedy*, 142 S. Ct. at 2451-53 (Sotomayor, J., dissenting).

[220] *See infra* Section VII.B.

[221] *Kennedy*, 142 S. Ct. at 2428 (majority opinion) (quoting Town of Greece v. Galloway, 572 U.S. 565, 576 (2014)).

[222] *Id.* (quoting Town of Greece v. Galloway, 572 U.S. 565, 577 (2014) (some alteration in original)).

[223] *Id.* at 2450 (Sotomayor, J., dissenting).

[224] 463 U.S. 783, 792 (1983).

a thirty-two foot Latin cross built in 1925 to honor soldiers who died in World War I.[225] Unlike the Court in *Marsh*, which traced prayer before legislative sessions back to the founding, the Court in *American Legion* was unable to trace the practice of building a large Latin cross to honor World War I soldiers to the founding era.[226] Instead, the Court found that the cross imagery had "widespread use as a symbol of Christianity by the fourth century," and that the context of religious symbols can change over time to have different meanings and purposes than their original intent.[227] To depict such potential for change, the Court then tried to reconcile the constitutionality of the monument with the history of other monuments and statues that incorporate religion in them, like how "memorials for Dr. Martin Luther King, Jr., make reference to his faith."[228]

The Court found that the monument in question was similar to the act of legislative prayer.[229] The Court reasoned that the practice of prayer before legislative sessions, "begun by the First Congress[,] stands out as an example of respect and tolerance for differing views, an honest endeavor to achieve inclusivity and nondiscrimination, and a recognition of the important role that religion plays in the lives of many Americans."[230] Similarly, the Court held that the Latin cross at issue in the case and other "categories of monuments, symbols, and practices with a longstanding history follow in that tradition . . . are likewise constitutional."[231] The Court in *American Legion* was unable to find a direct connection between a less than a century old monument and the founding era, as it had done with prayer in *Marsh*, and instead relied on the connection to historic themes of tolerance and religious inclusivity in order to fit the cross within a historical context warranting constitutional protection.[232]

Lower courts and governments, if not confused about what exactly their inquiry needs to encompass based on those two cases

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[225] American Legion v. American Humanist Ass'n., 139 S. Ct. 2067, 2074-75 (2019).

[226] *See generally id.* at 2074, 2081–90 (noting issues with application of *Lemon* test and attempting to find a historical justification to maintain Latin cross).

[227] *Id.* at 2074, 2081-89.

[228] *Id.* at 2086. More specifically, in this case, the Court reasoned that even though a cross is generally viewed as a religious symbol, the specific challenged cross's meaning had changed over time because of how people had come to view it. *See id.* at 2089-90. The Court noted that "[f]or some, that monument is a symbolic resting place for ancestors who never returned home. For others, it is a place for the community to gather and honor all veterans and their sacrifices for our Nation. For others still, it is a historical landmark." *Id.* at 2090.

[229] *American Legion*, 139 S. Ct. at 2088-89.

[230] *Id.* at 2089.

[231] *Id.*

[232] *Id.* at 2089-90.

applying a historical inquiry, likely will find no solace in *Town of Greece* either. There, the Court examined the constitutionality of prayer before town meetings.[233] Unlike the legislative prayer at issue in *Marsh* or even the cross memorial in *American Legion*, the challenged practice in *Town of Greece* started less than twenty years earlier.[234] At least, unlike in *American Legion*, it may be slightly easier to follow the Court's purported connection between prayer before town meetings and prayers before legislative sessions in *Marsh*, since the Court's reasoning for consitutionality relied on the fact that such prayer was "a practice . . . accepted by the Framers."[235] However, the existence of a historical-based inquiry in these three cases does not provide any information to lower courts or governments as to how long a practice needs to have existed for it to be considered within the tradition and understanding of the Founding Fathers.[236] Further, these tests provide competing inquires, as *Marsh* requires a direct connection to a founding era practice[237] and *American Legion* seemingly requires connection to founding principles instead.[238]

Additionally, in the realm of public schools, if the goal is to somehow trace the practice back to the founding of the country, public schools were "virtually nonexistent in the late 18th century."[239] As Justice O'Connor pointed out in her concurrence in *Wallace v. Jaffree*, the lack of public schools run by the government means "it is unlikely that the persons who drafted the First Amendment, or the state legislators who ratified it, anticipated the problems of interaction of church and state in the public schools."[240] Further, like in *Kennedy*, it is much harder to trace the tradition of prayer by a public school football coach on the field of a high school football game back to the founding era. This is not to say that there should be no consideration of history in Establishment Clause cases, but rather, that the Court in *Kennedy* provided no guidance on how to apply the historical test.[241] The Court's recent history and tradition-based tests, as applied in the Establishment Clause context, highlight the incongruities of examining historical practices and traditions as they relate to challenges existing in the realm of public schools.

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233 Town of Greece v. Galloway, 572 U.S. 565, 569-570 (2014).

234 *Id.* at 570 ("In 1999, the newly elected town supervisor, John Auberger, decided to replicate the prayer practice he had found meaningful while serving in the county legislature.").

235 *Id.* at 577.

236 Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2428 (2022).

237 Marsh v. Chambers, 463 U.S. 783, 786-90 (1983).

238 American Legion v. American Humanist Ass'n., 139 S. Ct. 2067, 2089 (2019).

239 Wallace v. Jaffree, 472 U.S. 38, 80 (1985) (O'Connor, J., concurring).

240 *Id.*

241 *See Kennedy*, 142 S. Ct. at 2434, 2449-50 (Sotomayor, J., dissenting).

Because of this, schools, like Bremerton School District who fired Coach Kennedy for fear of Establishment Clause violations, are left in no better position to determine if their actions are in fact unconstitutional based on the historical practices and understandings of the Founding Fathers.[242]

B. Problem Two: Ignoring Indirect Coercion in Schools

The Court has long "recognized a distinction when government-sponsored religious exercises are directed at impressionable children who are required to attend school, for then government endorsement is much more likely to result in coerced religious beliefs."[243] There is nothing that "prohibits public school students from voluntarily praying at any time before, during, or after the schoolday."[244] But it is "inevitable that the secular interests of government and the religious interests of various sects and their adherents will frequently intersect, conflict, and combine."[245] However, given its analysis in *Kennedy*, the Court seems to have lost sight of just how important looking at the indirect pressures faced by public school students are.[246] In fact, the Court notes that there was no coercion because there was "no evidence that students [were] directly coerced to pray with Kennedy."[247]

No matter which test the Court has applied to Establishment Clause issues, it has always emphasized the indirect pressures faced by students in schools and has noted that this is always a primary concern when reviewing Establishment Clause violations.[248] For example, in *Stone*, the Court noted that displaying the Ten Commandments in the classroom would have an effect on children, "perhaps to venerate and obey," even though the students were not being forced to read them.[249] Moreover, in *Lee*, the Court noted that "adolescents are often susceptible to pressure."[250] The pressures can come from teachers and coaches

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[242] *Kennedy*, 142 S. Ct. at 2450 (Sotomayor, J., dissenting).

[243] *Wallace*, 472 U.S. at 81 (O'Connor, J., concurring).

[244] *Id.* at 67.

[245] *Id.* at 69.

[246] *See Kennedy*, 142 S. Ct. at 2434 (Sotomayor, J., dissenting) ("In addition, while the Court reaffirms that the Establishment Clause prohibits the government from coercing participation in religious exercise, it applies a nearly toothless version of the coercion analysis, failing to acknowledge the unique pressures faced by students when participating in school-sponsored activities.").

[247] *Id.* at 2429 (majority opinion).

[248] *See supra* Part IV.

[249] Stone v. Graham, 449 U.S. 39, 42 (1980).

[250] Lee v. Weisman, 505 U.S. 577, 593-94 (1992).

given "the students' emulation of teachers as role models and the children's susceptibility to peer pressure."[251] Further, the Court has held that these pressures are "strongest in matters of social convention" and given that peer pressure, "the government may no more use social pressure to enforce orthodoxy than it may use direct means."[252] In *Santa Fe*, the Court was concerned with the fact that students would have to give up going to an extracurricular activity, the football game, in order to "avoid[] personally offensive religious rituals . . . ."[253] The sacrifice students would have to make to their educational journey was one that the Court found impermissible.[254] Additionally, the Court has expressly rejected the idea that coercion in schools needs to be in the form of direct coercion, and has instead reasoned that "prayer exercises in public schools carry a particular risk of indirect coercion."[255]

In *Kennedy*, the Court limited its analysis to three football games played in October of 2015 rather than addressing the ample evidence in the record documenting the significant history of prayer by Coach Kennedy.[256] This long standing practice by Coach Kennedy, which the Court, at best, willfully ignores, shows that his actions fit well within the pattern of concern the Court has previously shown for the indirect pressures faced by students.[257] Additionally, by focusing only on the three October games in its analysis, the Court removes the context from which its Establishment Clause analysis must revolve.[258] The record before the Court suggested that the practice was formed and solidified over approximately a seven-year period.[259] Indeed, that would mean that none of the students presently on the football team were part of a single game without prayer.

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[251] Edwards v. Aguillard, 482 U.S. 578, 584 (1987).

[252] *Lee*, 505 U.S. at 593-94.

[253] Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 312 (2000).

[254] *Id.*

[255] *Lee*, 505 U.S. at 592 (internal citations omitted).

[256] Kennedy v. Bremerton Sch. Dist. 142 S. Ct. 2407, 2430, 2432; *id.* at 2434 (Sotomayor, J., dissenting).

[257] *See supra* notes 248-55 and accompanying text.

[258] *Santa Fe Indep. Sch. Dist*., 530 U.S. at 315 ("Our inquiry into this question not only can, but must, include an examination of the circumstances surrounding its enactment. Whether a government activity violates the Establishment Clause is 'in large part a legal question to be answered on the basis of judicial interpretation of social facts …. Every government practice must be judged in its unique circumstances….'" (quoting Lynch v. Donnelly, 465 U.S. 668, 693-94) (O'Connor, J., concurring)).

[259] Kennedy v. Bremerton Sch. Dist., 991 F.3d 1004, 1010 (9th Cir. 2021), *rev'd*, 142 S. Ct. 2407 (2022).

After being hired in 2008, Coach Kennedy started his practice of kneeling at the fifty-yard line to pray.[260] Shortly thereafter, a majority of the team joined him in this prayer since he would also use this time to deliver speeches to the team. [261] These speeches also contained "overtly religious references"[262] which Coach Kennedy later "acknowledged . . . likely constituted prayers."[263] Some of his on-field prayers with the team involved him kneeling in the middle of the team as players all kneeled around him with their heads bowed.[264] Coach Kennedy also lead prayers in the locker room, a practice that started before him, but which he was more than willing to lead.[265] The Court is correct that Coach Kennedy did not specifically ask or tell students to participate in the prayer, however, it ignored testimony showing that nonetheless students felt pressured to participate because they did not want to lose certain extracurricular benefits of the sport.[266] Specifcally, the Court disregarded testimony from the school's principal that a parent had complained their son felt as though he had to participate because "he wouldn't get to play as much if he didn't participate."[267] Additionally, while the Court acknowledged that "a few parents told District employees that their sons had 'participated in the team prayers only because they did not wish to separate themselves from the team,'" it dismissed this testimony as hearsay and therefore unpersuasive.[268] Critically though, it is this testimony that shows some players likely felt like they needed to pray, even though not asked to, because of other indirect pressures such as being separated from the team or the ability to play in games–pressures that used to be the cornerstone of the Court's jurisprudence.[269]

As the dissent in *Kennedy* notes, "[s]tudents look up to their teachers and coaches as role models and seek their approval. Students also depend on this approval for tangible benefits. Players recognize that gaining the coach's approval may pay dividends small and large . . . ."[270]

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[260] *Id.*

[261] *Kennedy*, 142 S. Ct. at 2435-36 (Sotomayor, J., dissenting).

[262] *Id.* at 2436.

[263] *Kennedy*, 991 F.3d at 1011.

[264] *Id.* at 1010-11.

[265] *Kennedy*, 142 S. Ct. at 2416 (majority opinion).

[266] *See Kennedy*, 991 F.3d at 1010-11.

[267] *Id.*

[268] *Kennedy*, 142 S. Ct. at 2430. The Court also found this testimony unpersuasive because the majority thought it was unclear that the complaints from students and parents applied to the prayers lead at the three games in October 2015. *Id.*

[269] *See supra* Pavt IV.

[270] *Id.* at 2444 (Sotomayor, J., dissenting).

Additionally, it is not as though Coach Kennedy did not know the impact he had on students as he agreed that a "coach might even be the most important person they encounter in their overall life."[271] Even though Coach Kennedy may not have directly solicited or actively coerced students in those three games to participate in prayer, the long standing practice of him praying on the field as well as giving motivational talks to his team created pressure on students possibly seeking his approval to take part in the events.[272] One player later recalled that "[he] wanted to play football and treated [Coach Kennedy's] prayer time as any other order from a coach such as to exercise, attend study hall, or execute a play."[273]

The fact that Coach Kennedy "never 'told any student that it was important that they participate in any religious activity'" is not the stopping point of inquiry based on the Court's precedent.[274] As *Lee* and *Santa Fe* made clear, it is not just that a student might be told to participate;those cases rested on whether there was pressure felt by the students to participate in the prayer.[275] One player felt pressure to respectfully "[take] a knee . . . so there would be no objection to [him] playing football."[276] In *Lee*, there was additional focus on "maintain[ing] respectful silence."[277] The Court explained that students, while not forced to participate in the prayer, would have felt "public pressure" and peer pressure to maintain a respectful silence during the prayer.[278] The Court there noted that some "who have no desire to join a prayer have little objection to standing as a sign of respect for those who do."[279] However, the important difference is that the "respectful silence" of a school age dissenter could be viewed as "participation or approval of [the prayer,]" which the Court took serious issue with.[280] The social pressures faced by students, the Court reasoned, placed students with the "dilemma of participating . . . or protesting" and the Court found it distressing to put students in this position because of the state's actions.[281]

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[271] *Kennedy*, 991 F.3d at 1025 (Christen, J., concurring).

[272] *Kennedy*, 142 S. Ct. at 2443 (Sotomayor, J., dissenting).

[273] Brief of Bremerton Community Members as Amici Curiae Supporting Respondents at 15, Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022) (No. 21-418).

[274] *Kennedy*, 142 S. Ct. at 2429 (majority opinion) (internal citation omitted).

[275] Lee v. Weisman, 505 U.S. 577, 592-93 (1992); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 317 (2000).

[276] Brief for Respondents at 15, *Kennedy*, 142 S. Ct 2407 (2022) (No. 21-418).

[277] *Lee*, 505 U.S. at 593.

[278] *Id.*

[279] *Id.*

[280] *Id.*

[281] *Id.*

The school district told Coach Kennedy on September eleventh that he needed to stop leading the team in prayer.[282] However, Coach Kennedy continued the practice for two more games until the school district reached out again via letter to inform him he could not indirectly pressure students to pray with him.[283] After this, Coach Kennedy stopped leading the locker room prayers and began to pray after games on his own once students had left the locker room.[284] However, Coach Kennedy soon thereafter hired an attorney who contacted and informed the district that he intended to resume the prayer on the fifty-yard line at the next game.[285] The indirect pressure on students, both on the field and off the field, from Coach Kennedy's long-standing practice of prayer, likely dramatically increased as the public scrutiny on the football games increased.[286] The majority in *Kennedy* framed this increase in public attention in the light that it was Coach Kennedy's prayers that "spurred media coverage of Mr. Kennedy's dilemma."[287] This summary by the Court left out the fact that what "spurred media coverage" was Coach Kennedy intentionally reaching out to newspapers and television news programs to make multiple media appearances publicizing his intentions to continue to pray on the field.[288] The results of this "media coverage of Mr. Kennedy's dilemma" were a multitude of threatening emails, letters and calls to the school district.[289] In fact, the same day Coach Kennedy's lawyer sent a letter back to the school district, a newspaper article appeared in the Seattle Times discussing how Coach Kennedy was going to pray on the field despite being told not to.[290]

In response to the letter sent by Coach Kennedy's lawyer and his actions praying on the field after the October sixteenth game, the school district sought to clarify what actions they needed him to take and that its concern was with him praying while still in the process of carrying out his job responsibilities as a coach, while students were still on the field and audience members were still in the stands.[291] The school district was worried that continued prayer on the field right after the game

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[282] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2436 (2022) (Sotomayor, J., dissenting).
[283] *Id.*
[284] *Id.* at 2437.
[285] *Id.*
[286] *See id.* at 2418 (majority opinion) (detailing the increase in media coverage, school district's actions to forbit public access to the field, and increase in security).
[287] *Id*.
[288] Kennedy v. Bremerton Sch. Dist, 991 F.3d 1004, 1009-10 (9th Cir. 2021), *rev'd*, 142 S. Ct. 2407 (2022); *Kennedy*, 142 S. Ct. at 2437 (Sotomayor, J., dissenting).
[289] *Kennedy*, 142 S. Ct. at 2418 (majority opinion); *id.* at 2437 (Sotomayor, J., dissenting).
[290] *Kennedy*, 991 F.3d at 1012.
[291] *Id.* at 1013.

had finished would be perceived as endorsing religion.[292] The worry was especially critical given Coach Kennedy's "prior, long-standing and well-known history of leading students in prayer . . . ."[293] This long-standing practice of "le[ading] and particpat[ing] in locker-room prayers[,]" as well as "pray[ing] on the fifty-yard line, and . . . le[ading] a larger spiritual exercise at midfield after each game" had occurred for "the previous eight years."[294]

The majority was correct that no one from Coach Kennedy's team joined his prayer after the October sixteenth game.[295] However, the majority still mischaracterized the chaos after the game as Coach Kennedy prayed.[296] The majority's description depicited Coach Kennedy's actions as a brief post game prayer wherein he was alone at first, but, before he could finished praying, others joined him on the field to pray.[297] However, this description was devoid of how his quiet prayer turned into a large gathering wherein members of the general public rushed the field to join him by "jumping fences . . . and knocking over student band members."[298] The school district was then forced to make arrangements with local police to secure the field for future games, along with calling parents to remind them the general public was not allowed on the field.[299] The school district once again sent Coach Kennedy a letter reminding him they were happy to accommodate his religious preferences so long as he did not exercise them on the field given their concerns over being viewed as endorsing religion.[300] Following the October sixteenth game, Coach Kennedy again made numerous media appearances to discuss his actions.[301] The next two games on the twenty-third and twenty-sixth of October, Coach Kennedy continued to pray on the field.[302] On the twenty-third, he prayed on the field alone, but then on the twenty-sixth, he was joined "by members of the public, including state representatives."[303] The Court construes the fact that no team

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[292] *Id.*

[293] *Kennedy*, 142 S. Ct. at 2438 (Sotomayor, J., dissenting) (internal citations omitted).

[294] Kennedy v. Bremerton Sch. Dist., 869 F.3d 813, 834 (9th Cir. 2017).

[295] *Kennedy*, 142 S. Ct. at 2418.

[296] *See* infra notes 297-99.

[297] *Kennedy*, 142 S. Ct. at 2418.

[298] *Id.* at 2438 (Sotomayor, J., dissenting).

[299] *Id.*

[300] *Id.* at 2438-39.

[301] Kennedy v. Bremerton Sch. Dist., 991 F.3d 1004, 1013 (9th Cir. 2021), *rev'd*, 142 S. Ct. 2407 (2022).

[302] *Kennedy*, 142 S. Ct. at 2439 (Sotomayor, J., dissenting).

[303] *Id.*

members joined him to pray to mean none of them felt pressure to join, and therefore there was no coercive pressure whatsoever.[304]

However, the testimony from other public school employees may shed light on the lack of involvement of students. The head football coach testified to the increased anxiety he felt with Coach Kennedy's on the field prayers, especially after a stranger came up and cursed at him.[305] He also expressed fears of physical violence, including the possibility of being shot at during games.[306] It was this fear that caused him to resign from his position after eleven years.[307] One player later commented that after the October sixteenth game, he felt "overwhelmed" and ended up "miss[ing] a day of school and football practice the following week."[308]

The context of the consequences following these three games is notably absent from the Court's analysis.[309] The Court, in its apparent failure to consider the full context surrounding Coach Kennedy's actions, failed to analyze the fact that he led prayers both on the field and in the locker room for seven years before an opposing coach let the district know how "cool" it was that they allowed Coach Kennedy to pray on the field.[310] The Court's disingenuous coercion analysis, which focuses only on the lack of direct coercion by Coach Kennedy, further removes the facts of this case, as well as Establishment Clause jurisprudence, away from the context that they require.[311]

CONCLUSION

In *Kennedy v. Bremerton School District*, the Supreme Court held that Coach Kennedy's repeated practice of leading a prayer on the fifty-yard line after football games was protected under the First Amendment.[312] The Court rejected the school district's defense that it suspended Coach Kennedy because it would face potential violations of the Establishment Clause if it allowed his prayers to continue.[313] The

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304 *Id.* at 2431-32 (majority opinion).

305 *Kennedy*, 991 F.3d at 1013-14.

306 *Id.*

307 *Id.*

308 Brief for Bremerton Community Members as Amici Curiae Supporting Respondents at 15, *Kennedy*, 142 S. Ct. 2407 (No. 21-418).

309 *See generally Kennedy*, 142 S. Ct. at 2426-33 (failing to mention individual student and staff concerns).

310 *Id.* at 2435 (Sotomayor, J., dissenting).

311 *Id.* at 2434.

312 *Id.* at 2415-16 (majority opinion).

313 *Id.* at 2426-2433.

Court's decision altered the trajectory of future Establishment Clause cases by repudiating a decades old test, the *Lemon* test, as well as its offshoot, the endorsement test.[314] The majority opinion is problematic for several reasons.[315] First, the Court's new "historical practices and understandings test" will likely create confusion in lower courts and school districts trying to resolve Establishment Clause claims because of the Court's brief and internally inconsistent use of a history-based inquiry in this area of constitutional law.[316] Second, and even more problematic, the Court's analysis represents a major break from consistently upheld precedent relating to indirect coercion in school settings.[317] The Court has repeatedly held, no matter which Establishment Clause test it applied, that students face indirect pressures from their teachers, coaches, and peers that make these constitutional violations especially troubling in school settings.[318] The Court failed to adhere to its precedent, as its analysis focused solely on direct coercion.[319] Finally, the Court, through willful ignorance at best, ignored the record below, isolating Coach Kennedy's prayers from the years long context in which they occurred.[320]

[314] *See supra* Part VII.
[315] *See supra* Part IV and Section VII.B.
[316] *See supra* Section VII.A.
[317] *See supra* Part IV and Section VII.B.
[318] *See supra* Part IV.
[319] *See supra* Section VII.B.
[320] *See supra* Section VII.B.