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I. INTRODUCTION

The Supreme Court of the United States has officially overturned *Lemon v. Kurtzman*.[1] The controversial and heavily criticized *Lemon* opinion sets forth the primary test courts used for over fifty years in analyzing claims under the Establishment Clause. The official overruling of *Lemon* signals the Supreme Court's embrace of a more accommodating approach toward religion in the public sphere. This Comment predicts how, in *Lemon*'s absence, the Supreme Court will likely reassess precedent in the context of public school prayer and become more accommodating of religion.

In Part II, this Comment addresses the three approaches to interpreting the Establishment Clause: the strict separation, neutrality, and accommodation approaches. This Comment describes how these three approaches often dictate the result in Establishment Clause disputes, as caselaw has made apparent over time. Next, Part III explains the *Lemon* test and how the Supreme Court intended *Lemon* to provide consistency in its Establishment Clause jurisprudence. But the effort ultimately failed, and Part IV of this Comment expands on how the test soured over time, examining how the Supreme Court shifted away from *Lemon* and toward the history and tradition test. Then, Part V of this Comment discusses how the Court will apply the history and

* First, all praise and honor be to God for this opportunity. Thank you, Professor Jim Fleissner, for sparking my interest in this area of law and for your instruction and feedback as my Faculty Advisor. I would also like to thank my husband, Jordan Lipp; my parents, Lynn and Freddy Thompson; and my siblings, family, and friends who inspire me on this life and law school journey.

1. 403 U.S. 602 (1971), overruled by Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2428 (2022).

tradition test, as evinced by cases leading up to the demise of *Lemon*. Specifically, Part V will focus on how cases before, during, and after *Lemon*'s reign signal that the Supreme Court will become more accommodating of religion in the context of public school prayer. Finally, Part V concludes by examining how a claim may arise to provide the Supreme Court an opportunity to reexamine Establishment Clause precedent in the public school context.

II. BACKGROUND: THREE APPROACHES TO THE ESTABLISHMENT CLAUSE

"Congress shall make no law respecting an establishment of religion."[2] This instruction from the Founders has sparked much debate, from the time of its initial drafting to present, about the scope of the Establishment Clause. "While the concept of a formally established church is straightforward, pinning down the meaning of a 'law respecting an establishment of religion' has proved to be a vexing problem."[3]

The Establishment Clause is consistently interpreted to prohibit four government actions. The government cannot (1) establish a state religion; (2) pass laws that aid or favor one religion over another; (3) coerce participation in or abstention from participating in religious exercises; or (4) become involved in religious affairs or permit religion to become involved in government affairs.[4] But the scope of these prohibited governmental actions is heavily disputed, creating endless questions about the boundaries of the Establishment Clause. What constitutes "establishing" a religion? How can a law favor or disfavor religion? What constitutes coercion? Can religion and government ever interact under the Establishment Clause? If yes, when does interaction between religion and government violate the Establishment Clause?

Many responses are possible, but the Supreme Court of the United States's answer to these questions turns on which approach each Justice utilizes in determining whether a government action violates the Establishment Clause.[5] Three approaches exist: the strict separation approach, the neutrality approach, and the accommodation approach.[6] Each approach is rooted in a different belief about the permissible relationship between religion and government in the public sphere.[7]

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2. U.S. CONST. amend. I.

3. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2080 (2019).

4. Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 590–91 (1989).

5. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 1717–22 (Rachel E. Barkow et al. eds., 6th ed. 2020).

6. *Id.*

7. *Id.*

First, the strict separation approach calls for complete separation between church and state.[8] Adherents of this approach believe the purpose of the Establishment Clause is fulfilled when religious activity and civil authority exist in permanently separated spheres.[9] Thomas Jefferson illustrated this approach with his metaphor of a wall separating church and state.[10] Strict separationists strive to keep this wall of separation "high and impregnable" because they believe government involvement in religion ultimately corrupts both religion and government.[11] But, strict separationists acknowledge that "total separation is not possible in the absolute sense" because there must be room for necessary contacts between religion and government.[12] For example, church properties are still subject to fire inspections and zoning regulations, and fire departments still respond to calls related to church property.[13] Ultimately, though, the strict separation approach hinges on the belief that building a wall of separation benefits both religion and government.[14]

Second, the neutrality approach requires the government to maintain a stance of neutrality toward both religious and secular beliefs.[15] Thus, under this approach, the government violates the Establishment Clause by endorsing one religious belief or secular belief over another.[16] Adherents of the neutrality approach utilize the "reasonable observer test," which evaluates whether a reasonable observer would interpret the government's action as endorsing a particular belief.[17] But adherents

8. *Id.* at 1718–19.

9. "[The purpose of the Establishment Clause] was to create a complete and permanent separation of the spheres of religious activity and civil authority." Everson v. Bd. of Educ., 330 U.S. 1, 31–32 (1947) (Rutledge, J., joined by Frankfurter, Jackson, and Burton, JJ., dissenting).

10. "I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between church and State." Wallace v. Jaffree, 472 U.S. 38, 91–92 (1985) (Rehnquist, J., dissenting) (citing 8 WRITINGS OF THOMAS JEFFERSON 113 (H. Washington ed. 1861)).

11. *Everson*, 330 U.S. at 18. ("The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable.").

12. *Lemon*, 403 U.S. at 614.

13. *Id.*

14. "[The] first and most immediate purpose of the Establishment Clause rested on the belief that a union of government and religion tends to destroy government and to degrade religion." Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 221 (1963).

15. CHEMERINSKY, *supra* note 5, at 1719–21.

16. *Id.*

17. *Id.*

split in how they classify the hypothetical reasonable observer.[18] Some adherents apply a tort definition, assessing how a hypothetical reasonable observer—an ordinary person—would interpret the government action.[19] Others apply a higher standard, requiring more of the hypothetical reasonable observer: they consider whether an observer who is knowledgeable of the underlying history of the community would perceive the government's action as endorsing a particular belief.[20] Ultimately, both classifications are concerned with the appearance of government neutrality.[21]

Third, the accommodationist approach advocates that the government should recognize the importance of religion in society and accommodate religion.[22] Adherents of this approach believe that religion should be accommodated in public life as part of a pluralistic society.[23] Under the accommodation approach, the government only violates the Establishment Clause if it coerces the support of, participation in, or abstention from religion. Accommodationists split in how they define what constitutes "coercion."[24] Some define coercion broadly, finding that the government violates the Establishment Clause when a government action creates social pressure to conform to a particular religious practice.[25] In comparison, other accommodationists narrowly define coercion, finding coercion exists when there is a "coercion of religious orthodoxy and of financial support by force of law or threat of monetary

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18. *Id.*

19. *Id.*

20. *Id.*

21. The neutrality approach seemingly falls in the middle of a scale, with the most restrictive view of the Establishment Clause on one side—strict separationists—and the least restrictive view of the Establishment Clause—accommodationists—on the other. Thus, adherents of this approach are generally willing to provide more accommodation to religion than strict separationists, but less accommodation to religion than accommodationists. *See Schempp*, 374 U.S. at 306 (Goldberg, J., joined by Harlan, J., concurring).

> [T]he attitude of government towards religion must be one of neutrality. But untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but it seems to [us], are prohibited by it.

Id.

22. CHEMERINSKY, *supra* note 5, at 1721–22.

23. *Id.*

24. *Id.*

25. *Id.*

penalty."[26] Under this view, social pressure alone does not constitute "coercion."[27] Despite this distinction, accommodationists are united in the belief that the government should recognize the significant role of religion in society by accommodating its presence in the public sphere.[28]

The utilized approach impacts the outcome of a dispute. Consider the Supreme Court's analysis in *County of Allegheny v. American Civil Liberties Union*.[29] There, the Supreme Court evaluated the constitutionality of two holiday displays on public property: a creche display located in the city-county courthouse, and a Chanukah menorah, Christmas tree, and sign saluting liberty located outside the city-county building.[30] Strict separationists expressed the Establishment Clause created the presumption against displaying religious symbols on public property and, thus, found both displays unconstitutional.[31] In comparison, accommodationists found the displays acknowledged both the religious and secular nature of holidays and would have permitted both displays.[32] But both camps were outnumbered by the majority, which embraced the neutrality approach and evaluated whether a reasonable observer would perceive the displays as the government endorsing religion.[33] Two factors determined the display's effect on a reasonable observer: the display's setting and whether the setting included other symbols that detracted from the display's religious message.[34] Ultimately, the majority held the creche, standing alone, was unconstitutional while the other display—the Chanukah menorah, Christmas tree, and sign saluting liberty—was constitutional because it would be perceived as celebrating the winter holiday season.[35] The three approaches are a consistent theme in the Supreme Court's analysis of the

26. Lee v. Weisman, 505 U.S. 633, 640 (1992) (Scalia, J., joined by White, C.J., Thomas, J., dissenting).

27. CHEMERINSKY, *supra* note 5, at 1721–22.

28. *Id.*

29. 492 U.S. at 578.

30. *Id.* at 578–80.

31. *Id.* at 653–55 (Stevens, J., joined by Brennan & Marshall, JJ., concurring in part, dissenting in part) (observing a "strong presumption that the display, respecting two religions to the exclusion of all others," was the "very kind of double establishment that the [Establishment Clause] was designed to outlaw").

32. *Id.* at 663–67 (Kennedy, J., joined by Burger, C.J., White & Scalia, JJ., dissenting). Further, accommodationists expressed the majority's approach reflected "an unjustified hostility toward religion, a hostility inconsistent with our history and our precedents." *Id.* at 655.

33. *Id.* at 618–20 ("[T]he constitutionality of its effect must also be judged according to the standard of a 'reasonable observer.'").

34. *Id.* at 598–99.

35. *Id.* at 599–602, 611–21.

Establishment Clause and will continue to govern how the Court reassesses religion in the context of public school prayer in the future.

III . THE TEST: LEMON V. KURTZMAN

The Supreme Court of the United States embraced the *Lemon* test to create a more uniform approach to questions about the scope of permissible government action under the Establishment Clause.[36] Before understanding the significance of its demise, it is essential to peel back the layers of the *Lemon* test and understand how it governed interactions between government and religion. The *Lemon* test consisted of three prongs that, taken together, determined whether a government action violated the Establishment Clause.

First, the *Lemon* test evaluated whether a government action was rooted in a religious or secular purpose.[37] For a government action to be constitutional, the *Lemon* test required the government action to be motivated by a secular purpose.[38] A government action could be motivated in part by a religious purpose and satisfy the *Lemon* test, but *Lemon* required the Court to invalidate the government action if it was entirely motivated by the religious purpose.[39] If the government acted without a secular purpose,[40] or the Court did not believe the government's stated secular purpose,[41] the government action failed the *Lemon* test and violated the Establishment Clause.[42]

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36. *Am. Legion*, 139 S. Ct. at 2080 ("After grappling with such cases for more than 20 years, *Lemon* ambitiously attempted to distill from the Court's existing case law a test that would bring order and predictability to Establishment Clause decision making.").

37. *Lemon*, 403 U.S. at 615.

38. *Id.* at 612 ("First, the [government action] must have a secular legislative purpose.").

39. *Wallace*, 472 U.S. at 55. However, even in *Wallace*, Justices scathingly disagreed with this requirement. For example, Justice Rehnquist lamented, "[T]he purpose and effect prongs have the same historical deficiencies as the wall concept itself: they are in no way based on either the language or intent of the drafters." *Id.* at 108 (Rehnquist, J., dissenting).

40. For example, an Alabama law authorizing a moment of silence for voluntary prayer was struck down solely because of its exclusively religious purpose. *See Wallace*, 472 U.S. at 41–42, 58–60.

41. For example, two Kentucky counties displayed the Ten Commandments in high traffic areas of county courthouses to "show that the Commandments are Kentucky's 'precedent legal code.'" *McCreary Cnty. v. ACLU*, 545 U.S. 844, 850 (2005). The Supreme Court held the legislative intent in the record clearly established the displays were for a religious purpose and struck down the action under *Lemon*. *Id.* at 859, 881.

42. Further, the court was not required to consider the second and third prongs of the Lemon test when the government action completely lacked a secular purpose. *See Wallace*, 472 U.S. at 56.

Second, the *Lemon* test analyzed whether the questioned government action had the principal or primary effect of advancing or inhibiting religion.[43] In evaluating this prong, the Supreme Court determined whether the government action actually or symbolically endorsed religion. For example, under this prong, a reasonable observer would perceive a state action as endorsing religion if a public school conducted a religious exercise on school property during a school-sponsored event.[44] If the government action had the effect of advancing, inhibiting, or endorsing religion, the action was struck down as violating the Establishment Clause.[45]

Third, and finally, the *Lemon* test considered whether the government action fostered excessive entanglement between the government and religion.[46] This prong was rooted in the understanding that the government aid of religion could result in a relationship where the government was consistently entangled with religious affairs and administration.[47] For example, in *Lemon*, state statutes provided financial aid to qualifying nonpublic schools, including religious schools.[48] The Court expressed concern that "comprehensive, discriminating, and continuing state surveillance will inevitably be required" such that "[t]hese prophylactic contacts [would] involve excessive and enduring entanglement between state and church."[49] "The Court later elaborated that the 'effects' of a challenged action should be assessed by asking whether a 'reasonable observer' would conclude that the action constituted an 'endorsement' of religion." [50]

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43. *Lemon*, 403 U.S. at 612. "[I]ts principal or primary effect must be one that neither advances nor inhibits religion." *Id.* (citing Bd. of Educ. v. Allen, 392 U.S. 236, 243 (1968)).

44. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 307–08 (2000) (holding invocations over public school loudspeakers before a football game constituted an actual and symbolic endorsement of religion when the prayer occurred on government property and at a government-sponsored school event).

45. CHEMERINSKY, *supra* note 5, at 1666.

46. *Lemon*, 403 U.S. at 619. The Court sought to protect against two types of entanglement between religion and the government: specific entanglement and general entanglement. Specific entanglement results when government aid of religion requires comprehensive and continuing government surveillance. CHEMERINSKY, *supra* note 5, at 1732. In comparison, general entanglement is that which carries the grave potential for entanglement in a broader sense of continuing political strife over aid to religion. *Id.* The court particularly relied on this factor in evaluating the government funding of religious schools.

47. CHEMERINSKY, *supra* note 5, at 1732.

48. *Lemon*, 403 U.S. at 606–10.

49. *Id.* at 619.

50. *Am. Legion*, 139 S. Ct. at 2080.

The Supreme Court intended the *Lemon* test to create a unified methodology in resolving Establishment Clause claims. But each approach—strict separation, neutrality, and accommodation—viewed the *Lemon* test differently based on its interpretation of the Establishment Clause.[51]

First, strict separationists favored *Lemon* and the buffer, or wall of separation, *Lemon* secured between religion and the government.[52] The text of the *Lemon* test was unmistakably separatist. For a government action to stand, (1) the government had to articulate a secular purpose; and the Court had to believe this secular purpose truly motivated the action; (2) the government action could not have even the unintended effect of advancing or inhibiting religion; and (3) the government action could not create excessive entanglement between government and religion. Moreover, the test forbade "even a partial establishment" of religion, barring all government actions that were not rooted in a secular purpose, that may advance religion, and that could entangle the government and religion.[53] Therefore, *Lemon* fortified the wall of separation between government and religion.

Next, adherents of the neutrality approach tolerated *Lemon* but often emphasized the importance of focusing on whether the purpose and effect of a government action symbolically endorsed religion.[54] Unlike strict separationists, adherents of the neutrality approach supported more interaction between religion and the government as long as a reasonable observer would perceive the government action as neutral.[55] For example, in the context of providing government aid to parochial schools, adherents of the neutrality approach modified the *Lemon* test to permit more funding than deemed permissible in *Lemon* itself.[56] The new test condensed the second and third prongs of *Lemon* into one consolidated prong that evaluated whether government aid had the effect of advancing religion.[57] The Court assessed the "effect" of the government action by evaluating whether (1) the aid involved the government in religious indoctrination and (2) the aid was based on the recipient's religion or lack thereof.[58] The new test deescalated the "excessive entanglement" requirement of *Lemon* to make government aid of religious schools less

51. CHEMERINSKY, *supra* note 5, at 1730.
52. *Id.*
53. *See Cnty. of Allegheny,* 492 U.S. at 648.
54. CHEMERINSKY, *supra* note 5, at 1730.
55. *Id.*
56. *See* Agostini v. Felton, 521 U.S. 203, 233–35 (1997).
57. *Id.*
58. *Id.*

restrictive.[59] Accordingly, in cases applying *Lemon*, Justices guided by the neutrality approach were more likely to consider whether a government action has the effect and purpose of advancing or inhibiting religion, rather than the extent of entanglement the government action created.

Finally, accommodationists despised the *Lemon* test because, in their view, its failure to accommodate religion in the public sphere evinced hostility toward religion. The phraseology of each prong of *Lemon*, accommodationists claimed, demanded a separatist result. For example, a statute permitting a moment of silence for meditation and voluntary prayer in schools was struck down because it lacked a secular purpose, but a statute permitting moments of silence for meditation alone was constitutional.[60] In another case, a county courthouse creche display was unconstitutional because it had the "principal or primary effect" of advancing religion.[61] In yet another case, the government could provide public schools with funding for transportation to field trips, but the government providing the same funding for religious school transportation to field trips was unconstitutional because the funding could require supervision or monitoring such as to create excessive entanglement between the government and religion.[62] "Anything less [than accommodation] would require the 'callous indifference' [the Supreme Court] said was never intended [by the Establishment Clause]."[63] Therefore, accommodationists fundamentally opposed the *Lemon* test because they believed "[t]his view of the Establishment

59. Moreover, accommodationists sought to expand the scope of this test to permit schools to divert aid to religious use as long as the aid itself did not have impermissible content. Mitchell v. Helms, 530 U.S. 793, 824–25 (2000). But true adherents of the neutrality approach claimed the majority "announce[d] a rule of unprecedented breadth for the evaluation of Establishment Clause challenges to government school aid programs." *Id.* at 836–37 (O'Connor, J., joined by Breyer, J., concurring in the judgment). Notedly, Justice Breyer concurred with the narrower, neutrality approach interpretation of this prong set forth in Justice O'Connor's concurrence in the judgment. The Court issued this opinion in 2000, when the newest Justice Ketanji Brown Jackson clerked with Justice Breyer. Therefore, this concurrence in the judgment could indicate that Justice Jackson also aligns with the narrower neutrality approach.

60. *See Wallace*, 472 U.S. at 41–42.

61. *Cnty. of Allegheny,* 492 U.S. at 655 (Kennedy, J., concurring in part, dissenting in part).

62. Wolman v. Walter, 433 U.S. 229, 255 (1977).

63. Zorach v. Clauson, 343 U.S. 306, 314 (1952). Moreover, accommodationists pointed to the notion that "[n]o significant segment of our society and no institution within it can exist in a vacuum or in total or absolute isolation from all the other parts, much less from government." Lynch v. Donnelly, 465 U.S. 668, 673 (1984). And, in their view, applying the *Lemon* test effectively kept religion in a vacuum.

Clause reflect[ed] an unjustified hostility toward religion, a hostility inconsistent with our history and our precedents."[64]

Ultimately, these fundamentally different approaches inspired zesty debates amongst the Justices, inconsistent results, and *Lemon*'s eventual demise. These approaches will continue to play a role as the current Court develops its Establishment Clause approach in the context of public school prayers.

IV. THE *LEMON* SOURS

The attempt to establish a more uniform approach to Establishment Clause analysis, by creating the *Lemon* test, failed. A closer look at the history of *Lemon* reveals the controversy, criticism, and inconsistent results that soured the *Lemon* test over time. Moreover, the rise of the accommodationist approach accompanied the demise of *Lemon*, providing insight into how the accommodationist approach may continue to grow in the future.

A. Historical Overview

The *Lemon* test was first established in 1971, when the Supreme Court of the United States decided *Lemon v. Kurtzman*.[65] There, writing for the majority, Chief Justice Burger acknowledged the complexities associated with developing a streamlined test for questions related to Establishment Clause jurisprudence. Justice Burger expressed, "Candor compels acknowledgement, moreover, that [the Supreme Court] can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law."[66] The extent of this dim perception quickly became apparent.[67] On the same day the Supreme Court issued the *Lemon* opinion, the Court released another opinion that expressly

64. *Cnty. of Allegheny*, 492 U.S. at 655 (Kennedy, J., concurring in part, dissenting in part).

65. 403 U.S. at 602. The Supreme Court created the *Lemon* test upon "consideration of the cumulative criteria developed by the Court over many years." *Wallace*, 472 U.S. at 55; *see also* Bd. of Educ. v. Allen, 392 U.S. 236, 248 (1968); Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970).

66. *Lemon*, 403 U.S. at 612.

67. *See id.* at 671 (White, J., dissenting).

> I find it very difficult to follow the distinction between the federal and state programs in terms of their First Amendment acceptability. My difficulty is not surprising, since there is frank acknowledgment that "we can only dimly perceive the boundaries of permissible government activity in this sensitive area of constitutional adjudication," and that "judicial caveats against entanglement" are a "blurred, indistinct and variable barrier."

Id.

distinguished itself from the result in *Lemon*.[68] These distinctions continued over time.

Within the first decade of *Lemon*'s reign, Justices began to use concurring and dissenting opinions as vehicles for expressing their disdain for results that stemmed from *Lemon*. In *Committee for Public Education and Religious Liberty v. Nyquist*,[69] the dissent expressed it was "quite unreconciled to the Court's decision in *Lemon v. Kurtzman*," and that "[they] thought then, [and still thought], that the Court's conclusion there was not required by the First Amendment and [was] contrary to the long-range interests of the country."[70] Then, in *Roemer v. Board of Public Works*,[71] a concurrence in the judgment conveyed that the *Lemon* test "impose[d] unnecessary" and "superfluous tests for establishing 'when the [government's] involvement with religion passes the peril point' for First Amendment purposes."[72] Again, in *Stone v. Graham*,[73] a dissenting opinion articulated "[t]he Establishment Clause [did] not require that the public sector be insulated from all things which may have a religious significance or origin."[74]

The Supreme Court continued to grapple with how to apply the *Lemon* test for fifty-one years. Justices consistently wrestled with conflicting views of *Lemon*, often based on their differing approaches to Establishment Clause analysis. Consider, for example, the Justices in *Wallace v. Jaffree*.[75] The Court's majority of six Justices applied the *Lemon* test to strike down the government action in question.[76] Justice O'Connor, concurring, sought to refine the test and make it more workable for the future.[77] Justice O'Connor expressed that she was "not ready to abandon all aspects of the *Lemon* test," but thought "standards from *Lemon* should be reexamined and refined to make them more useful in achieving the underlying purpose of the First Amendment."[78] Other

68. *See* Tilton v. Richardson, 403 U.S. 672, 684–85 (1971).

69. 413 U.S. 756 (1973).

70. *Id.* at 820 (White, J., joined by Burger, C.J., Rehnquist, J., dissenting).

71. 426 U.S. 738 (1976).

72. *Id.* at 768 (White, J., joined by Rehnquist, J., concurring in the judgment).

73. 449 U.S. 39 (1980).

74. *Id.* at 45–46 (Rehnquist, J., dissenting).

75. 472 U.S. at 38.

76. *Id.* at 55–61.

77. *See id.* at 66–70 (O'Connor, J., concurring).

78. *Id.* at 68–69 (O'Connor, J., concurring). Consistent with Justice O'Connor's neutrality approach, she emphasized that the first prong, evaluating whether the government action was rooted in a secular purpose, should focus primarily on whether the endorsement of religion or a religious belief was the reason for the government action's existence. *Id.* at 75–76 (O'Connor, J., concurring). Further, she believed the endorsement

Justices, dissenting, believed the Supreme Court erroneously overextended the application of the *Lemon* test:

> [The Supreme] Court's extended treatment of the "test" of *Lemon v. Kurtzman* suggest[ed] a naive preoccupation with an easy, bright-line approach for addressing constitutional issues. [The Supreme Court] repeatedly cautioned that *Lemon* did not establish a rigid caliper capable of resolving every Establishment Clause issue, but that it sought only to provide "signposts." [The Supreme Court's] responsibility is not to apply tidy formulas by rote; [the Court's] duty is to determine whether the statute or practice at issue is a step toward establishing a state religion.[79]

Another Justice believed that *Lemon* directly contradicted the true meaning of the Establishment Clause, stating that "the *Lemon* test [had] no more grounding in the history of the First Amendment than does the wall [of separation] upon which it rests."[80]

Over time, Justices continued to expose the infrequency and inconsistency with which the Supreme Court applied the *Lemon* test. For example, in *Lee v. Weisman*,[81] the dissent referred to *Lemon* as a "formulaic abstraction[ ] that [was] not derived from, but positively conflict[ed] with, [the Court's] long-accepted constitutional traditions."[82] Further, this dissent noted the Supreme Court "demonstrate[d] the irrelevance of *Lemon* by essentially ignoring it."[83] Again, in *Van Orden v. Perry*,[84] the majority suggested the Supreme Court "sometimes pointed to [*Lemon*] as providing the governing test in Establishment Clause challenges,"[85] but that "many recent cases simply [did not] appl[y] the *Lemon* test," and that "[others] [applied *Lemon*] only after concluding the challenged practice was invalid under a different Establishment Clause test."[86]

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test should focus on whether an objective observer, acquainted with the history of the action in question, would perceive it as a state endorsement of religion. *Id.* at 76.

79. *Id.* at 89 (Burger, C.J., dissenting).

80. *Id.* at 110–12 (Rehnquist, J., dissenting).

81. 505 U.S. at 577.

82. *Id.* at 644 (Scalia, J., joined by Rehnquist, C.J., White & Thomas, JJ., dissenting).

83. *Id.*

84. 545 U.S. 677 (2005).

85. *Id.* at 685–86.

86. *Id.* at 686. Also, this dissent effectively alluded to the eventual overturn of *Lemon* by prefacing its conclusion with "[w]hatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence." *Id.*

B. The Current Court's Shift from Lemon

More recently, Justices on the Supreme Court signaled the reign of *Lemon* was nearing an end by its treatment of the *Lemon* test. Justices either ignored it, treated it as one of many optional tests, or acted as if the test was already dead. Take, for example, the Court's opinion in *American Legion v. American Humanist Association*.[87] *American Legion* examined the constitutionality of a Bladensburg Peace Cross memorial on public property that stood for eighty-nine years as a tribute to forty-nine area soldiers who gave their lives in World War One.[88]

The majority opinion essentially ignored *Lemon*.[89] Instead of applying *Lemon*, the Court began its analysis by focusing on how the meaning of the Bladensburg Peace Cross changed over time to develop a special significance.[90] Rather than apply *Lemon*, the Court made four points. First, it is difficult to identify the original purpose of monuments that were established long ago.[91] Second, the purposes associated with a particular monument, symbol, or practice may multiply over time to contain less of a religious sentiment.[92] Third, the message conveyed by the monument, symbol, or practice can also evolve over time.[93] Fourth, and finally, removing a religiously expressive monument, symbol, or practice "with this kind of familiarity and historical significance" may appear aggressively hostile to religion rather than neutral.[94] Thus, the majority ignored *Lemon* and did not apply it in reaching its conclusion. Moreover, the dissent completely ignored *Lemon* in expressing disapproval of the majority's approach in this case.[95]

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87. 139 S. Ct. at 2090–91.

88. *Id.* at 2074.

89. Part Two of the opinion is divided into two subparts: Part A and Part B. A majority of the Court supported Part B, which effectively ignored *Lemon*. Justice Alito authored Part A, which Chief Justice Roberts, Justice Breyer, and Justice Kavanaugh joined. Part A disparaged *Lemon*, noting that the Court often "either expressly declined to apply the test or has simply ignored it." *Id.* at 2080.

90. *Id.* at 2074–79.

91. *Id.* at 2082.

92. *Id.* at 2082–83.

93. *Id.* at 2084.

94. *Id.* at 2084–85. "A government that roams the land, tearing down monuments with religious symbolism and scrubbing away any reference to the divine will strike many as aggressively hostile to religion." *Id.* Moreover, the majority compared the practice of scrubbing religious references from monuments to the "militantly secular regimes" in the French Revolution. *See id.* n.24.

95. *Id.* at 2103–2113. (Ginsburg, J., joined by Sotomayor, J., dissenting). The dissent never mentions or cites *Lemon*, effectively ignoring the test.

Some Justices operated as if *Lemon* was but one of many tests used in the Supreme Court's Establishment Clause analysis.[96] Justice Breyer, joined in his concurrence by Justice Kagan, concluded that there was no single test for the Establishment Clause.[97] Rather, Justice Breyer explained, the Court must consider each case in light of the basic purposes the Establishment Clause was meant to serve.[98] Moreover, Justice Kagan agreed that "rigid application of the *Lemon* test [did] not solve every Establishment Clause problem."[99]

Moreover, some Justices referred to *Lemon* as if it was already overturned. For example, in Justice Kavanaugh's concurrence, he blatantly expressed, "The Court's decisions over a span of several decades demonstrate that the *Lemon* test [was] not good law and [did] not apply" to five categories of law which were traditionally under the reign of *Lemon*.[100] The five categories encompassed:

> (1) religious symbols on government property and religious speech at government events; (2) religious accommodations and exemptions from generally applicable laws; (3) government benefits and tax exemptions for religious organizations; (4) religious expression in public schools; and (5) regulation of private religious speech in public forums.[101]

"[T]his Court no longer applies the old test articulated in *Lemon*."[102]

Justice Gorsuch concurred in the judgment, indicating that the Court had effectively "shelved" the *Lemon* test.[103] He explained the *Lemon* test "sought a 'grand unified theory' of the Establishment Clause but left us only a mess."[104] Justice Thomas, too, found the *Lemon* test was "long-discredited" and advocated that he would "take the next logical step and overrule the *Lemon* test in all contexts."[105] In a later opinion, Justice

96. *See id.* at 2090 (Breyer, J., joined by Kagan, J., concurring).

97. *Id.* at 2090–91 (Breyer, J., joined by Kagan, J., concurring).

98. *Id.* at 2090. (Breyer, J., joined by Kagan, J., concurring).

99. *Id.* at 2094 (Kagan, J., concurring in part). Yet Justice Kagan also clarified her belief that focusing on the purpose and effects of an action, as required by *Lemon*, was crucial in evaluating government action in the context of monuments on public property. *Id.* (Kagan, J., concurring in part).

100. *Id.* at 2093 (Kavanaugh, J., concurring).

101. *Id.* at 2092–93 (Kavanaugh, J., concurring).

102. *Id.* at 2092 (Kavanaugh, J., concurring).

103. *Id.* at 2102 (Gorsuch, J., concurring in the judgment).

104. *Id.* at 2101 (Gorsuch, J., concurring in the judgment).

105. *Id.* at 2097 (Thomas, J., concurring in the judgment). He set forth three reasons to overrule *Lemon*. "First, that test [had] no basis in the original meaning of the Constitution. Second, 'since its inception,' it has 'been manipulated to fit whatever the Court aimed to

Gorsuch expanded on his distaste for *Lemon*, stating *Lemon* was "[i]ssued in a 'bygone era' when this Court took a more freewheeling approach to interpreting legal texts."[106] "*Lemon* ignored the original meaning of the Establishment Clause, it disregarded mountains of precedent, and it substituted a serious constitutional inquiry with a guessing game."[107] "In time, this Court came to recognize these problems [caused by *Lemon*], abandoned *Lemon*, and returned to a more humble jurisprudence centered on the Constitution's original meaning."[108] All of these statements occurred while *Lemon* was still considered "good law," signaling the Court's readiness to overrule the test.

And so it did. The Supreme Court officially overturned *Lemon* in *Kennedy v. Bremerton School District*.[109] The majority began by stating the lower court's application of *Lemon* "overlooked . . . the 'shortcomings' associated with this 'ambitious, abstract, and ahistorical approach to the Establishment Clause.'"[110] Then, the majority listed four reasons why the overturn of *Lemon* was long overdue.[111] First, the test invited chaos in the lower courts.[112] Second, its application led to inconsistent and differing results in factually similar cases.[113] Third, *Lemon* created a "minefield" for legislators seeking to discern what government actions violated the Establishment Clause.[114] Finally, the Court expounded the Establishment Clause did not include a "modified hecklers veto," proscribing religious activity based on others' perceptions or discomfort.[115] Accordingly, the Supreme Court officially overturned *Lemon* and prescribed a new test.

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achieve.' Third, it continues to cause enormous confusion in the States and lower courts." *Id.* (Thomas, J., concurring in the judgment).

106. Shurtleff v. City of Boston, 142 S. Ct. 1583, 1603 (2022) (Gorsuch, J., concurring in the judgment).

107. *Id.* at 1610 (Gorsuch, J., concurring in the judgment). Further, Justice Gorsuch concluded, "This Court long ago interred *Lemon*, and it is past time for local officials and lower courts to let it lie." *Id.* (Gorsuch, J., concurring in the judgment). He stated, "It is our job to say what the law is, and because *Lemon* is not good law, we ought to say so." *Id.* (Gorsuch, J., concurring in the judgment).

108. *Id.* at 1604.

109. 142 S. Ct. at 2428.

110. *Id.* at 2427.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

V. A NEW TWIST TO THE ESTABLISHMENT CLAUSE: NAVIGATING THE HISTORY AND TRADITION TEST IN THE CONTEXT OF PUBLIC SCHOOL PRAYER

"In place of *Lemon* and the endorsement test, [the Supreme Court of the United States] instructed that the Establishment Clause must be interpreted by 'reference to historical practices and understandings.'"[116] Further, "[t]he 'line' that courts 'must draw between the permissible and impermissible' must 'accord with history and faithfully respect the understanding of the Founding Fathers.'"[117] The Supreme Court emphasized this analysis, focusing on the original meaning and history of the Establishment Clause, has "long represented the rule rather than some 'exception' within the 'Court's Establishment Clause jurisprudence.'"[118] This history and tradition test leaves the door open for the Court to further accommodate religion in the public sphere and, taken with the Court's signaling in more recent cases, for further accommodation of religion in the context of public school prayer.[119]

Moreover, the Court's recent instructions elicit further questions. What are the historical practices and understandings of the Establishment Clause? And how will the history and tradition test shape the relationship between religion and the government in the future? An overview of cases in the context of public school prayer reveals a shift in the Supreme Court's approach: the current Court is more willing to accommodate the presence of religion in this context to the extent such accommodation aligns with the history and tradition of the Establishment Clause.

A. Relevant Cases Before Lemon v. Kurtzman Set the Baseline

Additionally, reviewing precedent in the context of public school prayer from before *Lemon*'s reign reveals concerns the current Court will readdress and tools the current Court may use in future cases

116. *Id.* at 2428.

117. *Id.* at 2428 (citing Town of Greece v. Galloway, 572 U.S. 565, 577 (2003)); *Schempp*, 374 U.S. at 294.

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

119. Further, lower courts are already grappling with how the history and tradition test may apply in other contexts of Establishment Clause analysis. *See, e.g.,* Napper v. Hankison, No. 3:20-CV-764-BJB, 2022 U.S. Dist. LEXIS 134182, at *45–46 n.12 (W.D. Ky. Jul. 28, 2022) (evaluating the implications of *Kennedy* on offended-observer standing); Rojas v. City of Ocala, 40 F.4th 1347, 1352 (11th Cir. 2022) (remanding case to apply the history and tradition test to the constitutionality of a prayer vigil in town square); Kane v. De Blasio, 21 No. 8733, 2022 U.S. Dist. LEXIS 154260, at *28–30 (S.D.N.Y. Aug. 26, 2022) (noting the Nation's long history of vaccination requirements in determining the constitutionality of a vaccine mandate).

interpreting the Establishment Clause in this context. Two cases are especially important: *Engel v. Vitale*[120] and *Abington School District v. Schempp*.[121] Each is discussed, in turn, below.

Government led public school prayer was first held unconstitutional in *Engel* in 1962, nine years before the creation of the *Lemon* test.[122] There, the State Board of Regents[123] directed public school principals to cause each class to say a daily prayer[124] out loud, in the presence of their teacher, at the start of each school day.[125] Ten students' parents initiated suit because the official prayer countered their religious beliefs. The lower court concluded this daily procedure was permissible as long as the regulations safeguarded against embarrassing or pressuring students who chose not to participate. Further, the lower court continued, schools could accommodate nonparticipation by permitting students to remain silent during the prayer or be entirely excused.[126] The New York Court of Appeals sustained the lower court's order, upholding the state's power to use the prayer "so long as the schools did not compel any pupil to join in the prayer over his or [her] parents' objection."[127] The Supreme Court granted certiorari to evaluate whether the government's composition and mandated recitation of prayer was consistent with the Establishment Clause.[128]

The Supreme Court began its analysis by evaluating the history and tradition surrounding the Establishment Clause. The Court expressed, "The history of man is inseparable from the history of religion,"[129] but the "very practice of establishing governmentally composed prayers for religious services was one of the reasons which caused many of our early

120. 370 U.S. 422 (1962).

121. 374 U.S. at 203.

122. 370 U.S. at 424–25.

123. *Id.* at 422–23. The Board of Regents is a governmental agency, created by the New York Constitution, to which the New York Legislature "granted broad supervisory, executive, and legislative powers" over the public school system. *Id.* The Board recommended and published the prayer as part of the "Statement on Moral and Spiritual Training in the Schools," stating, "We believe that this statement will be subscribed to by all men and women of good will, and we call upon all of them to aid in giving life to our program." *Id.* at 423.

124. Students prayed, "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.

125. *Id.*

126. Ultimately, the lower court held that establishing the policy regulations was ultimately a task for the State Board, not the court. *Id.*

127. *Id.*

128. *Id.* at 423–24.

129. *Id.* at 434.

colonists to leave England and seek religious freedom in America."[130] According to the Court, the Founders recognized that "one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services."[131] And, in response, the Founders added the Establishment Clause as a guarantee that "neither the power nor prestige of Federal Government would be used to control, support, or influence the kinds of prayer the American people can say."[132]

Applying this historical and traditional understanding of the Establishment Clause to *Engel*, the Supreme Court held the practice of requiring the recitation of government-composed prayer in a public school system was wholly inconsistent with the Establishment Clause.[133] The Court expressed:

> [T]he constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as part of a religious program carried on by government.[134]

Although the prayer was "non-denominational" and the state's regulations permitted individuals to remain silent or leave the room during the prayer, the Court found that the "indirect coercive pressure on religious minorities to conform to the prevailing officially approved religion [was] plain."[135] Because the prayer was "composed by governmental officials as a part of a government program to further religious beliefs," the Court held the prayer violated the Establishment Clause.[136]

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130. *Id.* at 425. Additionally, the Court identified that some early colonists passed laws to make their own religion the official religion of their colonies, but this practice was eradicated by the time the Constitution was adopted. *Id.* at 427–29.

131. *Id.* at 429.

132. *Id.*

133. *Id.* at 424.

134. *Id.* at 425.

135. *Id.* at 430–431. In comparison, two Justices in this 6-1 opinion did not believe compulsion existed in this case. *See id.* at 438 (Douglas, J., concurring) ("[T]here [was] no element of compulsion or coercion in New York's regulation requiring that public schools be opened each day with [that] prayer . . . ."); *Id.* at 445 (Stewart, J., dissenting) (noting that regulations made clear those who objected to recitation of the prayer were free of any compulsion to do so).

136. *Id.* at 425.

The issue of government-composed prayer arose again in *Schempp*, eight years before *Lemon*.[137] The Supreme Court examined *Schempp* in connection with another case, *Murray v. Curlett*.[138] In *Schempp*, a statute directed public schools to begin each morning with opening exercises where selected students read ten Bible verses into the school's intercommunications system and led the Lord's Prayer.[139] During the prayer, students across the school were asked to stand and repeat the prayer in unison. This exercise concluded with students saluting the flag and listening to morning announcements. The statute also directed that selected students could choose which verses to read, participation was voluntary, and nonparticipating students could either be absent during or choose not to participate in these exercises. Moreover, the statutory text ensured "[t]here [were] no prefatory statements, no questions asked or solicited, no comments or explanations made, and no interpretations given at or during the exercises."[140] Comparably, in *Murray*, the Board of School Commissioners adopted a rule that called for the reading of a chapter of the Bible followed by the Lord's Prayer during opening exercises in public school. This rule was amended to allow students to be excused during the exercise.[141] In both *Schempp* and *Murray*, concerned parents challenged these statutorily or administratively prescribed religious exercises.[142] The Supreme Court granted certiorari to examine whether these exercises were unconstitutional under the Establishment Clause.[143]

The Court began by recognizing "that religion has been closely identified with our history and government."[144] Then, the Court reviewed America's history of intertwining religious practices in the public sphere, noting how Founding Fathers evinced their devoted belief in God in their writings; Presidents continue to use the supplication, "So help me God," in their oaths of office; Congress continues to open each session with opening prayer; and the Supreme Court's Crier continues to open each session of Court by invoking the grace of God.[145] But, then, the Court emphasized "that religious freedom [was] likewise as strongly imbedded

137. 374 U.S. at 205.

138. *Id.* The Supreme Court consolidated *Murray* and *Schempp* as companion cases, evaluating the constitutionality of state action requiring schools to begin each day by reading passages of the Bible. *Id.*

139. *Id.*

140. *Id.* at 205–07.

141. *Id.* at 211–12.

142. *Id.* at 206, 211–12.

143. *Id.* at 205.

144. *Id.* at 212.

145. *Id.* at 212–13.

in our public and private life."[146] The Court ultimately held the Establishment Clause sought to create a "complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion."[147] The Court elaborated, although "[t]he place of religion in our society is an exalted one, ... it is not within the power of government to invade that citadel."[148] Rather, "[i]n the relationship between man and religion, the [government] is firmly committed to a position of neutrality."[149] The Court interpreted the principle of neutrality to protect against powerful sects fusing governmental and religious functions such as to create dependency between the two and to protect against government compelled religious observance.[150]

Applying this historical understanding, the Supreme Court held that the government's proscription of religious exercises violated the Establishment Clause's mandate that the government remain neutral, "neither aiding nor opposing religion."[151] First, the government prescribed two exercises of a religious character as part of the curricular activities of students: reading scripture from the Bible and the Lord's prayer.[152] Additionally, these religious exercises occurred in school buildings, warranting teachers' supervision and participation.[153] Finally, the Court held, attendance was compulsory for students who were expected to participate in these religious exercises.[154]

In both pre-*Lemon* cases, the Supreme Court began its analyses by emphasizing the importance of understanding the history and tradition surrounding the enactment and subsequent treatment of the Establishment Clause. In both cases, Justices provided examples of the history of religion being intertwined in the public sphere: chaplain-led

146. *Id.* at 214.

147. *Id.* at 226–27. Further, the Court interpreted the Establishment Clause to protect against more than government's mere preference for one religion over another or the government's "official establishment of a single sect, creed, or religion." *Id.* at 217.

148. *Id.* at 226.

149. *Id.*

150. *Id.* at 222–23.

151. *Id.* at 225.

152. *Id.* at 222–25.

153. *Id.* at 223.

154. *Id.* at 224–25. Comparable to *Engel*, two Justices found that the students were not coerced or compelled to participate in these activities. *Id.* at 228–29 ("The prayers announced [were] not compulsory, though some may think they [had] that indirect effect because the nonconformist student may [have been] induced to participate for fear of being called an 'odd-ball.' But that coercion, if it be present, [had] not been shown . . . .") (Douglas, J., concurring); *Id.* at 318–20 (Stewart, J., dissenting).

prayers before each legislative session of Congress; the use of a Bible in administering oaths; funding parochial schools; the Supreme Court Crier beginning each Court session with "God save the United States and this Honorable Court," the recognition of a Supreme Being in the Pledge of Allegiance; "In God we Trust" on coins; the recognition of the Star Spangled Banner as the national anthem with its inclusion of the motto "In God is our trust"; and the Founders' presupposition of a Supreme God in the Constitution. Despite acknowledging the Founders' devotion to religion and the consistent role of religion in America's society, the Supreme Court struck down the religious exercises in both cases because the government composed or prescribed them. Further, the Supreme Court's analyses considered the extent to which a student was compelled or coerced to participate in the government-prescribed exercises. These two concerns are consistently evaluated in the Court's analyses of the Establishment Clause in this context—before, during, and after *Lemon*. Therefore, the Court will continue to readdress these concerns in *Lemon*'s absence. Moreover, interpreting these concerns under the history and tradition test, which recognizes the history of how religion has been intertwined in the public sphere, will enable the Court to further accommodate prayer in the public school context.

B. Cases from Lemon's Progeny Signal How the Supreme Court Will Address Future Public School Prayer Cases

During *Lemon*'s reign, the Supreme Court used the *Lemon* test to strike down the intertwining of religious exercises or symbols in the public school context. Although the *Lemon* test is officially obsolete, reviewing these cases provides insight into the Court's gradual shift toward a more accommodating approach in the context of public school prayer. Further, views in these opinions forecast how the Supreme Court will likely navigate the Establishment Clause in the context of public school prayer in *Lemon*'s absence. Thus, this Comment addresses how the Supreme Court applied the *Lemon* test to strike down public school prayer both inside and outside the classroom.

1. Prayer Inside the Classroom

First, in *Wallace*, the Supreme Court analyzed several Alabama statutes relating to prayer in public schools. Three statutes were initially in question.[155] The first statute authorized a one-minute period of silence for meditation in all schools. The second statute authorized a period of silence in all schools for meditation or voluntary prayer. The third statute

155. 472 U.S. at 40.

authorized teachers to lead willing students in prescribed prayer to "Almighty God, the Creator and Supreme Judge of the World."[156]

Parties did not challenge the lower court's finding that the first statute, authorizing a moment of silence for meditation, was valid.[157] Moreover, the Supreme Court previously affirmed that the third statute, permitting teachers to lead students in prescribed prayer, was unconstitutional.[158] Thus, the Court granted certiorari to determine the narrow question of whether the second statute, authorizing "a period of silence for 'meditation or voluntary prayer[,]' [was] a law respecting religion within the meaning of the [Establishment Clause]."[159] Ultimately, the Supreme Court held this statute was unconstitutional because, based on the record and legislative history, this statute was solely motivated by a religious purpose.[160] Consequently, it was "unnecessary, and indeed inappropriate, to evaluate the practical significance of the words 'or voluntary prayer' to the statute."[161] Thus, its analysis stopped, and the statute was struck down.

Concurring opinions expanded on how this moment of silence was struck down when, generally, there was no question about the validity of moments of silence. In Justice Powell's concurrence, he acknowledged that some moment-of-silence statutes may be constitutional, but that this statute failed simply because the State failed to identify a non-religious purpose.[162] Similarly, Justice O'Connor wrote separately to "explain why moment of silence laws in other states [did] not necessarily manifest the same infirmity."[163] She clarified statutes authorizing a "moment of

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156. *Id.* Under this statute, willing teachers led the following prayer:

> Almighty God, You alone are our God. We acknowledge You as the Creator and Supreme Judge of the world. May Your justice, Your truth, and Your peace abound this day in the hearts of our countrymen, in the counsels of our government, in the sanctity of our homes and in the classrooms of our schools in the name of our Lord. Amen.

Id. at 41 n.3.

157. *Id.* at 41.

158. Wallace v. Jaffree, 466 U.S. 924, 924 (1984).

159. *Wallace*, 472 U.S. at 41–42.

160. *See id.* at 56–60. At a preliminary hearing, the "prime sponsor" of the bill testified that the bill was "an effort to return voluntary prayer to our public schools." *Id.* at 43. The Court held that the statute lacked a secular purpose because "[t]he legislative intent to return prayer to public school is quite different from merely protecting every student's right to engage involuntary prayer during appropriate moment of silence during the schoolday." *Id.* at 59. And under *Lemon*, if the statute lacked a clearly secular purpose, the Court was not bound to consider the second and third prong of the *Lemon* test. *Id.* at 56.

161. *Id.* at 61.

162. *Id.* at 63–66 (Powell, J., concurring).

163. *Id.* at 67 (O'Connor, J., concurring).

silence at the beginning of the schoolday during which students may meditate, pray, or reflect on the activities of the day" were allowed because, unlike the religious exercises in *Engel* or *Schempp*, a state-sponsored moment of silence was not inherently religious and did not compel a disinterested student to participate.[164] Thus, "[t]he Court [did] not hold that the Establishment Clause is so hostile to religion that it precludes the States from affording schoolchildren an opportunity for voluntary silent prayer."[165] The concurring opinion's clarification that this prayer solely failed because it lacked a secular purpose indicates the Court will be more accommodating of similar government actions now that the "secular purpose" prong of *Lemon* is obsolete. Moreover, the concurrence's distinction between the school prayer in *Wallace* and the school prayers in *Engel* and *Schempp* is significant because it suggests the government can advocate practices that may open the door for religious activity as long as the practice is not inherently religious and does not compel student participation.

The dissenting opinions in *Wallace* refused to apply *Lemon* and focused, instead, on interpreting the history and tradition of the relationship between religion and the government. Therefore, *Wallace* provides insight into how the current Court—no longer bound by *Lemon*'s stringent requirements—may accommodate government-facilitated voluntary prayer in public schools. Specifically, the dissent in *Wallace* roadmaps how the current Court may interpret the history and tradition of the Establishment Clause in this context.

First, Chief Justice Burger found it "ironic—perhaps even bizarre—that on the very day [the Supreme Court] heard arguments in these cases, the Court's session opened with an invocation for Divine protection. Across the park a few hundred yards away, the House of Representatives and the Senate regularly open each session with a prayer."[166] Further, he expanded, these legislative prayers have been given by government-paid clergy since 1789.[167] Moreover, Chief Justice Burger identified the Court's traditional understanding "that hostility toward any religion or toward all religions is as much forbidden by the Constitution as is an official establishment of religion."[168] He concluded, cautioning:

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164. *Id.* at 71–74. "It is difficult to discern a serious threat to religious liberty from a room of silent, thoughtful schoolchildren." *Id.* at 72 (O'Connor, J., concurring).

165. *Id.* at 84 (O'Connor, J., concurring).

166. *Id.* at 84–85 (Burger, C.J., dissenting).

167. *Id.* (Burger, C.J., dissenting) (italics omitted).

168. *Id.* at 85 (Burger, C.J., dissenting).

> If the government may not accommodate religious needs when it does so in a wholly neutral and noncoercive manner, the "benevolent neutrality" that we have long considered the correct constitutional standard will quickly translate into the "callous indifference" that the Court has consistently held the Establishment Clause does not require.[169]

Second, Justice White disagreed with the majority's disdain for a statute that mentioned prayer when a student would, nonetheless, be able to pray under another statute that did not expressly mention prayer.[170] Rather, he would not invalidate the statute that "at the outset provided the legislative answer to [a student's question] 'May I pray?'"[171]

Third, Justice Rehnquist expressed "[i]t would come as much of a shock to those who drafted the Bill of Rights as it will to a large number of thoughtful Americans today, that the Constitution, as construed by the majority, prohibited the [State] Legislature from 'endorsing' prayer."[172] Rather than apply *Lemon*, Justice Rehnquist surveyed the history and tradition of the Establishment Clause, finding "there [was] simply no historical foundation for the proposition that the Framers intended to build the 'wall of separation.'"[173] For example, "George Washington himself, at the request of the very Congress which passed the Bill of Rights, proclaimed a day of 'public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favors of Almighty God.'"[174] Moreover, Justice Rehnquist stated the original meaning of "establish," from the time of drafting the Establishment Clause, defining it "as 'the act of establishing, founding, ratifying, or ordaining,' such as in 'the episcopal form of religion, so called in England.'"[175] Thus, Rehnquist concluded, the Establishment Clause did not require absolute neutrality or bar the government from accommodating religion.[176]

These dissents punched holes in the notion that religion should not present in the public sphere. They also pointed to examples where Founding Fathers consistently accommodated religion by creating space for religious exercises in the public sphere. Finally, they applied the original public meaning of "establish" to guide the process of interpreting

169. *Id.* at 90 (Burger, C.J., dissenting).
170. *Id.* at 90–91 (White, J., dissenting).
171. *Id.* at 91 (White, J., dissenting).
172. *Id.* at 113 (Rehnquist, J., dissenting).
173. *Id.* at 92–113 (Rehnquist, J., dissenting).
174. *Id.* at 113 (Rehnquist, J., dissenting).
175. *Id.* at 106 (Rehnquist, J., dissenting) (alteration in original) (citation omitted).
176. *Id.* (Rehnquist, J., dissenting).

the history and tradition of the Establishment Clause. Without *Lemon*, the current Court may continue to utilize these tools in future analysis of the relationship between religion and the government in the context of public schools.

2. Prayer Outside the Classroom

Further, during *Lemon*'s reign, the Supreme Court decided two cases related to prayer in the public school context that occurred outside of the classroom. In both cases, the Court struck down the prayer under the *Lemon* test. Yet the majority and dissenting opinions raise issues that will be reconsidered in *Lemon*'s absence. Moreover, the dissenting opinions establish a framework the current Court may use in providing more accommodation for prayer in the public school context in the future.

First, in *Lee v. Weisman*, the Court held that the inclusion of clerical members to offer prayer at public school ceremonies was unconstitutional.[177] In *Lee*, a public school system permitted school principals to invite members of the clergy to offer invocation and benediction prayers at formal graduation ceremonies.[178] School officials provided the clerical members with a pamphlet, instructing them to pray an inclusive and nonsectarian prayer, not identifiable with any particular sect.[179] A concerned parent objected to the practice and sought a permanent injunction to bar the school system from inviting clerical members to pray at formal ceremonies.[180] The United States District Court for the District of Rhode Island held the school system's practice violated the second prong of *Lemon* because it had the effect of endorsing

177. *Lee*, 505 U.S. at 585–86.

178. *Id.* at 580.

179. This pamphlet was prepared by the "National Conference of Christians and Jews" and titled "Guidance for Civic Occasions." *Id.* at 581.

180. *Id.* at 581, 583–84. The parent sought a temporary restraining order four days before his daughter's middle school graduation after learning the middle school principle invited a Rabbi to deliver prayers at the graduation ceremony. *Id.* The court denied his motion for lack of time to consider it before the ceremony, days later. *Id.* at 584. Then, the same parent filed this amended complaint seeking a permanent injunction. *Id.* at 584. This case arose as a result of this amended complaint.

religion.[181] The United States Court of Appeals for the First Circuit affirmed.[182] The Supreme Court granted certiorari and affirmed.[183]

The Court "[did] not accept the invitation of petitioners" to overturn *Lemon*.[184] Rather, the Court found that the school system's practice violated the second prong of *Lemon* because the government involvement with religious activity was "pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a public school."[185] Like its approach in *Engel* and *Schempp*, the Court focused its analysis on the extent to which the government prescribed the religious exercise in question and the extent the government compelled a student's participation in that exercise.

First, the Court underscored "the principal directed and controlled the content of the prayers" by providing clerical members with a pamphlet containing guidelines and advising a nonsectarian[186] prayer.[187] The Court concluded that precedent did not permit school officials to assist in composing prayers for students.[188] Second, the Court analyzed whether the school compelled student participation in prayer. Although the student was not compelled to attend graduation or participate in the prayer, the Court emphasized graduation was "one of life's most significant occasions" and that it was not fair to make the objector "take unilateral and private action to avoid compromising religious scruples."[189] The Court also noted "[t]here [were] heightened concerns with protecting freedom of conscience from subtle coercive pressure in

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181. *Id.* at 584–85.

182. *Id.* at 585–86. Notedly, a concurring opinion expressed the school system's practice violated all three prongs of the *Lemon* test. *Id.* (Bownes, J., concurring). Further, this concurrence suggested "under [the] Establishment Clause rules[,] no prayer, even one excluding any mention of the Deity, could be offered at a public school graduation ceremony." *Id.* at 586 (Bownes, J., concurring). Finally, the dissent reasoned that the prayer did not violate the Establishment Clause because the prayer was nonsectarian and represented a variety of beliefs and ethical systems. *Id.* (Campbell, J., dissenting).

183. *Id.* at 586.

184. *Id.* at 587.

185. *Id.*

186. Nonsectarian is defined as "[n]ot affiliated with or limited to any particular religious group or its beliefs." *Nonsectarian*, BLACK'S LAW DICTIONARY (11th ed. 2019).

187. *Lee*, 505 U.S. at 588.

> It is a cornerstone principle of our Establishment Clause jurisprudence that 'it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government,' and that is what the school officials attempted to do.

Id. (citing *Engel*, 370 U.S. at 425).

188. *Id.* at 590.

189. *Id.* at 594–96.

the elementary and secondary public schools."[190] The Court held that presenting the student with the option to either skip graduation or remain silent during the prayer constituted psychological coercion, and the government could not prescribe a religious exercise at a ceremony where young graduates were induced to conform.[191] Consistent with its holdings in *Engel* and *Schempp*, the Court held that the state's role in prescribing a religious exercise in public school, where students are compelled to perform such exercise, was unconstitutional.[192]

Although the majority struck down the school system's practice under *Lemon*, its subsequent analysis of (1) the government's prescription of a religious exercise and (2) whether the government's action compelled student participation in a religious exercise signals that the Court will continue to examine these factors, first raised in *Engel* and *Schempp*, in its analysis of the Establishment Clause in the public school context. Further, the dissent in *Lee* provides insight into how the Court may shift its approach in addressing prayer at public school graduation ceremonies in the absence of *Lemon*.[193]

The dissenters began by articulating the "Establishment Clause must be construed in light of the 'government policies of accommodation, acknowledgement, and support for religion that are an accepted part of our political and cultural heritage.'"[194] The dissent then argued the meaning of the Establishment Clause was determined by reference to historical practices and understandings.[195] Finally, the dissent notes that any interpretation of the Establishment Clause which invalidates longstanding traditions must be improper.[196] This statement is impactful when considering the Nation's longstanding tradition of praying before significant events as a means of formalizing the event. The current Court

190. *Id.* at 592.

191. *Id.* at 592–94, 597–99.

192. *Id.* at 597–99.

193. *See id.* at 631–46 (Scalia, J., joined by Rehnquist, C.J., White & Thomas, JJ., dissenting).

194. *Id.* at 631 (Scalia, J., joined by Rehnquist, C.J., White & Thomas, JJ., dissenting). (citing *Cnty. of Allegheny*, 492 U.S. at 657 (Kennedy, J., joined by White, C.J, Scalia, J., concurring in the judgment in part, dissenting in part).

195. *Lee*, 505 U.S. at 631–32 (Scalia, J., joined by Rehnquist, C.J., White & Thomas, JJ., dissenting).

196. *Id.* Importantly, as flagged in several opinions throughout this Comment, longstanding traditions include the following practices: Presidential oaths of office concluding with the supplication "so help me God"; prayer led by a Chaplain, funded by the federal Government, before every session of Congress; the Supreme Court Crier invoking God's grace before every open session of Court; annual Thanksgiving Proclamations with a religious theme of gratitude; the motto "In God We Trust" inscribed on coins; "One Nation under God" as part of the pledge; etc.

could easily expand this argument to encompass prayer in public schools to formalize special events, such as graduation ceremonies.

The dissent framed how the current Court could apply this argument by evaluating the historical practices and understandings of the Establishment Clause in this context. The dissent concluded that conducting formalized prayer at public school graduation ceremonies was within the history and tradition of the Establishment Clause.[197] "The history and traditions of our Nation are replete with ceremonies featuring prayers of thanksgiving and petition."[198] The dissent underscored that prayer has consistently been a general tradition and prominent part of governmental ceremonies, proclamations, inaugural addresses, Thanksgiving Proclamations with a religious theme of prayerful gratitude, oaths of office, congressional sessions, and Supreme Court sessions, from the time of America's founding.[199] Moreover, the dissent concluded, the Establishment Clause supported the longstanding "more specific" tradition of invocations and benedictions at public school ceremonies.[200] Therefore, according to the dissent, prayer at public school graduation ceremonies is permissible under the Establishment Clause. Then, the dissent addressed the majority's concerns with (1) the government "direct[ing] the performance of a formal religious exercise"[201] and (2) the psychological coercion of a student.[202] The current Court may draw from the dissent's analysis of these two factors.

The dissent accused the majority of misconstruing the record in concluding the government directed a religious exercise when, instead, the principal acted within delegated authority to invite clerical members and provided a two-page pamphlet generally advising nonsectarian prayers.[203] The dissent argued these facts could not "fairly be transformed into the charges" that the principal directed, controlled,

197. *Id.* at 631–32 (Scalia, J., joined by Rehnquist, C.J., White & Thomas, JJ., dissenting).

198. *Id.* at 633 (Scalia, J., joined by Rehnquist, C.J., White & Thomas, JJ., dissenting).

199. *Id.* at 633–35 (Scalia, J., joined by Rehnquist, C.J., White & Thomas, JJ., dissenting).

200. *Id.* at 635 (Scalia, J., joined by Rehnquist, C.J., White & Thomas, JJ., dissenting). The dissent noted that the majority "obliquely acknowledge[d] in describing the 'customary features' of high school graduations, and as respondents [did] not contest, the invocation and benediction ha[d] long been recognized to be 'as traditional as any other parts of the school graduation program and [were] widely established.'" *Id.* at 636 (Scalia, J., joined by Rehnquist, C.J., White & Thomas, JJ., dissenting).

201. *Id.* at 639 (Scalia, J., joined by Rehnquist, C.J., White & Thomas, JJ., dissenting).

202. *Id.* at 636–40 (Scalia, J., joined by Rehnquist, C.J., White & Thomas, JJ., dissenting).

203. *Id.* at 639—40 (Scalia, J., joined by Rehnquist, C.J., White & Thomas, JJ., dissenting).

monitored, or composed official prayers when "nothing in the record remotely suggest[ed]" the government's prescription in this case.[204] Similarly, in the future, a more accommodating Court may apply a higher threshold for determining what constitutes the government "directing" a religious exercise. Further, the dissent cast the majority's conclusion students were psychologically coerced to participate in the prayer as "incoherent," lamenting "that the Court [went] beyond the realm where judges know what they are doing."[205] The dissent observed that the act the majority identified as "in a fair and real sense obligatory" was the act of attending graduation, not the act of participating in prayer.[206] According to the dissent, remaining silently seated or standing in silence cannot be perceived as participation in the prayer; rather, standing would "signify adherence to a view or simple respect for the views of others."[207] Additionally, the dissent would have "den[ied] that the dissenter's interest in avoiding even the false appearance of participation constitutionally trump[ed] the government's interest in fostering respect for religion generally."[208]

Finally, the dissent distinguished *Lee* from *Engel* and *Schempp*, drawing three distinctions. First, the dissent established that *Engel* and *Schempp* were not within the scope of the general rule that public ceremonies can include prayer because school instruction, in a classroom, did not constitute a public ceremony.[209] Second, *Engel* and *Schempp* were concerned with the legal coercion resulting from the students' mandatory attendance at schools, whereas the issue in *Lee* was whether forbidden coercion existed in an environment utterly devoid of legal coercion.[210]

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204. *Id.* at 640 (Scalia, J., joined by Rehnquist, C.J., White & Thomas, JJ., dissenting). "These distortions of the record [were], of course, not harmless error: without them, the Court's solemn assertion that the school officials could reasonably be perceived to be 'enforcing a religious orthodoxy' would ring as hollow as it ought." *Id.* (Scalia, J., joined by Rehnquist, C.J., White & Thomas, JJ., dissenting).

205. *Id.* at 636 (Scalia, J., joined by Rehnquist, C.J., White & Thomas, JJ., dissenting).

206. *Id.* at 637 (Scalia, J., joined by Rehnquist, C.J., White & Thomas, JJ., dissenting).

207. *Id.* at 637–38 (Scalia, J., joined by Rehnquist, C.J., White & Thomas, JJ., dissenting).

208. *Id.* at 638 (Scalia, J., joined by Rehnquist, C.J., White & Thomas, JJ., dissenting). The dissent also referenced the Supreme Court's holding in *West Virginia Board of Education v. Barnette,* 319 U.S. 624 (1943), that the school could not compel a student to recite the Pledge, noting that the Court "did not even hint that [the student] could not be compelled to observe respectful silence – indeed, even to stand in respectful silence – when those who wished to recite it did so." *Id.* at 638–39 (Scalia, J., joined by Rehnquist, C.J., White & Thomas, JJ., dissenting).

209. *Id.* at 643 (Scalia, J., joined by Rehnquist, C.J., White & Thomas, JJ., dissenting).

210. *Id.* (Scalia, J., joined by Rehnquist, C.J., White & Thomas, JJ., dissenting). This distinction arose from the dissenters' differing opinion of what constituted a coercion. The

Third, and finally, the daily prayers in *Engel* and *Schempp* occurred in a classroom setting—an instructional setting where parents could not counter the students' susceptibility to peer pressure; meanwhile, the prayer in *Lee* was a voluntary, one-time prayer at a graduation ceremony attended by parents and students.[211] The current Court will likely draw on these distinctions and continue distinguishing cases involving public school prayer from the results in *Engel* and *Schempp* to further accommodate religion in the public sphere.

Second, in *Santa Fe Independent School District v. Doe*, the Supreme Court examined the constitutionality of a public school policy that permitted student-led prayer over the loudspeakers at a football game.[212] Under the school's policy, the student body voted on whether to conduct a prayer at the football game for the school year and, if so, which student should pray.[213] Ultimately, the Court struck this policy down under *Lemon* because (1) the policy's purpose was to endorse school prayer and (2) the policy imposed a majoritarian election on the issue of prayer.[214]

The written school policy adopted the purpose of "solemniz[ing] the event" and required that the message "promote good citizenship" and "establish the appropriate environment for competition."[215] The majority held that these requirements limited the type of applicable message to a religious one.[216] Despite the school's stated purpose, the Court found that the school implemented the policy with the purpose of endorsing school prayer[217]—which, of course, failed under *Lemon*. Although the Court recognized the two-step election process as a means for the school to "disentangle itself from . . . religious messages," the Court held that the policy involved the school's perceived and actual endorsement of religion.[218] By establishing the election, the Court held the policy failed

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dissent believed the majority's expansion of "coercion" was unwarranted because Framers solely intended to protect against the coercion of religious orthodoxy and of financial support by force of law and threat of penalty. *Id.* at 640–42 (Scalia, J., joined by Rehnquist, C.J., White & Thomas, JJ., dissenting).

211. *Id.* at 642–43 (Scalia, J., joined by Rehnquist, C.J., White & Thomas, JJ., dissenting).

212. 530 U.S. at 294.

213. *Id.* at 297–98.

214. *Id.* at 314–16.

215. *Id.* at 306–07.

216. *Id.*

217. *Id.* at 307.

218. *Id.* at 305–07.

to protect minority viewpoints and threatened to impose coercion on students that did not desire to participate in the prayer.[219]

But without *Lemon*, the secular purpose requirement will no longer strike down similar school policies. Here, the Court did not believe the school's proposed secular purpose, to solemnize a football game. Without *Lemon*, the current Court will no longer need to evaluate whether they believe a school's proposed secular purpose for similar policies. Rather, the Court will focus on whether the history and tradition of the Establishment Clause permit conducting prayer to solemnize an event. According to these precedents, it probably does.[220] The majority's discussion of whether the school coerced participation in the prayer signals, again, this will be an important factor the Court will readdress in future cases.

Moreover, the dissent in *Santa Fe Independent School District* proclaimed this decision "misse[d] the mark."[221] First, the dissent noted the majority misconstrued the election process as being an election on prayer when, instead, it merely enabled the student body to elect a speaker that could choose to pray or not pray.[222] Ultimately, "[t]he elected student, not the government, would choose what to say.[223] Thus, a more accommodating Court may focus less on whether the government provides the platform for a religious message and more on who is speaking. Next, the dissent reprimanded the majority for appearing "openly hostile" toward the policy's stated purposes, quickly deciding the purposes were a sham rather than giving deference to the school's plausible secular purpose.[224] An accommodationist Court will be more deferential to the stated purposes of a government action—if the Court analyzes the purpose at all in absence of the "secular purpose" requirement in *Lemon*. Finally, the dissent emphasized that the history and tradition of Establishment Clause jurisprudence did "not mandate

219. *Id.* at 316–17. Although the majority recognized a high school student's decision to attend a football game was voluntary, the majority was "nevertheless persuaded that the delivery of a pregame prayer ha[d] the improper effect of coercing those present to participate in an act of religious worship." *Id.* at 312.

220. The Court may need to further evaluate whether the event in question is the type of event that would warrant formalization by prayer, consistent with the history and tradition of the Establishment Clause. *See* Town of Greece v. Galloway, 572 U.S. 565, 591–92 (2003) (holding the Town of Greece did not violate the Establishment Clause by opening town board meetings with a ceremonial prayer).

221. *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 320 (Rehnquist, C.J., joined by Scalia & Thomas, JJ., dissenting).

222. *Id.* at 320–21 (Rehnquist, C.J., joined by Scalia & Thomas, JJ., dissenting).

223. *Id.* at 321 (Rehnquist, C.J., joined by Scalia & Thomas, JJ., dissenting).

224. *Id.* at 322 (Rehnquist, C.J., joined by Scalia & Thomas, JJ., dissenting).

'content neutrality.'"[225] And, in their view, even if the content neutrality requirement applied, speech cases "would not require that all public school actions with respect to student speech be content neutral."[226] Accordingly, the dissent, and an accommodationist court, would not require content neutrality in this context.

C. Further Accommodation of Religion Ahead

The Supreme Court has signaled a shift toward a more accommodationist approach over the past decade, and its decision to officially overturn *Lemon* is a monumental step toward accommodating the presence of religion in the public sphere. Several signals raise the flag that the Supreme Court is likely to become more accommodating of religion and reevaluate the constitutionality of prayer in public schools.

Immediately preceding the Court's overturn of *Lemon* in *Kennedy*, it unanimously struck down the City of Boston's refusal to fly a religious flag at City Hall.[227] The majority invalidated the city's refusal under the Free Speech Clause of the First Amendment, finding that Boston refused to raise the flag based solely on the flag's religious viewpoint.[228] Justice Gorsuch's concurrence explained that the city refused to raise the flag out of the fear that, in flying a religious flag, it would violate the Establishment Clause.[229] Quite simply,[230] he said, the city applied *Lemon*:[231]

> To justify a policy that discriminated against religion, Boston sought to drag *Lemon* once more from its grave.[232] It was a strategy as risky

225. *Id.* at 325 (Rehnquist, C.J., joined by Scalia & Thomas, JJ., dissenting). Instead, the dissent proclaimed this was "undoubtedly a new requirement" in the context of the Establishment Clause. *Id.* (Rehnquist, C.J., joined by Scalia & Thomas, JJ., dissenting). Rather, the requirement of content neutrality was limited to speech cases. *Id.* (Rehnquist, C.J., joined by Scalia & Thomas, JJ., dissenting).

226. *Id.* at 325 (Rehnquist, C.J., joined by Scalia & Thomas, JJ., dissenting).

227. *Shurtleff*, 142 S. Ct. at 1593.

228. *Id.* at 1587.

229. *Id.* at 1603 (Gorsuch, J., joined by Thomas, J., concurring in the judgment).

230. Justice Gorsuch explained that "Lemon's abstract three-part test [seemed to be] a simpler and tempting alternative to busy local officials and lower courts." *Id.* at 1609 (Gorsuch, J., joined by Thomas, J., concurring in the judgment). In comparison, "[b]y demanding a careful examination of the Constitution's original meaning, a proper application of the Establishment Clause no doubt requires serious work and can pose its challenges." *Id.* (Gorsuch, J., joined by Thomas, J., concurring in the judgment).

231. *See id.* at 1608–09 (Gorsuch, J., joined by Thomas, J., concurring in the judgment).

232. Here, Justice Gorsuch alludes to a famous illustration of *Lemon* once prescribed by Justice Scalia. "Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad after being repeatedly killed and buried, *Lemon* stalks our

> as it was unsound. *Lemon* ignored the original meaning of the Establishment Clause, it disregarded mountains of precedent, and it substituted a serious constitutional inquiry with a guessing game. This Court long ago interred *Lemon*, and it is past time for local officials to let it lie.[233]

Now, in *Lemon*'s absence, the Court is likely to invoke the original meaning of the Establishment Clause to reevaluate the "mountains of precedent" that *Lemon* disregarded. In reevaluating precedent in the context of facilitated public school prayers, the Court may use two additional tests: whether (1) removing facilitated prayer from public prayer evinced neutrality or hostility toward religion and (2) facilitated prayer would be consistent with the history and tradition of the Establishment Clause.

The majority opinion in *American Legion* emphasized that "when time's passage imbues a religiously expressive . . . practice with this kind of familiarity and historical significance, removing it may no longer appear neutral, especially to the local community for which it has taken on a particular meaning."[234] The removal of facilitated prayer from public schools sparked national outrage when the Court decided *Engel*.[235] This action was commonly viewed, by dissenting members of the Supreme Court and the court of public opinion,[236] as government hostility toward

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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., joined by Thomas, J., concurring in the judgment).

233. *Shurtleff*, 142 S. Ct. at 1610 (Gorsuch, J., joined by Thomas, J., concurring in the judgment).

234. 139 S. Ct. at 2084–85. *See also Van Orden*, 545 U.S. at 704 (Breyer, J., concurring in the judgment) ("[D]isputes concerning the removal of longstanding depictions of the Ten Commandments from public buildings across the Nation . . . could thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid.").

235. *Engel* and *Schempp* were described as "among the most controversial decisions the Court has ever handed down, provoking an immediate and popular backlash that endures today." Lauren Maisel Goldsmith & James R. Dillon, *The Hallowed Hope: The School Prayer Cases and Social Change*, 59 ST. LOUIS U. L.J. 409, 419 (2015). These cases "'fell like a meteor into American society' and were perceived by much of the American public as an attack on the nation's religious heritage and liberty." *Id.* at 424. Further, "*Engel* and *Schempp* marked the beginning of a decades-long campaign to amend the Constitution to return religious worship to public education." *Id.* at 426. In between *Engel* and *Schempp* alone, around fifty proposals were introduced in the House of Representatives and Senate proposing to amend the Constitution to overcome the result of *Engel*. *Id.*

236. "Nonjudicial actors have also registered disagreement with the Court by taking it to task in the court of public opinion" through advertisements condemning Supreme Court decisions, publishing scholarly articles or editorials, or demonstrating before the Supreme Court in protest. Amy Coney Barrett, *Stare Decisis and Nonjudicial Actors*, 83 NOTRE DAME L. REV. 1147, 1169–72 (May 2008). Although "[t]he Court holds all of these demonstrations

religion. In *Lemon*'s absence, the Court could easily argue that removing facilitated prayer evinces hostility, not neutrality toward religion, establishing far more separation than the Establishment Clause requires.

Further, the Court could argue that beginning a school day, ceremony, or sporting event with a prayer would "place [students] in a solemn and deliberative frame of mind, invoke divine guidance in [school] affairs, and follow a tradition practiced by Congress and dozens of state legislatures."[237] In *Town of Greece v. Galloway*, the Supreme Court upheld a town's practice of beginning each town meeting with a ceremonial prayer, led by an invited clerical members, because the prayer shared this "permissible ceremonial purpose."[238] The Court concluded the town did not violate the Establishment Clause by "opening its meetings with prayer that comport[ed] with our tradition and [did] not coerce participation by nonadherents."[239] Therefore, the current Court may expand this reasoning to permit facilitated prayer in public school as long as the prayer (1) comports with the history and tradition of the Establishment Clause and (2) does not coerce participation by nonadherents.

D. Planting the Seed for the Proper Case

Ultimately, to readdress the constitutionality of prayer in the public school context, the Supreme Court needs the proper case. *Engel* and *Schempp* sparked a wildfire in the court of public opinion, as individuals across the nation called for elected representatives to act quickly to undo

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at arm's length," the Court balances being caught between its role as an "impartial dispenser of justice . . . governed by legal argument rather than political pressure" and the "sufficiently great and sufficiently sustained" tides of public opinion. *Id.* at 1171.

237. *Town of Greece*, 572 U.S. at 570. In *Town of Greece*, the Supreme Court evaluated the constitutionality of a town opening monthly board meetings with a prayer. *Id.* at 569–72. The town supervisor invited local clerical members to deliver an invocation before each meeting and concluded each prayer by awarding the clerical member with a plaque to honor the minister for serving as the "chaplain for the month." *Id.*

238. *Id.* at 591–92. Further the majority expressed:

> Ceremonial prayer is but a recognition that, since this Nation was founded and until the present day, many Americans deem that their own existence must be understood by precepts far beyond the authority of government to alter or define and that willing participation in civic affairs can be consistent with a brief acknowledgment of their belief in a higher power, always with due respect for those who adhere to other beliefs. The prayer in this case has a permissible ceremonial purpose. It is not an unconstitutional establishment of religion.

Id. at 591.

239. *Id.* at 592.

the Supreme Court's decision.[240] The *Engel* decision alone generated more hate mail than any previous decision in the Court's history.[241] And, despite the Court's decision in *Engel*, schools across the country opened the following year with reports of prayer and Bible-reading.[242] Public opposition to these decisions endures today, and the *Kennedy* decision pours gas on the wildfire, sparking debate on both sides of the argument.[243]

The question remains: who will bring a case to present the Supreme Court an opportunity to apply the history and tradition test to public school prayer? Options abound.

First, if a public school ignores precedent from *Engel* and *Schempp*, facilitating prayer at public school functions, an individual or concerned parent could bring a claim challenging the constitutionality of the religious activity. On the other side of the coin, an individual or concerned parent who wishes their school conducted prayer before functions may bring a claim against the school that, by refusing to facilitate prayer, the school inhibits religious exercise and evinces hostility toward religion as barred by the Establishment Clause.

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240. Goldsmith, *supra* note 235, at 425—27. These decisions led to a "decades-long campaign to amend the Constitution to return religious worship to public schools." *Id.*

241. *Id.* at 424.

242. *Id.* at 425. More recently, a 2019 survey revealed religious expression is still relatively common in public schools. Pew Research Center, *Religion in the Public Schools*, PEW RESEARCH (Oct. 3, 2019), https://www.pewresearch.org/religion/2019/10/03/religion-in-the-public-schools-2019-update/ [https://perma.cc/MGY2-D945]. According to the survey, four-in-ten public school students routinely see students pray before sporting events and one-half of public school teenagers routinely see others wearing jewelry or clothing with religious symbols. *Id.*

243. Goldsmith, *supra* note 235, at 428. *See* Hannah Natanson, *After Court Ruling, Activists Push Prayer Into schools*, THE WASHINGTON POST (July 26, 2022), https://www.washingtonpost.com/education/2022/07/26/school-prayer-kennedy-church-state/ [https://perma.cc/SD2E-JWGP]

> In response [to *Kennedy*,] families, teachers and activists are preparing to push religious worship into public schools nationwide — working to blur the line dividing prayer and pedagogy, and promising emotional, spiritual and educational benefits for students. Some school officials are listening: In at least three states, Illinois, Alabama and Oregon, school personnel have said they are reviewing their policies on employee prayer.

Id.

See also James Rainey et al., *Supreme Court school prayer ruling stirs debate over how far religion will seep into campus*, LOS ANGELES TIMES (June 27, 2022), https://www.latimes.com/california/story/2022-06-27/school-prayer-decision-reaction [https://perma.cc/6D68-RXLN]. "The U.S. Supreme Court's decision to permit a high school football coach to pray on the field after games is expected to reopen a vigorous and probably tense debate among parents, educators and others over how far religion can enter public school grounds . . . ." *Id.*

Next, now that the secular purpose requirement from *Lemon* no longer applies, legislators are no longer constrained by needing to justify legislation with a secular purpose. This means legislators have more freedom in drafting and passing legislation which could establish the practice of prayer in public schools. Thus, claims could arise in several states, in response to proposed legislation, as legislators begin to draft legislation to reintroduce or accommodate the practice of prayer in public schools.

Finally, multiple organizations on both sides of the argument are vehemently dedicated to lobbying either for or against the further accommodation of prayer in public schools. For example, after Petitioner Kennedy filed the petition for a writ of certiorari in *Kennedy*, the following organizations filed amicus briefs: Chaplain Alliance for Religious Liberty, The Ethics and Religious Liberty Commission of the Southern Baptist Convention, Pennsylvania Family Institute, and Advancing American Freedom. And over forty organizations filed amicus briefs after the Supreme Court granted the petition for a writ of certiorari.[244] Although these organizations range in their level of participation with this cause, such organizations will play a vital role in future developing cases and providing amicus briefs that potentially influence the Supreme Court's future decisions in this area of law.

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244. *Kennedy v. Bremerton School Dist.*, SCOTUS BLOG, https://www.scotusblog.com/case-files/cases/kennedy-v-bremerton-school-district-2/ [https://perma.cc/JU3M-PAN8] (last visited Oct. 25, 2022). Such organizations include, but are not limited to, the following: Alabama Center for Law and Liberty, Foundation for Moral Law, American Constitutional Rights Union, World Faith Foundation, Thomas More Society, the Claremont Institute's Center for Constitutional Jurisprudence, Mountain States Legal Foundation and Southeastern Legal Foundation, Family Policy Alliance and State Family Policy Councils, Chaplain Alliance for Religious Liberty, American Center for Law and Justice, The American Cornerstone, Foundation for Individual Rights in Education, America First Legal Foundation, Jewish Coalition for Religious Liberty, The America First Policy Institute, Americans for Prosperity Foundation, The American Legion, The Rutherford Institute, United States Conference of Catholic Bishops, Christian Legal Society, Elisabeth P. DeVos and Defense of Freedom Institute for Policy Studies, Advancing American Freedom and 39 Additional Organizations and Individuals, Notre Dame Law School Religious Liberty Initiative, Protect the First Foundation, Lambda Legal Defense and Education Fund, Baptist Joint Committee for Religious Liberty, Washington State School Directors' Association, American Civil Liberties Union and ACLU of Washington, Forum on the Military Chaplaincy and Former Members of the Military Chaplaincies, Freedom from Religion Foundation, AASA, The School Superintendents Association, American Atheists, Inc., Washington State Charter Schools Association and California Charter Schools Association, California School Boards Association and Education Legal Alliance, Psychology and Neuroscience Scholars, and the National Education Association. *Id.*

VI. CONCLUSION

Although the implications of the new history and tradition test are not yet set in stone, the Supreme Court's recent precedent reflects a shift toward accommodating the presence of religion in the public sphere. The current Court is not timid about reevaluating its precedent in controversial areas of the law,[245] and the official overturn of *Lemon* is indicative of the Court's dissatisfaction with Establishment Clause precedent. A review of the Supreme Court's interpretation of the history and tradition of the Establishment Clause regarding prayer indicates the Court will likely reevaluate the constitutionality of facilitated prayer in public schools. Accordingly, "[t]he history of man is inseparable from the history of religion,"[246] and the current Court will determine the new scope of separation between religion and the public sphere, in *Lemon*'s absence, in the public school context.

245. *See*, *e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022) (overturning *Roe v. Wade* and *Planned Parenthood of Se. Pa. v. Casey* and holding abortion is not implicitly protected by the Constitution); N.Y. State Rifle & Pistol Assoc. v. Bruen, 142 S. Ct. 2111, 2156 (2022) (striking down New York's proper cause requirement as violating the Fourteenth Amendment right to keep and bear arms); Carson v. Makin, 142 S. Ct. 1987, 2002 (2022) (striking down Maine's "nonsectarian" requirement for otherwise generally available tuition assistance payments as violating the Free Exercise Clause of the First Amendment).

246. *Engel*, 370 U.S. at 434.