
THREE HAIL MARYS:
CARSON, KENNEDY, AND THE FRACTURED DÉTENTE
OVER RELIGION AND EDUCATION

*Justin Driver**

It is not too optimistic to suggest that [School District of Abington Township v. Schempp¹] may well be the last major battle . . . in the area of religion in the public schools. . . . [T]he controversy . . . will begin to disappear as a major national issue.

— Leo Pfeffer, Counsel for the American Jewish Congress, 1963²

[W]hy isn't she praying? Isn't she a Christian?

— Anonymous spectator at a public school basketball game after a seventh-grade player declined to participate in a coach-led team prayer, late 1980s³

INTRODUCTION

On December 28, 1975, the Dallas Cowboys trailed the Minnesota Vikings, 14–10, on the road, in the waning seconds of a playoff game.⁴ Dallas needed a quick touchdown to save its season, but the line of scrimmage stood only at midfield — fifty long yards away from the Vikings' end zone.⁵ After dropping back to pass in the brisk Minnesota air, legendary Dallas quarterback Roger Staubach heaved the football in the general direction of a darting Drew Pearson, who somehow man-

* Justin Driver is the Robert R. Slaughter Professor of Law at Yale Law School. I am grateful to William Baude, Gregory Briker, Laura Ferry, Heather Gerken, Pratheepan Gulasekaram, Emma Kaufman, Randall Kennedy, Randy Kozel, Douglas Laycock, Sanford Levinson, Kerrel Murray, Lucas Powe, and David Schleicher for providing illuminating comments on a previous draft. I received indispensable research assistance and editorial assistance from Samantha Bensinger, Liam Gennari, Jim Huang, Cynthia Long, Patrick Monaghan, James Piltch, Anna Salvatore, and Jordan Thomas. Thanks to the talented, insightful editors of the *Harvard Law Review* for their faith in the project. This Comment is dedicated to the memory of Walter Dellinger, with gratitude for the many essential lessons he taught.

¹ 374 U.S. 203 (1963).

² LEO PFEFFER, JOINT ADVISORY COMM. OF THE SYNAGOGUE COUNCIL OF AM. & THE NAT'L CMTY. RELS. ADVISORY COUNCIL, THE SUPREME COURT'S BIBLE-PRAYER DECISION (SCHOOL DISTRICT V. SCHEMPP; MURRAY V. CURLETT) 8 (1963).

³ *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 404 (5th Cir. 1995).

⁴ Mickey Spagnola, *A Pass and a Prayer: History of the Hail Mary*, DALL. COWBOYS (Nov. 8, 2019, 2:00 PM), <https://www.dallascowboys.com/news/a-pass-and-a-prayer-history-of-the-hail-mary> [<https://perma.cc/424D-7R2R>].

⁵ *Id.*

aged to corral the pass between his elbow and hip to secure an improbable — even miraculous — winning touchdown.⁶ “It was a play you hit one in a hundred times if you’re lucky,” Staubach told reporters afterward.⁷ “[I]t’s a Hail Mary pass. You throw it up and pray he catches it.”⁸ The Staubach-to-Pearson connection popularized the idea of a Hail Mary event — a desperate attempt that possesses an infinitesimal likelihood of success.⁹ Although the term’s colloquial usage began in the sports world, its reach now extends well beyond — including into the legal realm, where judges with some frequency invoke the metaphor, often to reject a litigation long shot.¹⁰

Toward the end of last Term, the Supreme Court issued two momentous decisions involving religion and education: *Carson v. Makin*¹¹ and *Kennedy v. Bremerton School District*.¹² In both *Carson* and *Kennedy*, the Court found that governmental entities violated the Constitution’s Free Exercise Clause,¹³ even though not so very long ago those claims would have readily been deemed Hail Marys. Indeed, as recently as the turn of the century, it seemed virtually unimaginable that the Supreme Court would have voted to grant certiorari in either *Carson* or *Kennedy*,

⁶ Sam Farmer, *Cowboys’ Drew Pearson Shares Inside Info on Original “Hail Mary” Touchdown Pass*, L.A. TIMES (Dec. 21, 2019, 3:04 PM), <https://www.latimes.com/sports/story/2019-12-21/cowboys-drew-pearson-inside-info-original-hail-mary-touchdown-pass> [<https://perma.cc/K46T-4TXN>].

⁷ JOSH CHETWYND, THE FIELD GUIDE TO SPORTS METAPHORS: A COMPENDIUM OF COMPETITIVE WORDS AND IDIOMS 63 (2016) (internal quotation marks omitted).

⁸ *Id.* (internal quotation marks omitted).

⁹ Popularized, not invented. The “Hail Mary” term appeared in football circles dating back at least to the 1920s. In 1922, one Notre Dame player commented after the team defeated Georgia Tech: “Say, that Hail Mary is the best play we’ve got.” Angelo Stagnaro, *How the Hail Mary Pass Got that Name*, NAT’L CATH. REG. (Apr. 13, 2017) (internal quotation marks omitted), <https://www.ncregister.com/blog/how-the-hail-mary-pass-got-that-name> [<https://perma.cc/JD3W-R3DD>].

¹⁰ *See, e.g.*, *Lee v. United States*, 137 S. Ct. 1958, 1967 (2017) (observing that a criminal defendant “would have rejected any plea leading to deportation — even if it shaved off prison time — in favor of throwing a ‘Hail Mary’ at trial”); *United States v. George*, 676 F.3d 249, 251 (1st Cir. 2012) (“A Hail Mary pass in American football is a long forward pass made in desperation at the end of a game, with only a small chance of success. The writ of error coram nobis is its criminal-law equivalent.”); *In re Lionel Corp.*, 722 F.2d 1063, 1072 (2d Cir. 1983) (Winter, J., dissenting) (“The courts below were quite right in not treating their arguments seriously for they are the legal equivalent of the ‘Hail Mary pass’ in football.”); *Nat’l Football League Players Ass’n v. Pro-Football, Inc.*, 857 F. Supp. 71, 75–76 (D.D.C. 1994) (“The defendants next turn to the ‘Hail Mary’ of challenges to an arbitrator’s decision, public policy. . . . Such public policy arguments, much like Hail Mary passes, are usually unsuccessful.”), *vacated*, 56 F.3d 1525 (D.C. Cir. 1995), *vacated in part on reh’g*, 79 F.3d 1215 (D.C. Cir. 1996); *see also* Isaac Chotiner, *The Supreme Court’s History of Protecting the Powerful*, NEW YORKER (May 17, 2022), <https://www.newyorker.com/news/q-and-a/the-supreme-courts-history-of-protecting-the-powerful> [<https://perma.cc/92M4-SMWH>] (interviewing Professor Laurence Tribe, who contended that the modern Republican Party has moved away from the commitments of Chief Justice Roberts in that today’s GOP is “much less Burkean, much less incremental, much more radical and willing to toss Hail Marys”).

¹¹ 142 S. Ct. 1987 (2022).

¹² 142 S. Ct. 2407 (2022).

¹³ U.S. CONST. amend. I (“Congress shall make no law . . . prohibiting the free exercise [of religion] . . .”).

let alone that it would find the underlying claims of religious infringement meritorious. Two decades have succeeded in transforming yesteryear's Hail Marys into today's answered prayers.¹⁴

In *Carson*, the Court held that Maine violated the Free Exercise Clause by prohibiting students from using a state-run tuition assistance program to attend religious schools engaging in religious instruction when they can otherwise use the assistance at all private schools.¹⁵ That claim would have been a constitutional long shot in 2002 because the Supreme Court had decided in *Zelman v. Simmons-Harris*¹⁶ only that year — and by the slimmest of possible margins — that students could redeem government vouchers at religious schools without violating the Establishment Clause.¹⁷ *Zelman v. Simmons-Harris* represented a sea change, one that many commentators detested.¹⁸ It is one thing to determine that the funding of religious schools is *permissible* under the Establishment Clause. But it is quite another to determine that including religion-oriented schools in funding schemes is *required* by the Free Exercise Clause.¹⁹ *Carson* took that additional step, and, according to its detractors, hastily enacted a radical reinterpretation of the Religion Clauses. Justice Sotomayor's dissent in *Carson* repeatedly struck this temporal point, noting that “in just a few years, the Court has upended constitutional doctrine,” and condemning “the Court's rapid transformation of the Religion Clauses.”²⁰ At least one legal scholar who celebrated *Carson*'s outcome, and who had worked for a long time to

¹⁴ Justice Sotomayor's dissent in *Carson* at times contended that the transformation occurred even more quickly: “What a difference five years makes.” 142 S. Ct. at 2014 (Sotomayor, J., dissenting). Rapid change, it would seem, is not an unfamiliar sight on the landscape of judicial decisions involving religious liberty. Professor Stephen Carter opened his Comment in these pages on *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), by noting: “What a difference three years can make.” Stephen L. Carter, *The Supreme Court, 1992 Term — Comment: The Resurrection of Religious Freedom?*, 107 HARV. L. REV. 118, 118 (1993). Carter was emphasizing the Court's turnabout from what he called its “horrible 1990 decision in *Employment Division v. Smith*,” 494 U.S. 872 (1990). Carter, *supra*, at 118.

¹⁵ *Carson*, 142 S. Ct. at 2002.

¹⁶ 536 U.S. 639 (2002).

¹⁷ *Id.* at 662–63. For a contemporaneous view holding out the possibility that *Zelman v. Simmons-Harris* may not prove to be a durable decision, see Charles Fried, *The Supreme Court, 2001 Term — Comment: Five to Four: Reflections on the School Voucher Case*, 116 HARV. L. REV. 163, 174–77 (2002).

¹⁸ See, e.g., Stephen M. Feldman, *Religious Minorities and the First Amendment: The History, the Doctrine, and the Future*, 6 U. PA. J. CONST. L. 222, 263–65 (2003); Editorial, *The Wrong Ruling on Vouchers*, N.Y. TIMES, June 28, 2002, at A26; Dahlia Lithwick, *The Supremes Pledge Allegiance to God.*, SLATE (June 27, 2002, 7:08 PM), <https://slate.com/news-and-politics/2002/06/the-supremes-pledge-allegiance-to-god.html> [<https://perma.cc/Q8J9-MYPB>].

¹⁹ See *Carson*, 142 S. Ct. at 2006 (Breyer, J., dissenting).

²⁰ *Id.* at 2013–14 (Sotomayor, J., dissenting).

achieve it, nevertheless observed that the challenge had, at times, seemed a quixotic mission.²¹

In *Kennedy*, the Court held that a public school district violated a football coach's free exercise and free speech rights when it sanctioned him for striding out to midfield following games and taking a knee to bow his head in prayer.²² The Court focused exclusively upon "the three prayers that resulted in [Coach Joseph Kennedy's] suspension," which were relatively brief and did not involve his players, even though he had previously led the team in locker-room prayers and delivered postgame sermons to players at midfield.²³ This constitutional claim would have been a long shot in 2000 for many reasons, not least because the Court that year prohibited student-led prayers at public high school football games in Santa Fe, Texas, for violating the Establishment Clause.²⁴ Prayers led by school officials would, if anything, seem to present an even more conspicuous violation of that constitutional provision. *Santa Fe Independent School District v. Doe*,²⁵ moreover, expressly directed courts to construe Establishment Clause challenges in their full, rich context, rather than viewing them in the isolated, highly stylized fashion employed in *Kennedy*.²⁶

Distinguished left-leaning scholars noted that Coach Kennedy would have had little chance of prevailing if Justice Kennedy still held the decisive vote regarding such claims.²⁷ That is no great surprise, of course. But prominent conservatives also long viewed conduct resembling Coach Kennedy's as contravening the Establishment Clause, notions they articulated before the Court issued *Santa Fe*. Professor Michael McConnell — the intellectual architect for the accommodationist ascendance in this area — observed in 1991 that "if a public school football coach (or even a member of the team) offers a prayer or other

²¹ See Nicole Stelle Garnett, *A Victory for Religious Liberty and Educational Pluralism*, CITY J. (June 22, 2022), <https://www.city-journal.org/carson-v-makin-is-a-victory-for-religious-liberty> [<https://perma.cc/9JEV-M7ZP>] (noting that when she initially helped to mount a challenge to the Maine program that was ultimately invalidated in *Carson*, "it wasn't clear whether the Constitution even permitted states to include religious schools in choice programs, let alone whether it required them to do so").

²² *Kennedy*, 142 S. Ct. at 2433.

²³ See *id.* at 2424–25.

²⁴ *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 310–12 (2000).

²⁵ 530 U.S. 290 (2000).

²⁶ *Id.* at 308 (noting that the Establishment Clause inquiry centered on "an objective observer, acquainted with the text, legislative history, and implementation" of the challenged actions in the relevant context (quoting *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring in the judgment))).

²⁷ See, e.g., Greg Bishop, *When Faith and Football Teamed Up Against American Democracy*, SPORTS ILLUSTRATED (June 13, 2022), <https://www.si.com/high-school/2022/06/13/fear-over-scotus-ruling-in-public-school-coach-prayer-case-daily-cover> [<https://perma.cc/G9MV-UJT5>] (noting that Professor Michael Klarman deemed it improbable that Coach Kennedy would have prevailed if Justice Kennedy had remained on the Court).

religious inspiration before the game, he will be stopped.”²⁸ Four years later, in a case evaluating coach-led prayers during public school basketball games, Judge Edith Jones allowed: “There is practically no doubt” that the Court’s interpretation of the Establishment Clause “prevents teachers from actively joining in . . . student-led prayers” because allowing teachers to do so “would imply coercion of non-participants.”²⁹ Few facts bring into sharper relief the sheer improbability of Coach Kennedy’s victory this year than that accommodationists (like Professor McConnell) and archconservatives (like Judge Jones) concluded coach-led prayers at public schools were unconstitutional in the 1990s.

Most observers will view *Carson* and *Kennedy* as an inseparable pair. Liberals will tend to decry both decisions as forming only the latest attacks on the once-sturdy wall of separation between church and state.³⁰ Conservatives will tend to applaud both decisions as eliminating egregious manifestations of antireligion hostility and thus restoring the role that faith can play in our national life.³¹ This liberal-conservative divide held perfectly at the Supreme Court; the three Justices appointed by Democratic Presidents voted as a bloc to reject the Free Exercise Clause claims in both *Carson* and *Kennedy*, while the six Justices appointed by Republican Presidents voted as a bloc to accept such claims in the two opinions.³²

In this Comment, however, I challenge both of these camps, as *Carson* and *Kennedy* can be — and should be — disentangled. Viewed

²⁸ Michael W. McConnell, *A Response to Professor Marshall*, 58 U. CHI. L. REV. 329, 329 (1991). For only one of McConnell’s influential scholarly works exploring accommodation, see Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1 (1986).

²⁹ *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 409 (5th Cir. 1995) (Jones, J., concurring in part and dissenting in part).

³⁰ See, e.g., Noah Feldman, Opinion, *The Supreme Court Has Just Eroded First Amendment Law*, BLOOMBERG (June 21, 2022, 4:52 PM), <https://www.bloomberg.com/opinion/articles/2022-06-21/supreme-court-aids-religious-education-and-erodes-first-amendment> [https://perma.cc/3U75-BT6V]; Noah Feldman, Opinion, *Supreme Court Is Eroding the Wall Between Church and State*, BLOOMBERG (June 27, 2022, 12:05 PM), <https://www.bloomberg.com/opinion/articles/2022-06-27/supreme-court-upends-church-state-law-in-case-of-praying-coach> [https://perma.cc/FC3H-LWGG]. For some of Professor Noah Feldman’s earlier assessments of the Religion Clauses, see NOAH FELDMAN, *DIVIDED BY GOD: AMERICA’S CHURCH-STATE PROBLEM — AND WHAT WE CAN DO ABOUT IT* (2005). For a critique of Feldman’s position, see Douglas Laycock, *Substantive Neutrality Revisited*, 110 W. VA. L. REV. 51, 72–80 (2007).

³¹ See, e.g., Patrick M. Garry, Essay, *Establishing Religious Freedom*, LAW & LIBERTY (July 5, 2022), <https://lawliberty.org/establishing-religious-freedom> [https://perma.cc/R8Q6-8NTY] (celebrating *Carson* and *Kennedy*).

³² *Carson*, 142 S. Ct. at 1992 (majority opinion written by Chief Justice Roberts and joined by Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett); *id.* at 2002 (Breyer, J., dissenting) (joined by Justice Kagan in full and Justice Sotomayor in part); *id.* at 2012 (Sotomayor, J., dissenting); *Kennedy*, 142 S. Ct. at 2415 (majority opinion written by Justice Gorsuch and joined by Chief Justice Roberts and Justices Thomas, Alito, and Barrett in full and Justice Kavanaugh in part); *id.* at 2434 (Sotomayor, J., dissenting) (joined by Justices Breyer and Kagan); Ian Prasad Philbrick, *A Pro-Religion Court*, N.Y. TIMES (June 22, 2022), <https://www.nytimes.com/2022/06/22/briefing/supreme-court-religion.html> [https://perma.cc/F6QC-W5XW]; Adam Liptak & Jason Kao, *Looking Back over a Landmark Supreme Court Term*, N.Y. TIMES, July 3, 2022, at A16.

through the prism of the Supreme Court's jurisprudence regulating schools, *Carson* offered an acceptable outcome, whereas *Kennedy* unwisely invited the scourge of religious coercion to reenter the nation's public schools. Although the Supreme Court issued some incendiary decisions at the intersection of religion and education in the 1960s, the Court had in recent decades achieved an improbable *détente* in this area. A core element of that *détente* has been its staunch protection of the public school as a place where pupils are free from the specter of religious orthodoxy. With that central tenet firmly in place, the Court issued several education decisions that cheered observers desiring greater accommodations of religion — including a series of opinions enabling religious families to use public money to educate their children at private religious schools. Those decisions were vital to the *détente*, but they in no way threatened the public school as a sphere where students enjoy religious autonomy. *Carson* — viewed in isolation — can quite plausibly be understood as maintaining this *détente*. *Kennedy*, however, unmistakably fractures the *détente*, bringing to an immediate halt any era of rapprochement. Only one year after the Supreme Court issued the stirring proclamation that “America’s public schools are the nurseries of democracy,” *Kennedy* threatens to render them the hotbeds of divinity.³³

Kennedy represents a brazen, radical break with the Supreme Court's longstanding tradition of construing public schools as special sites of constitutional interpretation. Indeed, during the last several decades, the Supreme Court has developed a distinct constitutional doctrine that applies exclusively within the nation's public schools.³⁴ When the Court has treated the public school as an arena of constitutional interpretation, it has typically afforded students what might be termed junior-varsity constitutional rights. That is, rather than providing students in public schools with the full-fledged array of constitutional protections that exist in non-school environments, the Supreme Court has

³³ *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2046 (2021); see MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY 232–33 (2008) (noting that “[t]he public schools have long held a special place in Americans’ conception of their democracy,” and observing that the public schools’ democratic foundation renders “Americans . . . unusually sensitive to the ways in which religion might enter divisively into public education”).

³⁴ I borrow this insight from Professor James Ryan’s foundational, first-rate article assessing students’ constitutional rights. See James E. Ryan, *The Supreme Court and Public Schools*, 86 VA. L. REV. 1335, 1338–39 (2000). More broadly, the Constitution assumes distinct contours in distinct institutional settings. For work exploring the distinctive constitutional contours of prison, see Justin Driver & Emma Kaufman, *The Incoherence of Prison Law*, 135 HARV. L. REV. 515, 525–41 (2021). For work exploring related notions of constitutionally distinct domains, see, for example, Heather K. Gerken, *The Supreme Court, 2006 Term — Comment: Justice Kennedy and the Domains of Equal Protection*, 121 HARV. L. REV. 104, 108–22 (2007); ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT (1995); and PAUL HORWITZ, FIRST AMENDMENT INSTITUTIONS (2013).

often articulated somewhat diluted versions of those rights for the scholastic context.³⁵ This junior-varsity dynamic captures the Court's approach regarding free speech, where students receive not the "uninhibited, robust, and wide-open" First Amendment rights that exist outside of school,³⁶ but instead the more modest protections associated with *Tinker v. Des Moines Independent Community School District*³⁷ and its progeny.³⁸ Chief Justice Burger acknowledged this school-specific free speech doctrine when he noted: "[T]he First Amendment gives a . . . student the classroom right to wear Tinker's armband, but not Cohen's jacket."³⁹ Similarly, regarding the Fourth Amendment, students do not receive protection against school searches in the absence of "probable cause," but instead receive the more lenient standard of "reasonable suspicion," as announced in *New Jersey v. T.L.O.*⁴⁰ Additional examples of public school students receiving diminished constitutional rights could easily be adduced.⁴¹

In one exceptional area, however, the Supreme Court has inverted its traditional approach. The Court has repeatedly interpreted the Establishment Clause to afford public school students greater constitutional protections against religious coercion than they would possess outside of school.⁴² This capacious understanding of the Establishment Clause is driven by the Court's view that public schools can become uniquely coercive religious environments, and that preventing educators from becoming proselytizers requires the utmost vigilance.⁴³ The Supreme Court has thus stated that Establishment Clause concerns are "most pronounced" in "the context of schools," and that "prayer exercises

³⁵ See Ryan, *supra* note 34, at 1338–39.

³⁶ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Though *New York Times v. Sullivan* is a case involving libel, I use it here as being emblematic of the Court's broad protections for free expression. For a historical overview of the case, see ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* (1991).

³⁷ 393 U.S. 503 (1969).

³⁸ *Id.* at 513–14 (permitting schools to sanction students for speech upon a reasonable fear of a substantial disruption or material interference of school activities).

³⁹ *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682–83 (1986) (quoting *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1057 (2d Cir. 1979) (Newman, J., concurring in the result)). The references are, of course, to the black armbands worn to school in protest of the Vietnam War in *Tinker* and the jacket emblazoned "Fuck the Draft" that was worn in a courthouse in *Cohen v. California*, 403 U.S. 15, 16 (1971).

⁴⁰ 469 U.S. 325, 345 (1985).

⁴¹ See Ryan, *supra* note 34, at 1338, 1364 (noting that the Due Process Clause rights that students received in *Goss v. Lopez*, 419 U.S. 565, 579–82 (1975), assumed diluted form compared to due process rights in nonschool settings).

⁴² See *id.* at 1339.

⁴³ See *id.* at 1382 ("[C]hildren in school are young and impressionable, and they are likely to imitate teachers and be susceptible to peer pressure.").

in public school carry a particular risk of indirect coercion.”⁴⁴ Whereas public school educators typically receive greater constitutional leeway over students’ rights than do other governmental actors, the Court has placed unusually exacting restraints on educators in the Establishment Clause context.⁴⁵

Focusing upon the Supreme Court’s history of site-specific constitutional interpretation enables last Term’s prominent religion decisions to be decoupled. This lens makes clear that *Kennedy* betrayed the Court’s venerable Establishment Clause tradition in the public school setting by not only ignoring the fundamental realities of athletic environments, but also misconstruing Bremerton High School as just another government building.⁴⁶ *Carson*, whatever else its frailties, cannot be accused of similar mischief — assuming, of course, that its reasoning is not eventually extended to intrude into public education in the form of charter schools. Rather, *Carson* can be viewed as consistent with precedent — notably *Meyer v. Nebraska*⁴⁷ — that allows private religious schools to chart their own courses.⁴⁸

This Comment proceeds in four Parts. Part I recovers the period of widespread religious incursion into public schools, and then details the terms of détente that the judiciary has helped to forge at the intersection of religion and education. Part II contends that *Carson* can in fact be reconciled with the détente — that is, taking the opinion on its own terms, and assuming that it is not extended to the realm of charter schools, as some scholars have recently urged. Part III demonstrates how *Kennedy* ruptures the détente by turning a blind eye to realities of both public schools and athletics, settings where the Court had previously demonstrated deep engagement with the underlying complexities. Part IV explores how the Court’s decisions in *Carson* and *Kennedy* are linked, investigates the implications of *Kennedy*’s breaking the terms of détente, and suggests that a third Hail Mary may well be on the horizon. A brief conclusion follows.

Given its focus on the Supreme Court’s role in facilitating détente, it may at first blush seem as though this Comment adopts an exclusively

⁴⁴ *Lee v. Weisman*, 505 U.S. 577, 592 (1992) (citing *Engel v. Vitale*, 370 U.S. 421 (1962); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963); *County of Allegheny v. ACLU*, 492 U.S. 573, 661 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part)); see William P. Marshall, “*We Know It When We See It*”: *The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495, 541 (1986) (“The Court has been its most consistent and forceful in the context of public schools.”).

⁴⁵ See Ryan, *supra* note 34, at 1338–39; JUSTIN DRIVER, *THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND* 363 (2018) (noting that “educators [receive] less deference over religion than they generally receive” regarding other constitutional provisions, and that “the Establishment Clause . . . presents a highly aberrational mode of constitutional interpretation within the schoolhouse gate”).

⁴⁶ See *Kennedy*, 142 S. Ct. at 2433 (describing the school district as “a government entity”).

⁴⁷ 262 U.S. 390 (1923).

⁴⁸ See *id.* at 403.

external approach to *Carson* and *Kennedy* and ignores the basic constitutional law of the Religion Clauses. I have learned a great deal from external accounts examining the development of constitutional doctrine, and have no doubt that they have influenced my own approach.⁴⁹ In addition, it is certainly true I do not approach these cases with the same methods that legal scholars of religion typically employ.⁵⁰ Nevertheless, it would be mistaken to construe this Comment as offering only external assessments of *Carson* and *Kennedy*. To the contrary, the prudential and doctrinal considerations highlighted in this Comment have been a touchstone of the Supreme Court's site-sensitive approach to the constitutional law of public schools for the last several decades.⁵¹ Those considerations are in no sense external or somehow extralegal; rather, they have long rested at the very heart of the Court's jurisprudence regarding schools. Until quite recently, then, viewing *Carson* and *Kennedy* as school cases involving religion — rather than religion cases involving schools — would have been the standard perspective in this constitutional domain. My approach thus helps to underscore how *Kennedy*'s disregard for the site-sensitive methodology is the aberration, not the tradition.

I. THE ELEMENTS OF DÉTENTE

Before appreciating how *Kennedy* fractured the détente over religion and education, it is necessary first to contemplate how religious expression once pervaded the American public school system. Highlighting the regrettable, repressive state of affairs that existed before the Supreme Court addressed school prayer is not, alas, merely an antiquarian inquiry. Instead, the coercive religious atmosphere that reigned prior to *Engel v. Vitale*⁵² in 1962 seems to anticipate the shape of things to come.

* * *

⁴⁹ For the classic article in this realm featuring an external approach, see John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 284 (2001) (noting that their approach pays "little heed . . . to the internal structure and logic of Establishment Clause decisions," and instead views those decisions as the product of larger cultural forces).

⁵⁰ From one internal viewpoint, particularly the notion that the state should demonstrate neutrality toward religion, *Carson* can be viewed as correctly decided and *Kennedy* can be viewed as incorrectly decided. Professor Douglas Laycock has offered an important notion of religious neutrality. See Laycock, *supra* note 30, at 72 ("[M]oney can be delivered in a way that is consistent with individual choice. Prayers cannot."). Laycock's notion of neutrality has profoundly shaped my prior explorations of this area. See DRIVER, *supra* note 45, at 364, 521 n.3.

⁵¹ Here, I am drawing on Professor Philip Bobbitt's six modalities of constitutional interpretation. See PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12–13 (1991).

⁵² 370 U.S. 421 (1962).

In Charlotte, North Carolina, during the early 1950s, an eleven-year-old boy named Walter Dellinger would wake up “every Thursday [morning] with a dull aching pain in the pit of [his] stomach.”⁵³ Dellinger, who grew up in a working-class household, would eventually rise to become a law clerk for Justice Black, a constitutional law professor at Duke University, and an Acting Solicitor General of the United States during the Clinton Administration.⁵⁴ But long before his storied legal career commenced, Dellinger dreaded Thursdays because that was when a Bible teacher would arrive in his fifth-grade class for her weekly, hour-long sessions.⁵⁵

The public schools in Charlotte — and around the nation, for that matter — routinely provided religious instruction to pupils during that era.⁵⁶ Although the lessons in Charlotte were billed as “non-denominational,” they in fact assumed a pan-Protestant tint.⁵⁷ Those weekly lessons posed considerable trouble for Dellinger because he was Catholic, and the tiny number of Catholics attending Charlotte public schools were encouraged not to participate.⁵⁸ (As Professor Paul Freund once observed: “One man’s piety is another’s idolatry.”⁵⁹) With the sole exception of a Jewish student named Victor Burg, all of Dellinger’s classmates looked forward to the Bible teacher’s visits, when they would “eat[] cookies, color[] pictures of Jesus, sing[] hymns and recit[e] prayers.”⁶⁰ Dellinger and Burg received special permission to be excused from participating in the Bible sessions, and their regular teacher would announce as the time approached: “Walter and Victor should now leave the room.”⁶¹ Four decades after these events occurred, Dellinger could still recall — or perhaps, more accurately, could not forget — the sting that he felt being repeatedly banished from the classroom due to his

⁵³ Walter Dellinger, *Say Amen, Or Else — Piety and the Law*, WASH. POST, Nov. 3, 1991, at C1; see also BRUCE J. DIERENFIELD, *THE BATTLE OVER SCHOOL PRAYER: HOW ENGEL V. VITALE CHANGED AMERICA 1–2* (2007) (recounting Dellinger’s anecdote of exclusion and dating the events to the early 1950s).

⁵⁴ See Clay Risen, *Walter Dellinger, Constitutional Scholar, Dies at 80*, N.Y. TIMES, Feb. 17, 2022, at A21.

⁵⁵ See Dellinger, *supra* note 53.

⁵⁶ See *id.*; Jeffries & Ryan, *supra* note 49, at 297–99; DIERENFIELD, *supra* note 53, at 2.

⁵⁷ See Dellinger, *supra* note 53 (referring to the lessons as “generically Protestant”); Jeffries & Ryan, *supra* note 49, at 330 (noting the continuance of “pan-Protestant religious exercises”).

⁵⁸ See Dellinger, *supra* note 53. For another gripping account of a student from a minority faith who attended North Carolina public schools in the 1950s and who would go on to become an esteemed figure in American law, see Sanford Levinson, *The (Possible) Impact of Judaism and Israel on One Particular Career as a Legal Academic*, 16 RUTGERS J.L. & RELIGION 321, 322–23 (2015). See also SANFORD LEVINSON, *WRESTLING WITH DIVERSITY 62–69* (2003) (recalling growing up in Hendersonville, North Carolina, as a member of a tiny Jewish community, and how Christianity informed his public school education).

⁵⁹ PAUL A. FREUND & ROBERT ULICH, *RELIGION AND THE PUBLIC SCHOOLS 14* (1965).

⁶⁰ Dellinger, *supra* note 53.

⁶¹ *Id.* (internal quotation marks omitted).

status as one of two religious minorities.⁶² Instead of spending time with their classmates, Dellinger and Burg were dispatched to the school library, where they spent the hour shelving books.⁶³

In 1962, roughly ten years after enduring weekly exiles from his fifth-grade classroom, Dellinger learned during his junior year of college about a recently issued Supreme Court decision called *Engel v. Vitale* — an opinion that heralded a new day for the place of religion in America's public schools.⁶⁴ In *Engel*, the Court evaluated a prayer composed by the New York State Board of Regents that ran as follows: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."⁶⁵ The prayer was intended — like Charlotte's Bible classes — to be non-denominational.⁶⁶ Nevertheless, the Supreme Court in *Engel* invalidated the Regents-devised prayer as violating the Establishment Clause, marking its first major effort to rid public schools of prayers backed by government authority.⁶⁷ "When the power, prestige and financial support of government is placed behind a particular religious belief," Justice Black wrote for the Court, "the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."⁶⁸

It would be virtually impossible to exaggerate the vehement disapproval that *Engel* generated across the nation. On Long Island, New York, where the *Engel* lawsuit originated, one superintendent spoke for many who derided the Court's decision as attacking the very heart of education itself: "A school without a prayer is not a school."⁶⁹ A Gallup poll conducted shortly after the decision revealed that seventy-nine percent of Americans approved of "religious observances in public

⁶² See *id.* One did not, of course, need to be a religious minority to appreciate the awkwardness of such situations. Stephen Carter recalled attending public school in Washington, D.C., where every morning a Christian student would read a psalm aloud, while the small number of Jewish students were excluded from the practice. "I . . . recall . . . feeling with the sharp empathy of a seven-year-old the exclusion of Jewish kids: how, I often wondered, do they feel at this moment?" STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* 185 (1993).

⁶³ See Dellinger, *supra* note 53. For a related account of being a religious minority who attended a public school during the 1950s, see Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743, 743-44 (1992).

⁶⁴ Dellinger, *supra* note 53; *Engel v. Vitale*, 370 U.S. 421 (1962).

⁶⁵ *Engel*, 370 U.S. at 422.

⁶⁶ *The Court Decision — and the School Prayer Furor*, NEWSWEEK, July 9, 1962, at 43.

⁶⁷ See *Engel*, 370 U.S. at 424.

⁶⁸ *Id.* at 431. For an account of the external forces — including increased religious pluralism within the United States — that led the Court to issue *Engel* in the early 1960s, see Jeffries & Ryan, *supra* note 49, at 319-23.

⁶⁹ *The Court Decision — and the School Prayer Furor*, *supra* note 66, at 45.

schools.”⁷⁰ Noted theologian Reinhold Niebuhr, no one’s idea of a reactionary, bemoaned *Engel* for “practically suppress[ing] all religion, especially in the public schools.”⁷¹ Senator Sam Ervin of North Carolina — a graduate of Harvard Law School and a former state supreme court justice — put the matter more bluntly: “The Supreme Court has held that God is unconstitutional.”⁷² In this same spirit, Chief Justice Earl Warren recalled encountering one newspaper headline that blared: “Court outlaws God.”⁷³

Despite this firestorm of criticism, the Supreme Court had — until last Term — remained vigilant in using the Establishment Clause to protect public school students from the specter of government-endorsed prayers for the last six decades. In *Engel*’s immediate aftermath, the Court invalidated school-sponsored Bible reading in *School District of Abington Township v. Schempp*.⁷⁴ In 1980, in one of the most underappreciated cases in American constitutional law, the Court in *Stone v. Graham*⁷⁵ barred states from posting copies of the Ten Commandments in public school classrooms.⁷⁶ Twelve years later, the Court in *Lee v. Weisman*⁷⁷ blocked public schools from selecting members of the clergy to deliver prayers at public school graduation ceremonies.⁷⁸ Finally, in 2000, the Court in *Santa Fe Independent School District v. Doe* prohibited students from delivering official prayers at public school football games.⁷⁹

This unbroken series of school-sponsored prayer decisions has elicited disdain from cultural conservatives, who often argue that the Court has exhibited hostility toward religion and assert that this posture has severely harmed the nation. Critics of those decisions have long portrayed themselves as members of a beleaguered, even oppressed, group — a trend that continues into the modern era.⁸⁰ Back in 1963, Governor George Wallace of Alabama offered an early articulation of the politics of Christian aggrievement in reacting to the Court’s decision

⁷⁰ Linda Lyons, *The Gallup Brain: Prayer in Public Schools*, GALLUP (Dec. 10, 2002) (internal quotation marks omitted), <https://news.gallup.com/poll/7393/gallup-brain-prayer-public-schools.aspx> [<https://perma.cc/5E76-SP7R>].

⁷¹ JAMES T. PATTERSON, *GRAND EXPECTATIONS: THE UNITED STATES, 1945–1974*, at 567 (1996) (internal quotation marks omitted).

⁷² DIERENFIELD, *supra* note 53, at 148 (internal quotation marks omitted). For an evaluation of Senator Ervin’s pivotal role in shaping the segregationist response to *Brown v. Board of Education*, see Justin Driver, *Supremacies and the Southern Manifesto*, 92 *TEX. L. REV.* 1053, 1070, 1077–78, 1083, 1098, 1115, 1124–27 (2014).

⁷³ EARL WARREN, *THE MEMOIRS OF CHIEF JUSTICE EARL WARREN* 316 (1977).

⁷⁴ 374 U.S. 203, 223 (1963).

⁷⁵ 449 U.S. 39 (1980) (per curiam).

⁷⁶ *Id.* at 42–43.

⁷⁷ 505 U.S. 577 (1992).

⁷⁸ *Id.* at 599.

⁷⁹ 530 U.S. 290, 312–13 (2000).

⁸⁰ See JONATHAN ZIMMERMAN, *WHOSE AMERICA?: CULTURE WARS IN THE PUBLIC SCHOOLS* 180 (2d ed. 2022); *infra* pp. 249–52.

in *Schempp*: “I wouldn’t be surprised if they sent troops into the classrooms and arrested little boys and girls who read the Bible and pray.”⁸¹ Such arrests were, of course, unthinkable, but Wallace’s statements helped to stoke the fires of religious resentment.⁸²

By the 1980s, the Republican Party had fully embraced the cause of condemning the Court’s decisions in this area. Indeed, President Ronald Reagan in 1982 proposed a constitutional amendment designed to restore official prayers to public schools.⁸³ One year later, in touting this constitutional amendment, President Reagan quipped in his State of the Union address: “God should never have been expelled from America’s classrooms in the first place.”⁸⁴ In 1984, as First Lady Nancy Reagan’s “Just Say No” antidrug campaign was gaining steam, President Reagan went one step further by connecting the Court’s school prayer decisions to what he deemed the nation’s cultural deterioration.⁸⁵ “If we could get God and discipline back in our schools,” President Reagan contended, “maybe we could get drugs and violence out.”⁸⁶ Restoring prayer to public schools, it seemed, formed a vital part of President Reagan’s effort to Make America Great Again.⁸⁷ Predictably, the Religious Right advanced these ideas with even greater intensity. “[T]he greatest enemy of our children today in [the] United States . . . is the public school system,” Reverend Jimmy Swaggart warned in 1985.⁸⁸ “It is education without God.”⁸⁹

While prominent Americans have often lamented the Court’s school prayer decisions, it would be utterly mistaken to believe that constitutional conflicts over religion and education have raged continuously at the same fever pitch. To the contrary, the dawn of the twenty-first century witnessed a sustained period of détente in the wars over religion in

⁸¹ ZIMMERMAN, *supra* note 80, at 161 (internal quotation marks omitted).

⁸² *Id.*

⁸³ *Reagan Proposes School Prayer Amendment*, N.Y. TIMES, May 18, 1982, at A24.

⁸⁴ HOWARD GILLMAN & ERWIN CHEMERINSKY, *THE RELIGION CLAUSES: THE CASE FOR SEPARATING CHURCH AND STATE* 11 (2020) (internal quotation marks omitted). In one of his weekly presidential radio addresses, President Reagan offered a homespun version of this idea: “[T]he good Lord who has given our country so much should never have been expelled from our nation’s classrooms.” DIERENFIELD, *supra* note 53, at 196.

⁸⁵ DRIVER, *supra* note 45, at 11 (discussing Nancy Reagan’s “Just Say No” campaign); Susan Page, *Reagan Whoops It Up at Two Iowa Rallies*, NEWSDAY, Feb. 21, 1984, at 15A1; Rita Ciolli, *The Push for School Prayer: A Holy War Is Shaping Up in the Congress*, NEWSDAY, Mar. 13, 1984, at 4.

⁸⁶ ZIMMERMAN, *supra* note 80, at 182.

⁸⁷ See Jeremy W. Peters, *Gloomy Republican Campaigns Leave Behind Reagan Cheer*, N.Y. TIMES (Sept. 12, 2015), <https://www.nytimes.com/2015/09/13/us/politics/gloomy-republican-campaigns-leave-behind-reagan-cheer.html> [<https://perma.cc/ZN8G-GG25>] (noting that President Reagan debuted the Make America Great Again slogan that President Trump echoed in his successful presidential run in 2016).

⁸⁸ JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* 203 (1991) (omission in original) (internal quotation marks omitted).

⁸⁹ *Id.*

American schools that began with *Engel* in 1962. I ventured this argument four years ago in a chapter of *The Schoolhouse Gate: Public Education, the Supreme Court, and the Battle for the American Mind* titled “The Quiet Détente over Religion and Education.”⁹⁰ The Court in no way retreated from its foundational commitment to ensuring that neither educators nor their emissaries could coerce or pressure public school students into participating in religious observances.⁹¹ The Supreme Court’s decisions in this area have been unwavering, and they have spared many young people the anguish and aching stomach that beset young Walter Dellinger.⁹²

At the same time, three major legal developments occurred in recent decades that helped to produce détente. I analyzed these elements of détente at considerable length in *The Schoolhouse Gate*, so I will recount them only briefly here. First, the judiciary has made it clear that public schools are in no sense God-free zones. Public schools are, even in the aftermath of *Wallace v. Jaffree*,⁹³ welcome to observe moments of silence, when students who feel so inclined may take a moment to pray.⁹⁴ That development, along with a Supreme Court decision upholding a federal statute that recognized the legitimacy of co-curricular religious clubs,⁹⁵ reassured parents that their children need not curb their religious identities within the public school environment.⁹⁶

Second, the remarkable rise of homeschooling among particularly devout families since the 1990s has obviated many legal conflicts over public school curricula that those families would have pursued had their children remained in public schools.⁹⁷ When the Supreme Court declined to grant certiorari on a major free exercise challenge to textbooks used in public schools during the 1980s, Michael Farris of the Home School Legal Defense Association proclaimed: “It’s time for every born-again Christian in America to take their children out of public

⁹⁰ DRIVER, *supra* note 45, at 362–422.

⁹¹ *Id.* at 362–63.

⁹² I do not contend, of course, that *Engel* and *Schempp* found *immediate* acceptance in every public school throughout the nation. Rather, public schools in various regions responded quite distinctly to the Court’s efforts to reign in school-sponsored prayers, with the South exhibiting particular recalcitrance. Nevertheless, by 1973, ninety percent of the nation’s public schools adhered to the lessons of *Engel* and *Schempp*, and that percentage surely increased over the last five decades. *See id.* at 380–82 (extensively discussing regional variations to school prayer decisions and noting that ninety percent of schools followed the decisions within a decade).

⁹³ 472 U.S. 38 (1985).

⁹⁴ *Id.* at 60–61 (invalidating an Alabama moment of silence provision, but one that arose from highly unusual circumstances); *see* DRIVER, *supra* note 45, at 397 (noting that thirty-four states expressly permit or require public schools to observe a moment of silence and that no state has a policy prohibiting such moments).

⁹⁵ Bd. of Educ. v. Mergens, 496 U.S. 226, 253 (1990) (upholding the Equal Access Act).

⁹⁶ DRIVER, *supra* note 45, at 395.

⁹⁷ *Id.* at 400.

schools.”⁹⁸ The resulting public school exodus — 1.8 million children were homeschooled in 2012 — thus served to decrease the temperature dramatically regarding religious objections to school content.⁹⁹

Finally, as mentioned above, the Supreme Court in 2002 upheld the constitutionality of a voucher program in Cleveland, Ohio, that permitted students from low-income homes to use public funds to attend private schools, including those with religious affiliations.¹⁰⁰ When *Zelman v. Simmons-Harris* held that the Establishment Clause did not preclude states and localities from experimenting with vouchers for religious schools,¹⁰¹ the decision cheered cultural and free-market conservatives alike, who had long been irritated by what they deemed a misbegotten, stultifying barrier to educational innovation.¹⁰²

Before examining how *Carson* and *Kennedy* alter these terms of détente, two points bear emphasizing. First, in *The Schoolhouse Gate*, I pointedly used the term *détente*, and eschewed the term *peace*, to describe the relationship between religion and education.¹⁰³ Where *détente* denotes a relaxation or easing of strained relations, *peace* goes much further to describe a state of tranquility.¹⁰⁴ Second, and closely related to the first point, I did not pose as a latter-day Leo Pfeffer, whose decidedly unprophetic post-*Schempp* assessment serves as this Comment’s first epigraph. Instead of claiming, with Pfeffer, that the last major battle had been waged in this area, I noted: “None of the foregoing should be mistaken for asserting that contentious disputes over the role of religion in public schools have vanished altogether and will never reappear on the Supreme Court’s docket. Such a claim would be foolhardy.”¹⁰⁵ And indeed, the Supreme Court returned to this hotly contested arena when it addressed *Carson* and *Kennedy* last Term.

⁹⁸ *Id.* at 402. The Court’s denial of certiorari that drew Farris’s ire was *Mozert v. Hawkins County Board of Education*, 827 F.2d 1058 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988). DRIVER, *supra* note 45, at 401–02.

⁹⁹ See DRIVER, *supra* note 45, at 400.

¹⁰⁰ *Zelman v. Simmons-Harris*, 536 U.S. 639, 662–63 (2002).

¹⁰¹ *Id.*

¹⁰² See DRIVER, *supra* note 45, at 394. For a bold understanding of *Zelman v. Simmons-Harris*, see RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT* 500 (2014) (“[T]he difficult theoretical question with [*Simmons-Harris*] is not whether vouchers should be *allowed*, but whether they should be *required* in order to offset the powerful redistributive tendencies in favor of public school students under the current regime.”).

¹⁰³ See DRIVER, *supra* note 45, at 363 (contending that “these various developments have introduced a period of détente — even if not absolute peace — into the ‘culture wars’ arguments that have long predominated legal discussions involving religion and education”).

¹⁰⁴ Compare *Détente*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/detente> [<https://perma.cc/677Y-HFY2>], with *Peace*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/peace> [<https://perma.cc/4BFQ-296N>].

¹⁰⁵ DRIVER, *supra* note 45, at 420.

II. CARSON, “PUBLIC” EDUCATION, AND THE FUTURE OF CHARTER SCHOOLS

In 2018, Amy and David Carson, residents of Glenburn, Maine, wished to utilize a state tuition assistance program to send their daughter to Bangor Christian Schools.¹⁰⁶ Glenburn’s school district — like more than half of the school districts located in Maine¹⁰⁷ — had a sufficiently sparse population and was located in a sufficiently remote location that it did not operate its own high school.¹⁰⁸ Nor did Glenburn’s school district enter into an agreement with a neighboring public high school to educate its youth.¹⁰⁹ Accordingly, the Carsons’ residence in Glenburn qualified the family to use the tuition assistance program’s funds.¹¹⁰ But Maine’s Department of Education deemed Bangor Christian ineligible to receive the funds because it engaged in religious instruction.¹¹¹ The Carsons sued Maine, contending Bangor Christian’s exclusion from the tuition program violated the Free Exercise Clause.¹¹² Although the Maine district court and the U.S. Court of Appeals for the First Circuit affirmed Maine’s decision as consistent with the Constitution,¹¹³ the Carsons prevailed at the Supreme Court.¹¹⁴

Writing on behalf of the Court, Chief Justice Roberts dedicated much of his opinion to demonstrating that the result in *Carson* did not arrive as a bolt from the blue, but instead represented the logical culmination of recent Free Exercise Clause opinions. In 2017, the Supreme Court in *Trinity Lutheran Church of Columbia, Inc. v. Comer*¹¹⁵ invalidated a Missouri playground resurfacing program that excluded religious entities from participating.¹¹⁶ *Trinity Lutheran*’s third footnote limited the decision’s holding to its narrow set of facts: “This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination.”¹¹⁷ In 2020, the Supreme Court

¹⁰⁶ See *Carson*, 142 S. Ct. at 1994–95.

¹⁰⁷ *Id.* at 1993. Although Maine refers to its school districts as “school administrative units (SAUs),” *id.*, there is no reason that we must use that ungainly phrasing.

¹⁰⁸ Joint Appendix at 16, *Carson* (No. 20-1088).

¹⁰⁹ *Id.* at 18.

¹¹⁰ *Id.* at 18–19.

¹¹¹ *Carson*, 142 S. Ct. at 1994.

¹¹² *Id.* at 1995.

¹¹³ *Carson v. Makin*, 401 F. Supp. 3d 207, 211–12 (D. Me. 2019); *Carson v. Makin*, 979 F.3d 21, 49 (1st Cir. 2020).

¹¹⁴ See *Carson*, 142 S. Ct. at 2002.

¹¹⁵ 137 S. Ct. 2012 (2017).

¹¹⁶ See *id.* at 2025; *Carson*, 142 S. Ct. at 1996.

¹¹⁷ *Trinity Lutheran*, 137 S. Ct. at 2024 n.3. For an appraisal of *Trinity Lutheran*, see Douglas Laycock, *The Supreme Court, 2016 Term — Comment: Churches, Playgrounds, Government Dollars — and Schools?*, 131 HARV. L. REV. 133 (2017). For an argument supporting the exclusion of religious entities from government programs, see Nelson Tebbe, *Excluding Religion*, 156 U. PA. L. REV. 1263 (2008).

in *Espinoza v. Montana Department of Revenue*¹¹⁸ extended *Trinity Lutheran*'s principle beyond playgrounds, invalidating a state tuition program that excluded private schools from participating due to their religious status.¹¹⁹ *Espinoza* held: "A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious."¹²⁰

In *Carson*, Chief Justice Roberts stated that "[t]he 'unremarkable' principles applied in *Trinity Lutheran* and *Espinoza* suffice to resolve this case."¹²¹ *Carson* readily dispatched Maine's two central efforts to distinguish its facts from precedent, including the assertion that excluding Bangor Christian was not predicated on its religious *status*, but its religious *use* of public funds.¹²² This justification was, Chief Justice Roberts found, a distinction without a difference. Chief Justice Roberts also forcefully rejected the notion that *Carson* was in any sense requiring Maine to fund religious education: "The State retains a number of options: it could expand the reach of its public school system, increase the availability of transportation, provide some combination of tutoring, remote learning, and partial attendance, or even operate boarding schools of its own."¹²³ The only thing that *Carson* forced Maine to do, Chief Justice Roberts intimated, was avoid religious discrimination. Finally, *Carson* left undisturbed *Locke v. Davey*'s¹²⁴ holding, finding that it remained permissible to prevent university students from using state funds to pursue vocational religious degrees.¹²⁵

Justice Breyer wrote the lead dissent on behalf of himself, Justice Kagan, and (largely) Justice Sotomayor.¹²⁶ The dissent opened by contending that *Carson*'s excessively broad conception of the Free Exercise Clause led it to offer an anemic conception of the Establishment Clause.¹²⁷ Maine's program, Justice Breyer maintained, fell within the "legislative leeway" between what the Establishment Clause forbids and what the Free Exercise Clause demands, the concept that the Court has previously termed "play in the joints."¹²⁸ Yet Justice Breyer noted, "The Court today nowhere mentions, and I fear effectively abandons, this

¹¹⁸ 140 S. Ct. 2246 (2020).

¹¹⁹ See *Carson*, 142 S. Ct. at 1996–97; *Espinoza*, 140 S. Ct. at 2257.

¹²⁰ *Espinoza*, 140 S. Ct. at 2261.

¹²¹ *Carson*, 142 S. Ct. at 1997.

¹²² See *id.* at 2001.

¹²³ *Id.* at 2000.

¹²⁴ 540 U.S. 712 (2004).

¹²⁵ See *Carson*, 142 S. Ct. at 2001–02; *Locke*, 540 U.S. at 725. For a critical assessment of *Locke v. Davey*, see Douglas Laycock, *The Supreme Court, 2003 Term — Comment: Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 162–218 (2004).

¹²⁶ *Carson*, 142 S. Ct. at 2002 (Breyer, J., dissenting). Justice Sotomayor refrained from joining Part I-B of Justice Breyer's dissent.

¹²⁷ *Id.*

¹²⁸ *Id.* (internal quotation marks omitted); see also *id.* at 2003 ("Maine's nonsectarian requirement falls squarely within the scope of that constitutional leeway.").

longstanding doctrine.”¹²⁹ *Carson* was particularly regrettable, Justice Breyer contended, because the decision “undermine[d] the Religion Clauses’ goal of avoiding religious strife,”¹³⁰ and “[t]his potential for religious strife is still with us.”¹³¹

Justice Sotomayor wrote a brief solo dissent, asserting in effect that she was correct to dissent in *Trinity Lutheran* — unlike Justice Breyer and Justice Kagan — because she foresaw in 2017 where that road led. “[T]his Court should not have started down this path five years ago” in *Trinity Lutheran*, Justice Sotomayor explained early in her dissent.¹³² She concluded: “Today, the Court leads us to a place where separation of church and state becomes a constitutional violation. . . . With growing concern for where this Court will lead us next, I respectfully dissent.”¹³³

* * *

Although many of my fellow liberals have decried *Carson*, the opinion can be viewed as consistent with the terms of détente that emerged at the beginning of the twenty-first century. Taken on its own terms, *Carson* in no way threatens to reintroduce government-backed prayers into the public school realm. Rather, the decision was limited to students living in particularly rural states with tuition assistance programs who wished to attend religious schools. *Carson* is undeniably predicated on an exuberant understanding of the Free Exercise Clause, one that seems to eliminate any remaining “play in the joints” between what the Establishment Clause proscribes and what the Free Exercise Clause requires.¹³⁴ But in this relatively confined context, it seems difficult to believe that parents will be compelled to expose their children to religious content that they would prefer to avoid. *Carson* allows parents to use public funds to send their children to religious schools, but preserves the public schools as a particular type of sanctuary — a place free from the perils of religious indoctrination.

¹²⁹ *Id.* at 2004.

¹³⁰ *Id.* at 2010.

¹³¹ *Id.* at 2005.

¹³² *Id.* at 2012 (Sotomayor, J., dissenting).

¹³³ *Id.* at 2014–15. For an article exploring the tendency of Justice Breyer and Justice Kagan to join the Court’s conservatives in religion cases, evidently in an effort to avert catastrophic outcomes, see Micah Schwartzman & Nelson Tebbe, *Establishment Clause Appeasement*, 2019 SUP. CT. REV. 271 (2020). Neither Justice Breyer nor Justice Kagan joined the Court’s opinions in *Carson* and *Kennedy*, suggesting that any attempts at moderating the Court’s right-wing lurch in this area did not prove fruitful.

¹³⁴ See *Carson*, 142 S. Ct. at 2002–03 (Breyer, J., dissenting) (warning that the “play in the joints” notion is not referenced in the majority’s opinion, and regretting the elimination of “legislative leeway” and “constitutional leeway”). For criticism of the “leeway” that Justice Breyer’s majority opinion in *Mahanoy Area School District v. B.L.*, 141 S. Ct. 2038 (2021), conferred on educators regarding student speech, see Mary-Rose Papandrea, *Mahanoy v. B.L. & First Amendment “Leeway,”* 2021 SUP. CT. REV. 53 (2022).

If *Carson* is extended no further — a big *if*, admittedly — the apocalyptic alarms that many liberals have sounded about the decision’s import will prove overblown. Justice Breyer’s dissent in *Carson* derived much of its rhetorical force from attempting to elide the distinction between what happens in private schools (including religious ones) and what happens in public schools. “Forcing Maine to fund schools that provide the sort of religiously integrated education offered by Bangor Christian . . . creates a similar potential for religious strife as that raised by promoting religion in public schools,” Justice Breyer asserted.¹³⁵ But there is a distinction in kind, not degree, between when students attending public schools must confront religious coercion in exchange for simply obtaining an education and when students elect to attend private schools that feature religious education. Elsewhere in his *Carson* dissent, Justice Breyer further elided — and perhaps even seemed to erase — the distinction between private schools, on the one hand, and public schools, on the other hand. In critiquing the Court’s decision in *Carson*, Justice Breyer warned of “the increased risk of religiously based social conflict when government promotes religion in its *public school system*.”¹³⁶ Initially, this formulation seems quite odd, as *Carson* required Maine not to exclude private religious schools from its tuition program, and did not have much to do with the public school system. What did Justice Breyer mean by suggesting that the decision “promotes religion in [Maine’s] public school system”?¹³⁷

Answering this question requires comprehending one of Maine’s primary justifications for why its exclusion of religious schools from the tuition program should not be viewed as violating the Constitution. Maine contended that its tuition program provided participating students with a Maine public school education — even though private schools provided the actual education in question.¹³⁸ Including religiously oriented schools in the program would be impermissible, this claim ran, because the Establishment Clause forbids Maine public schools from offering religious instruction.¹³⁹ Maine’s free public school system, in other words, included some tuition-charging private schools. Here is how Maine gamely endeavored to explain this notion in the brief it filed at the Supreme Court:

Simply put, Maine does not offer parents a choice of publicly funded alternatives to public schools; rather, Maine allows parents . . . to obtain a public education for their children by choosing from among a small group of

¹³⁵ *Carson*, 142 S. Ct. at 2010 (Breyer, J., dissenting). Justice Breyer returned to this theme in the concluding paragraph of his dissent. *See id.* at 2012 (summing up the goal of Maine’s tuition program as “wish[ing] to provide children within the State with a secular, public education”).

¹³⁶ *Id.* at 2005 (emphasis added).

¹³⁷ *Id.*

¹³⁸ Brief of Respondent at 1, *Carson* (No. 20-1088).

¹³⁹ *Id.* at 2.

private schools who demonstrate to the State that the educational program they provide is a suitable equivalent to a public education.¹⁴⁰

Writing “[s]imply put” at the beginning of a sentence, however, does not magically render the subsequent content straightforward. This claim that Maine’s tuition program was providing its beneficiaries with a public school education albeit within private school corridors — quite understandably — elicited some confoundment at the Supreme Court. During oral argument, when Maine’s counsel broached this idea, Justice Gorsuch interjected with a hint of incredulity: “I do want to understand this theory. So . . . a private entity can provide a public education in Maine?”¹⁴¹

Predictably, *Carson* rejected this adventurous notion.¹⁴² Although many liberals criticized the immediate outcome in *Carson*, they may someday — perhaps even quite soon — relish the fact that the Court spurned this defense. That is because the notion that a public school can somehow exist within a private school setting has an obvious, if unstated corollary: a private school could be understood to exist within a public school setting. This corollary matters tremendously because it will doubtless arise in a looming battle about charter schools and religion. The most significant aspect of *Carson* is not what it means for the modest number of Mainers who are affected by this decision, but what it portends for the ability of all states to prevent churches from opening charter schools.¹⁴³

* * *

When Professor Nicole Stelle Garnett received word of the *Carson* decision, it brought tears to her eyes, and — presumably — a smile to her lips.¹⁴⁴ The tears were owed to the fact that, as a newly minted attorney in the late-1990s, Garnett helped to file a lawsuit challenging the Maine tuition program’s exclusion of religious schools.¹⁴⁵ “Twenty-five years is a long time [to wait],” Garnett stated, after *Carson* delivered her the sorely anticipated victory.¹⁴⁶ A smile on Garnett’s face would have been owed to what *Carson* could mean for the future of charter schools. After all, Garnett has questioned, if it violates the Free Exercise Clause to exclude religious schools from state-funded tuition programs,

¹⁴⁰ *Id.* at 6–7.

¹⁴¹ Transcript of Oral Argument at 69, *Carson* (No. 20-1088), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/20-1088_7kh7.pdf [<https://perma.cc/5ALK-2H8H>].

¹⁴² See *Carson*, 142 S. Ct. at 1998–99.

¹⁴³ Maine’s tuition program is highly unusual, and is driven by the fact that it “is the most rural State in the Union.” *Id.* at 1993.

¹⁴⁴ After learning of *Carson*’s outcome, Professor Garnett wrote: “I cried.” Garnett, *supra* note 21.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

why can states permit all sorts of entities to administer charter schools yet ban religious entities from doing so?¹⁴⁷

How do voucher programs differ from charter schools? Whereas voucher programs offer students assistance to attend private schools, charter schools can “be viewed as straddling the public-private divide,”¹⁴⁸ and have been called variously “quasi-public” schools and “hybrid public schools.”¹⁴⁹ Charter schools can be viewed as sharing three common features: first, the schools sign a charter contract with a governmental entity that both grants them authority to function and assesses their performance by various standards;¹⁵⁰ second, the schools are excused from state regulations and statutes that non-charter, or traditional, public schools must follow;¹⁵¹ and third, the schools receive direct governmental funding raised primarily from state and local taxes.¹⁵²

This question of whether charter schools should be considered public (thereby prohibiting the existence of religiously affiliated charter schools under the Establishment Clause) or be considered private (thereby requiring religiously affiliated charter schools under the Free Exercise Clause) presents an issue of vast practical significance. Indeed, from the perspective of sheer magnitude, the charter school question dwarfs the voucher question considered in *Zelman v. Simmons-Harris*.¹⁵³ Despite all of the oxygen that law professors consumed debating the constitutionality of vouchers for religious schools two decades ago, those policies never became very widespread — something that shrewd commentators anticipated at the time.¹⁵⁴ Charter schools, in contrast, present a very

¹⁴⁷ See NICOLE STELLE GARNETT, MANHATTAN INST., RELIGIOUS CHARTER SCHOOLS: LEGALLY PERMISSIBLE? CONSTITUTIONALLY REQUIRED? 14 (2020), <https://media4.manhattan-institute.org/sites/default/files/religious-charter-schools-legally-permissible-NSG.pdf> [https://perma.cc/3Z7V-AXM2]. For scholarship exploring and critiquing the legal status of charter schools, see Julie F. Mead, *Devilish Details: Exploring Features of Charter School Statutes that Blur the Public/Private Distinction*, 40 HARV. J. ON LEGIS. 349, 356–57 (2003); and Preston C. Green III, Bruce D. Baker & Joseph O. Oluwole, *Having It Both Ways: How Charter Schools Try to Obtain Funding of Public Schools and the Autonomy of Private Schools*, 63 EMORY L.J. 303 (2013).

¹⁴⁸ DRIVER, *supra* note 45, at 24 n.*.

¹⁴⁹ Mead, *supra* note 147, at 352 (internal quotation marks omitted); see also Green et al., *supra* note 147, at 304 (referring to the “hybrid characteristics” of charter schools).

¹⁵⁰ See Mead, *supra* note 147, at 350.

¹⁵¹ *Id.*

¹⁵² See Green et al., *supra* note 147, at 303.

¹⁵³ Jay Mathews, *Can Charter Schools Pick the Best Students? No, But Many Believe the Myth.*, WASH. POST (Jan. 2, 2021, 6:00 AM), https://www.washingtonpost.com/local/education/charter-schools-lotteries/2020/12/31/2816a31e-4aaf-11eb-839a-cf4ba7b7c48c_story.html [https://perma.cc/QN6U-K597] (noting that forty-three states and the District of Columbia have charter schools).

¹⁵⁴ For contemporaneous commentary on *Zelman v. Simmons-Harris*, see, for example, Fried, *supra* note 17, at 183–92. See DRIVER, *supra* note 45, at 419 (noting, as of 2016, only fourteen states and the District of Columbia had enacted voucher programs and that “those programs served a not-so-grand-total of 250,000 students”); James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2050 (2002) (“[A] Supreme Court decision approving the use of vouchers at religious schools is not likely to remove the serious *political* constraints on voucher

different, much larger story, as they currently exist in more than forty states and educate millions of students.¹⁵⁵ As important, charter schools typically receive far more funding, making them extremely attractive to groups interested in starting schools.¹⁵⁶

In a testament to the legal ambiguity surrounding charter schools, Garnett has, over the course of the last eight years, slowly evolved toward the position that the Free Exercise Clause requires states and localities to recognize the legitimacy of religious charter schools. In 2014, Garnett — joined by a coauthor — acknowledged that charter schools were public schools and therefore suggested that obtaining the goal of religious charter schools would require a seismic shift in the legal landscape. The claim merits excerpting at length:

As a political matter, all state laws make clear that charter schools are privately operated public schools — rather than publicly funded private schools. And, if the Supreme Court’s Establishment Clause canon establishes anything clearly, it is that public schools cannot teach religion as the truth of the matter. Thus, in order to even engage the question of whether the Establishment Clause would allow states to authorize religious charter schools, state laws would have to be amended to provide that charter schools are private, not public, ones.¹⁵⁷

In 2017, Garnett struck a notably more equivocal tone on the question. “A case can be made . . . that charter schools are, in many legally significant respects, publicly funded private schools — not privately operated public ones,” Garnett wrote.¹⁵⁸ In 2020, following the Court’s decision in *Espinoza*, Garnett suggested that recognizing religious charter schools may be constitutionally required. Writing in a piece published by the Manhattan Institute, Garnett contended: “Assuming that charter schools are private schools, the Court’s ruling [in *Espinoza*] . . . would seem to squarely apply to laws prohibiting religious charter schools.”¹⁵⁹ Most recently, after the Court issued *Carson*,

programs, which will continue to keep those programs limited in size and scope.”); James Forman, Jr., *The Rise and Fall of School Vouchers: A Story of Religion, Race, and Politics*, 54 UCLA L. REV. 547 (2007) (analyzing the failure of vouchers to gain substantial traction).

¹⁵⁵ Mathews, *supra* note 153.

¹⁵⁶ See Matt Barnum, “*The Next Frontier*”: Supreme Court Case Could Open Door to Religious Charter Schools, CHALKBEAT (Feb. 24, 2022, 3:08 PM), <https://www.chalkbeat.org/2022/2/24/22949483/supreme-court-maine-carson-makin-religious-charter-schools> [https://perma.cc/7K23-WS3E] (noting funding discrepancies between charter schools and voucher programs). For an argument that the growth of vouchers and charter programs threatens the future of America’s public schools and American democracy, see DEREK W. BLACK, SCHOOLHOUSE BURNING: PUBLIC EDUCATION AND THE ASSAULT ON AMERICAN DEMOCRACY (2020).

¹⁵⁷ MARGARET F. BRINIG & NICOLE STELLE GARNETT, LOST CLASSROOM, LOST COMMUNITY: CATHOLIC SCHOOLS’ IMPORTANCE IN URBAN AMERICA 149 (2014); see also *id.* at 154 (contending that the distinction between private schools and public schools contains “significant constitutional implications,” as “charter schools are not private schools; they are, by virtue of a government act, privately operated public schools”).

¹⁵⁸ Nicole Stelle Garnett, *Sector Agnosticism and the Coming Transformation of Education Law*, 70 VAND. L. REV. 1, 7 (2017).

¹⁵⁹ GARNETT, *supra* note 147, at 12.

Garnett stated that the decision “clears away a major hurdle to the expansion of parental choice in the [United States] by clarifying that, when states adopt choice programs, they must permit parents to choose faith-based schools for their children.”¹⁶⁰ It hardly seems extravagant to maintain that Garnett’s reference to “choice programs” could be construed as an umbrella term that includes charter schools.

The U.S. Court of Appeals for the Fourth Circuit, sitting en banc, recently engaged in an intense, bitter dispute regarding whether a North Carolina charter school should be considered a public entity or a private entity. Although the dispute arose in the context of a challenge to gender-based school uniform policy, it was not difficult to glimpse adumbrations of a charter school debate regarding how to treat religious entities.¹⁶¹ The majority held that the school uniform policy could, in fact, be challenged under § 1983 and the Equal Protection Clause because of North Carolina’s provision defining charter schools as public schools.¹⁶² In a vehement dissent, Judge Wilkinson contended that the majority’s decision “will drape a pall of orthodoxy over charter schools and shift educational choice and diversity into reverse.”¹⁶³ Perhaps the pall of charter school orthodoxy that Judge Wilkinson had in mind was secularism. Reacting to the *Espinoza* decision in 2020, Michael McConnell voiced similar, prodiversity views: “School choice is actually the opposite of the establishment of religion by the government; it allows pluralism and diversity in education, as an alternative to the homogeneity of public schools.”¹⁶⁴

What light, if any, does *Carson* shed on this burgeoning debate over whether charter schools will be classified as public or private, bearing in mind all that this classification entails for both the Religion Clauses and the future of American education? An honest answer must acknowledge that *Carson* is ambiguous on this score, as evidence can be placed in both the public and the private columns. In perhaps the most crucial passage of Chief Justice Roberts’s opinion for the Court, he identified “numerous and important” “differences between private schools eligible to receive tuition assistance under Maine’s program and a Maine

¹⁶⁰ Robert Barnes, *Supreme Court Says Maine Cannot Deny Tuition Aid to Religious Schools*, WASH. POST (June 21, 2022, 6:19 PM) (internal quotation marks omitted), <https://www.washingtonpost.com/politics/2022/06/21/supreme-court-maine-religious-schools> [https://perma.cc/U4BP-B73D].

¹⁶¹ *Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104 (4th Cir. 2022) (en banc). The uniform policy was predicated on a benighted notion that girls are “fragile vessels.” *Id.* at 112. For a claim that courts should scrutinize school uniform policies more aggressively, particularly given their tendency to obsess over the attire of young women, see DRIVER, *supra* note 45, at 132 & n.*.

¹⁶² *Peltier*, 37 F.4th at 130–31.

¹⁶³ *Id.* at 150 (Wilkinson, J., dissenting).

¹⁶⁴ Michael W. McConnell, Opinion, *On Religion, The Supreme Court Protects the Right to Be Different*, N.Y. TIMES (July 9, 2020), <https://www.nytimes.com/2020/07/09/opinion/supreme-court-religion.html> [https://perma.cc/RQV7-U4DZ].

public school.”¹⁶⁵ First, “start[ing] with the most obvious” distinction, Chief Justice Roberts highlighted selectivity, noting that one of the quintessential features of private schools is that “they do not have to accept all students,” whereas “[p]ublic schools generally do.”¹⁶⁶ This selectivity point makes charter schools seem more like public schools, as charter schools typically do not turn away students due to qualifications and — if a school is oversubscribed — will hold lotteries to determine who is admitted.¹⁶⁷ Second, Chief Justice Roberts emphasized the monetary point, observing that the private schools participating in Maine’s program often charge students tuition.¹⁶⁸ Again, here, this tuition point makes charter schools seem like public schools, as charters do not charge their students tuition but instead receive their funding directly from the government.¹⁶⁹ So far, so good, at least from the perspective of those who believe charter schools should be considered public schools and therefore cannot be religiously backed due to the Establishment Clause.

The remaining factors that Chief Justice Roberts noted, however, complicate the analysis considerably. The third factor that he identified was the curriculum, noting that “the curriculum taught at participating private schools need not even resemble that taught in the Maine public schools.”¹⁷⁰ Charter schools are, of course, welcome to depart from the standard public school curriculum; indeed, that may well be the single biggest selling point of charter schools.¹⁷¹ Chief Justice Roberts’s fourth factor noted that “[p]articipating [private] schools need not hire state-certified teachers,”¹⁷² whereas public schools typically must do so. Charter schools, too, are often permitted to hire teachers who lack certification.¹⁷³ Finally, Chief Justice Roberts observed that “the [participating private] schools can be single-sex,”¹⁷⁴ whereas presumably Maine’s public schools must be coeducational. Here, the analysis is less

¹⁶⁵ *Carson*, 142 S. Ct. at 1999.

¹⁶⁶ *Id.*

¹⁶⁷ See Mathews, *supra* note 153 (noting that selectivity “by [charter schools] is rare, and usually unlawful. . . . Nearly all of the 43 states and Washington, D.C. that have charter schools require that random lotteries be used to select students if there is not room for all that apply”). Some charter schools doubtless seek to circumvent those laws and shape student enrollment. See Wagma Mommandi & Kevin Welner, *Shaping Charter Enrollment and Access: Practices, Responses, and Ramifications*, in CHOOSING CHARTERS: BETTER SCHOOLS OR MORE SEGREGATION? 61, 61–77 (Iris C. Rotberg & Joshua L. Glazer eds., 2018). But such circumvention does not change the underlying fact that charter schools are — unlike private schools — typically supposed to take all comers.

¹⁶⁸ *Carson*, 142 S. Ct. at 1999.

¹⁶⁹ See Mead, *supra* note 147, at 367 (noting that nearly every state has “explicit statutory language prohibiting charter schools from charging tuition” and that “federal law defines a charter school as one that ‘does not charge tuition’” (quoting 20 U.S.C. § 7221i)).

¹⁷⁰ *Carson*, 142 S. Ct. at 1999.

¹⁷¹ See Karla A. Turekian, *Traversing the Minefields of Education Reform: The Legality of Charter Schools*, 29 CONN. L. REV. 1365, 1375 (1997).

¹⁷² *Carson*, 142 S. Ct. at 1999.

¹⁷³ See Turekian, *supra* note 171, at 1375 n.40.

¹⁷⁴ *Carson*, 142 S. Ct. at 1999.

tidy, as both charter schools and traditional public schools across the nation operate single-sex schools, though students usually must — even in the public school context — affirmatively opt into such arrangements.¹⁷⁵

Chief Justice Roberts summed up his extended private-public comparison in *Carson* as follows: “In short, it is simply not the case that these [private] schools, to be eligible for state funds, must offer an education that is equivalent — roughly or otherwise — to that available in the Maine public schools.”¹⁷⁶ That sentence will doubtless loom large in the growing debate about religious charter schools, as proponents and opponents will both fiercely contend that it affirms their preferred positions.

Who has the better argument? Should charter schools be considered public or private for purposes of the Religion Clauses? In my view, charter schools bear a closer resemblance to public schools than they do to private schools. At their core, charter schools are publicly funded educational institutions that are permitted, in some instances, to deviate from local public schools’ standard operating procedures.¹⁷⁷ But governmental entities permitting charter schools to develop curricula and hire personnel according to their own criteria is a far cry from declaring that the Constitution of the United States is irrelevant within those institutions. Our nation’s governing document cannot be casually dismissed as some mere bureaucratic trifle.¹⁷⁸

Crucially, the deleterious consequences of deeming charter schools private entities for constitutional purposes could prove staggering. In recent years, charter schools have become dominant in many areas, with New Orleans in 2019 becoming the first city in the United States to abandon traditional public schools and adopt a system made up entirely of charter schools.¹⁷⁹ It surely will not be the last. Jurists construing charter schools as private schools could thus eventually render the constitutional protection that students have enjoyed for the last several decades a dead letter. Indeed, if the Supreme Court were to rule that

¹⁷⁵ See, e.g., *PHSG at a Glance*, SCH. DIST. OF PHILA. (Feb. 7, 2020), <https://girlshs.philasd.org/about/at-a-glance> [<https://perma.cc/T7PM-N5MK>]. For thoughtful analysis of these matters, see Kimberly J. Jenkins, *Constitutional Lessons for the Next Generation of Public Single-Sex Elementary and Secondary Schools*, 47 WM. & MARY L. REV. 1953 (2006); Gary J. Simson, *Separate but Equal and Single-Sex Schools*, 90 CORNELL L. REV. 443 (2005).

¹⁷⁶ *Carson*, 142 S. Ct. at 1999.

¹⁷⁷ See Green et al., *supra* note 147, at 303 (“Charter schools are characterized as public schools that receive autonomy from a variety of rules and regulations that traditional public schools must follow.”).

¹⁷⁸ I advanced a version of this argument in DRIVER, *supra* note 45, at 24 n.*. For a helpful article exploring this terrain, see Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1267–68 (2003).

¹⁷⁹ See Marta Jewson, *New Orleans Becomes First Major American City Without Traditional Public Schools*, THE LENS (July 1, 2019), <https://thelensnola.org/2019/07/01/new-orleans-becomes-first-major-american-city-without-traditional-schools> [<https://perma.cc/J5DW-XGDQ>]; BLACK, *supra* note 156, at 17.

charter schools are private, states and localities who wish to deny constitutional rights to students would have strong incentives to transform all of their schools into charter schools and, therefore, Constitution-free zones. Yes, some observers would doubtless view the destruction of the United States public school system as a virtue, not a vice. Yet there can be no gainsaying that such a move would inflict a radical assault upon American traditions.¹⁸⁰

Given how charter schools are funded, moreover, construing them as public entities holds particular import in the Establishment Clause context. Typically, charter schools receive their funding directly from the government, and the Supreme Court has stressed the significance of money going to religious entities only indirectly in the educational context. This consideration cast a long shadow in *Zelman v. Simmons-Harris*, for example, with the Court repeatedly noting that the vouchers in Cleveland were issued directly to families, who then decided where to spend them.¹⁸¹ In order to permit religious charter schools, then, the Supreme Court would need to repudiate this foundational principle.

This broad conclusion is joined most emphatically by Nina Rees, president of the National Alliance for Public Charter Schools, who has argued: “The bottom line is: Charter schools, as public schools, can never be religious institutions. And anyone who says differently is flat-out wrong.”¹⁸² Others no doubt will evaluate the matter exactly the opposite way, but with equal certitude. We shall see.

* * *

Regardless of what *Carson* portends for charter schools, the decision itself can be construed as furthering the détente by permitting private religious schools to differ from their public school counterparts. In this respect, *Carson* seems quite compatible with *Meyer v. Nebraska*, though

¹⁸⁰ See DRIVER, *supra* note 45, at 24 n.* (contending that “the negative consequences that would flow from permitting schools to disregard students’ constitutional rights by delegating their authority are nothing less than breathtaking”); BLACK, *supra* note 156, at 238 (contending that the growth of charter schools “cross[es] the Rubicon for our democracy”).

¹⁸¹ See *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002) (“[O]ur decisions have drawn a consistent distinction between government programs that provide aid directly to religious schools, and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals.” (citations omitted)); *id.* (“Three times we have confronted Establishment Clause challenges to neutral government programs that provide aid directly to a broad class of individuals, who, in turn, direct the aid to religious schools or institutions of their own choosing. Three times we have rejected such challenges.”); Brief for the United States as Amicus Curiae Supporting Petitioners at 3, *Simmons-Harris* (Nos. 00-1751, 00-1777 & 00-1779), 2001 WL 1456249, at *3 (citing OHIO REV. ANN. CODE § 3313.979 (Anderson 1999 & Supp. 2000) (noting that tuition checks were made payable not to schools, but to parents of eligible students)). For an argument that the direct-indirect funding distinction has been eroded, see GARNETT, *supra* note 147, at 10–11.

¹⁸² Barnum, *supra* note 156.

Chief Justice Roberts's opinion did not mention that century-old precedent.¹⁸³ Today, *Meyer* is remembered for invalidating a xenophobic statute that forbade schools in Nebraska from teaching languages other than English because of virulent anti-German sentiment following World War I.¹⁸⁴ That view of *Meyer* is not wrong, but it is incomplete. Appreciating the connections between *Meyer* and *Carson* requires understanding a bit more about the underlying facts at issue in *Meyer*.

When a Nebraska official appeared in the doorway of Mr. Robert Meyer's fifth-grade classroom at Zion Parochial School in 1920, Mr. Meyer was leading his pupils in German.¹⁸⁵ Mr. Meyer was not teaching his students in just any subject; instead, they were engaged in Biblical instruction.¹⁸⁶ Mr. Meyer thought that it was especially important for his students to learn about God using the native tongue.¹⁸⁷ "It was my duty," Mr. Meyer explained.¹⁸⁸ "I am not a pastor . . . but I have the same duty to uphold my religion. Teaching the children the religion of their fathers in the language of their fathers is part of that religion."¹⁸⁹ During the 1920s, in German-American communities, it became something of a refrain to assert: "Language saves faith."¹⁹⁰ The Supreme Court in *Meyer* did not hold that Nebraska lacked the ability to control its public school curriculum.¹⁹¹ Instead, *Meyer*'s holding extended only to the private school sphere — including religious schools like Zion Parochial.¹⁹²

On this reading, *Meyer* can be viewed as a Free Exercise Clause decision that prohibited Nebraska from interfering with Zion Parochial School's ability to run its affairs how it deemed fit. *Carson* can be viewed from a similar vantage. By striking down Maine's exclusion of religiously oriented schools from the tuition assistance program, *Carson* eliminated the incentive for such schools to become secular in an effort to qualify for the program. *Carson* thus utilized the Free Exercise Clause to prohibit Maine from interfering with the ability of religious schools to run their affairs how they deem fit. This understanding of *Carson* distinguishes it from *Kennedy*, which does not, of course, permit religious instruction to flourish in private school classrooms, but instead invites educators to proselytize in one place where that activity does not belong: the public school.

¹⁸³ Compare *Carson*, 142 S. Ct. at 1993–2002, with *Meyer v. Nebraska*, 262 U.S. 390 (1923).

¹⁸⁴ *Meyer*, 262 U.S. at 403.

¹⁸⁵ WILLIAM G. ROSS, FORGING NEW FREEDOMS: NATIVISM, EDUCATION, AND THE CONSTITUTION, 1917–1927, at 3–4 (1994); see also *Meyer*, 262 U.S. at 396–97.

¹⁸⁶ See ROSS, *supra* note 185, at 3–4.

¹⁸⁷ *Id.* at 4.

¹⁸⁸ *Id.* (internal quotation marks omitted).

¹⁸⁹ *Id.* (omission in original).

¹⁹⁰ *Id.* at 14 (internal quotation marks omitted).

¹⁹¹ See *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923).

¹⁹² See *id.* at 396–97.

III. KENNEDY, JUSTICE KENNEDY, AND “COACH” KENNEDY

In September 2015, Bremerton School District’s superintendent became aware that Coach Joseph Kennedy had been leading team prayers in the locker room and at midfield in the immediate aftermath of games, where some players gathered around him as he delivered religious messages.¹⁹³ The school district sent Coach Kennedy a letter (the first in what became a series) discouraging him from such conduct and cited the Establishment Clause as justifying its position.¹⁹⁴ Coach Kennedy agreed to cease leading team prayers in the locker room and at midfield after games.¹⁹⁵ He did, however, express his intention (both to the school district and to the media) to continue offering postgame prayers at the fifty-yard line, even if he was not leading his players in prayer.¹⁹⁶ In October 2015, over the school district’s objections, Kennedy walked to midfield after three games and kneeled down to pray on the very spot where he had previously led team prayers.¹⁹⁷ Not long after the third October prayer, the school district announced that it would place Coach Kennedy on administrative leave and barred him from participating in team activities.¹⁹⁸ Although the district court and the U.S. Court of Appeals for the Ninth Circuit found that Coach Kennedy’s conduct violated the Establishment Clause, the Supreme Court disagreed, vindicating the legitimacy of his three October prayers.¹⁹⁹

Justice Gorsuch, writing for the majority,²⁰⁰ held that the Free Exercise Clause and Free Speech Clause offered a form of double protection for the three prayers Kennedy conducted in October 2015, and that the Establishment Clause did not prohibit them.²⁰¹ “Joseph Kennedy lost his job as a high school football coach because he knelt at midfield after games to offer a quiet prayer of thanks,” Justice Gorsuch began.²⁰² “Mr. Kennedy prayed during a period when school employees were free to speak with a friend, call for a reservation at a restaurant,

¹⁹³ *Kennedy*, 142 S. Ct. at 2416.

¹⁹⁴ *Id.* at 2416–17.

¹⁹⁵ *Id.* at 2417.

¹⁹⁶ *Id.*; *id.* at 2437 (Sotomayor, J., dissenting).

¹⁹⁷ *Id.* at 2418 (majority opinion).

¹⁹⁸ *Id.* at 2418–19.

¹⁹⁹ See *Kennedy v. Bremerton Sch. Dist.*, 443 F. Supp. 3d 1223, 1232 (W.D. Wash. 2020) (noting the court denied Kennedy’s motion for a preliminary injunction in 2016); *Kennedy v. Bremerton Sch. Dist.*, 869 F.3d 813, 839 (9th Cir. 2017) (affirming the district court’s denial of a preliminary injunction). When this dispute initially made its way to the Court, Justice Alito issued a statement respecting the denial of certiorari that criticized the Ninth Circuit’s reasoning. See *Kennedy v. Bremerton Sch. Dist.*, 139 S. Ct. 634, 636 (2019) (mem.) (Alito, J., respecting the denial of certiorari). The district court and circuit court adhered to their initial positions regarding Coach Kennedy. See *Kennedy*, 443 F. Supp. 3d at 1228.

²⁰⁰ Justice Kavanaugh refrained from Part III.B of Justice Gorsuch’s majority opinion. *Kennedy*, 142 S. Ct. at 2415. Justices Thomas and Alito both wrote brief concurring opinions. *Id.* at 2433 (Thomas, J., concurring); *id.* (Alito, J., concurring).

²⁰¹ *Id.* at 2433 (majority opinion).

²⁰² *Id.* at 2415.

check email, or attend to other personal matters.”²⁰³ Justice Gorsuch underscored that Coach Kennedy had complied with Bremerton School District’s instructions not to lead his players in prayer and that the District did not contend that it placed him on administrative leave due to those group prayers.²⁰⁴ Instead of stating that tension existed between the Free Exercise Clause and the Establishment Clause, Justice Gorsuch insisted that the two provisions complemented each other.²⁰⁵ When Coach Kennedy delivered his three contested October prayers, Justice Gorsuch reasoned, he was engaged in private speech rather than government speech.²⁰⁶ Justice Gorsuch warned that construing Coach Kennedy’s speech as government speech was dangerous because it would enable “schools [to] fire teachers for praying quietly over their lunch, for wearing a yarmulke to school, or for offering a midday prayer during a break before practice.”²⁰⁷ The Establishment Clause thus did not require the school district’s discipline of Coach Kennedy, Justice Gorsuch concluded,²⁰⁸ seizing the opportunity to supplant *Lemon v. Kurtzman*²⁰⁹ and the endorsement test with a test predicated on “historical practices and understandings.”²¹⁰

Justice Sotomayor dissented.²¹¹ She criticized the majority for focusing upon Coach Kennedy’s three October prayers in isolation, rather than construing them in the fact-specific context that *Santa Fe* required. “This Court’s precedent . . . does not permit treating Kennedy’s ‘new’ prayer practice as occurring on a blank slate,” Justice Sotomayor wrote.²¹² She ensured that Coach Kennedy’s active leading of team prayers would not be forgotten by taking the unusual step of including photographs depicting the scene.²¹³ Justice Sotomayor emphasized that she did not believe “that a coach may never visibly pray on the field,” only that it was impermissible for Coach Kennedy “to initiate prayers visible to students, while still on duty during school events, under the exact same circumstances as his past practice of leading student prayer.”²¹⁴

* * *

²⁰³ *Id.*

²⁰⁴ *Id.* at 2417–19.

²⁰⁵ *Id.* at 2426.

²⁰⁶ *See id.* at 2429.

²⁰⁷ *Id.* at 2431.

²⁰⁸ *See id.* at 2427.

²⁰⁹ 403 U.S. 602 (1971).

²¹⁰ *Kennedy*, 142 S. Ct. at 2428 (internal quotation marks omitted) (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014)).

²¹¹ *Id.* at 2434 (Sotomayor, J., dissenting). Justices Breyer and Kagan joined the dissent. *Id.*

²¹² *Id.* at 2444.

²¹³ *Id.* at 2438–39.

²¹⁴ *Id.* at 2453.

The Supreme Court in *Kennedy* demonstrated insufficient regard for the fact that these events arose in a public school setting, where Establishment Clause concerns have long been acknowledged to be paramount. For the last six decades, it has been a hallmark of the Court’s jurisprudence that public schools must operate with extreme care to avoid creating potentially coercive religious atmospheres for their pupils. The Supreme Court has described its own approach as having “been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools.”²¹⁵ Dating back to the early 1960s — the era of *Engel* and *Schempp* — the Court has “recognize[d] . . . that prayer exercises in public schools carry a particular risk of indirect coercion,” and that “distinguish[ing] the public school context” is “require[d].”²¹⁶ In *Lee v. Weisman*, Justice Kennedy’s opinion for the Court emphasized that “there are heightened concerns with protecting freedom of conscience . . . in the elementary and secondary public schools,” and went so far as to declare that Establishment Clause “concern[s] may not be limited to the context of [public] schools, but [are] most pronounced there.”²¹⁷

Implementing this site-sensitive constitutional vision, the Supreme Court has repeatedly determined that conduct the Establishment Clause could tolerate in other governmental venues must be deemed impermissible if it occurs in a public school setting. Thus, the Court has — in both *Marsh v. Chambers*²¹⁸ and *Town of Greece v. Galloway*²¹⁹ — found that public prayers delivered at the beginning of legislative assemblies can pass constitutional muster, even though identical public prayers would violate the Establishment Clause if they were uttered to begin a school day.²²⁰ Writing for a plurality in *Town of Greece* only eight years ago, Justice Kennedy’s opinion expressly distinguished legislative prayers from the school prayers at issue in *Weisman* and *Santa Fe*, reasoning that “mature adults” — as distinct from “students” — are “not readily susceptible to religious indoctrination or peer pressure.”²²¹ Relatedly, the Supreme Court in *Stone v. Graham* rejected Kentucky’s plan to post the Ten Commandments in all of its public school classrooms.²²² While the Court has subsequently found that the Ten Commandments can, in

²¹⁵ *Edwards v. Aguillard*, 482 U.S. 578, 583–84 (1987).

²¹⁶ *Lee v. Weisman*, 505 U.S. 577, 592, 597 (1992) (characterizing the Court’s decisions in *Engel* and *Schempp* in this manner).

²¹⁷ *Id.* at 592. Furthering this idea of public school distinctiveness, *Weisman* reasoned: “What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy.” *Id.*

²¹⁸ 463 U.S. 783 (1983).

²¹⁹ 572 U.S. 565 (2014).

²²⁰ See *Marsh*, 463 U.S. at 790–91; *Town of Greece*, 572 U.S. at 591–92 (plurality opinion).

²²¹ *Town of Greece*, 572 U.S. at 590 (internal quotation marks omitted) (citations omitted) (quoting *Marsh*, 463 U.S. at 792).

²²² *Stone v. Graham*, 449 U.S. 39, 42–43 (1980) (per curiam).

at least some instances, be displayed on governmental grounds without running afoul of the Establishment Clause, *Stone v. Graham*'s ban on official Commandment displays in public schools remains undisturbed.²²³ In *Van Orden v. Perry*,²²⁴ Chief Justice Rehnquist wrote a plurality opinion — joined by Justice Scalia, Justice Kennedy, and Justice Thomas²²⁵ — stating, “[t]here are, *of course*, limits to the display” of the Ten Commandments, and cited approvingly *Stone v. Graham*'s defense of Kentucky's “public schoolroom[s]” and “the classroom context.”²²⁶

In *Kennedy*, however, this longstanding recognition that the public school forms a constitutionally distinctive setting for Establishment Clause purposes is conspicuous in its absence. It is revealing that in Justice Gorsuch's soaring summation of *Kennedy*'s significance, he neglected even to mention that the events occurred on school grounds:

Respect for religious expressions is indispensable to life in a free and diverse Republic — whether those expressions take place in a sanctuary or on a field, and whether they manifest through the spoken word or a bowed head. Here, a government entity sought to punish an individual for engaging in a brief, quiet, personal religious observance And the only meaningful justification the government offered for its reprisal rested on a mistaken view that it had a duty to ferret out and suppress religious observances even as it allows comparable secular speech.²²⁷

But it is surely not incidental that the “field” in question sat on public school property, the “individual” in question was a public school official, and the “government entity” or “the government” in question was a public school district. Until *Kennedy*, those important particulars would have driven the Supreme Court's analysis. Their marginalization in *Kennedy* indicates that the public school may well be on the verge of becoming just another governmental office building — at least for Establishment Clause purposes.

Kennedy's refusal to acknowledge the special nature of public schools fuels one of its most important — and distressing — analytical innovations: the defining down of coercion.²²⁸ The Court's school prayer decisions had long evinced a robust conception of what constitutes “coercion” for Establishment Clause purposes. For example,

²²³ See *Van Orden v. Perry*, 545 U.S. 677, 690–91 (2005) (plurality opinion).

²²⁴ 545 U.S. 677.

²²⁵ *Id.* at 681.

²²⁶ *Id.* at 690 (emphasis added).

²²⁷ *Kennedy*, 142 S. Ct. at 2432–33.

²²⁸ Here, my language is designed to invoke Daniel Patrick Moynihan's formulation of “defining deviancy down,” Daniel Patrick Moynihan, *Defining Deviancy Down*, 62 AM. SCHOLAR, Winter 1993, at 17, 17, even if I do not necessarily wish to associate myself with Moynihan's underlying view of what qualifies as “deviancy.” For an early academic work suggesting that coercion is “the fundamental evil against which the [Establishment] [C]ause is directed,” see Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933, 939 (1986).

Justice Kennedy's opinion for the Court in *Weisman* highlighted "indirect coercion" and "subtle coercive pressure" as triggering constitutional concerns.²²⁹ Justice Scalia famously ridiculed *Weisman*'s "psycho-journey,"²³⁰ sniping that "interior decorating is a rock-hard science compared to psychology practiced by amateurs."²³¹ But it would be severely mistaken to dismiss *Weisman*'s broad conception of coercion as a product of New Age psychologizing. Rather than some newfangled idea introduced by California-native Justice Kennedy in the 1990s, coercion was emphasized by Justice Black of Alabama in the Court's 1962 decision *Engel v. Vitale*, which invalidated the Regents prayer due to the "indirect coercive pressure" that appears in the school context.²³²

Justice Gorsuch's opinion in *Kennedy* cast aside the expansive notion of coercion for an emaciated one. "[T]he [Bremerton School] District never raised coercion concerns," Justice Gorsuch wrote.²³³ "To the contrary, the District conceded . . . that there was 'no evidence that students [were] directly coerced to pray with Kennedy.'"²³⁴ By equating "coercion" with "direct coercion" and turning its back on "indirect coercive pressure," "indirect coercion," and "subtle coercive pressure," *Kennedy* opened a Pandora's box of religious influence and religious indoctrination in the nation's public schools. *Kennedy*'s misguided diminution of coercion comes perilously close to installing the understanding of coercion that Justice Scalia's dissenting opinion advanced thirty years ago in *Weisman*.²³⁵ In that dissent, Justice Scalia notoriously contended: "The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support by force of law and threat of penalty."²³⁶ The emphasis, significantly, was Justice Scalia's.²³⁷ The notion that public schools could stop just shy of religiously "forc[ing]" and "threat[ening]" their students without violating the Establishment Clause is disconcerting, but *Kennedy*'s "direct coercion" standard creeps in that direction.

Kennedy's insensitivity to the historical realities of American public schools led the Court to embrace a new, historically based test that, if actually followed, promises to wreak havoc on our public school system. Justice Gorsuch buried the much-maligned Establishment Clause test from *Lemon v. Kurtzman*²³⁸ and replaced it with a test driven by "*historical practices and understandings*" that must "accor[d] with history

²²⁹ *Lee v. Weisman*, 505 U.S. 577, 592 (1992).

²³⁰ *Id.* at 643 (Scalia, J., dissenting).

²³¹ *Id.* at 636.

²³² *Engel v. Vitale*, 370 U.S. 421, 431 (1962).

²³³ *Kennedy*, 142 S. Ct. at 2429.

²³⁴ *Id.* (alteration in original).

²³⁵ See *Weisman*, 505 U.S. at 640–44 (Scalia, J., dissenting).

²³⁶ *Id.* at 640.

²³⁷ *Id.*

²³⁸ 403 U.S. 602, 612–13 (1971).

and faithfully reflec[t] the understanding of the Founding Fathers.”²³⁹ This portion of *Kennedy* also strikingly follows in the path of Justice Scalia’s dissent in *Weisman*, where he condemned the majority opinion for being “conspicuously bereft of any reference to history” and asserted that “the meaning of the [Establishment] Clause is to be determined by reference to *historical practices and understandings*.”²⁴⁰

But history — like equality — once loosed, is not easily cabined.²⁴¹ The nation’s earliest public schools were rife with compelled student prayers.²⁴² Indeed, even before the United States sprang into existence, the measure that would lay the foundation for the American system of compulsory public education had unmistakably religious origins. In 1647, colonial Massachusetts enacted the Old Deluder Satan Act, which required towns of more than fifty households to provide education.²⁴³ That measure, as its name suggests, was animated by the Puritan belief that being able to read Scripture directly, rather than relying on ministers, would help to keep the Devil at bay.²⁴⁴ For a long time thereafter, public schooling and religion went together hand in glove. Legal scholars John Jeffries and James Ryan have explained: “For most of its history, public education in America [was] . . . unmistakably Protestant.”²⁴⁵ In the 1850s, public school officials in Massachusetts physically assaulted Catholic pupils for refusing to join classmates in reading from the Protestant Bible.²⁴⁶ A state court resolved one such dispute against the student, reasoning that educators possessed broad discretion in how they schooled their pupils.²⁴⁷ In 1869, the National Teacher’s Association expressed the dominant understanding that “the Bible should [be] . . . devotionally read, and its precepts inculcated, in all the

²³⁹ *Kennedy*, 142 S. Ct. at 2428 (alterations in original) (emphasis added) (internal quotation marks omitted) (citations omitted). Justice Sotomayor took sharp exception to *Lemon*’s demise. *See id.* at 2447 (Sotomayor, J., dissenting) (regretting that the Court “completely repudiates the test established in *Lemon*”). Candor requires acknowledging, though, that *Lemon*’s death did not arrive as a shock. *See, e.g.*, DRIVER, *supra* note 45, at 399 n.† (observing that “the anti-coercion idea has ascended in significance . . . and the notorious three-part *Lemon* test has correspondingly descended”). However one assesses the doctrinal implications, I believe that we can all celebrate what seems likely to be legal scholarship’s steep decline in *Lemon* puns. For a notably subtle, restrained version of the form, see CARTER, *supra* note 62, at 110 (referring to “the *Lemon* test — a lemon indeed, for it has proved well nigh impossible to apply”).

²⁴⁰ *Weisman*, 505 U.S. at 631 (Scalia, J., dissenting) (emphasis added) (internal quotation marks omitted). Justice Scalia similarly proclaimed: “[O]ur Constitution[] cannot possibly rest upon the changeable philosophical predilections of the Justices of this Court, but must have deep foundations in the historic practices of our people.” *Id.* at 632.

²⁴¹ *See* Archibald Cox, *The Supreme Court, 1965 Term — Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 91 (1966) (“Once loosed, the idea of Equality is not easily cabined.”).

²⁴² *See* Jeffries & Ryan, *supra* note 49, at 297–98.

²⁴³ *See* MICHAEL IMBER ET AL., EDUCATION LAW 12 (5th ed. 2014).

²⁴⁴ *See id.*

²⁴⁵ Jeffries & Ryan, *supra* note 49, at 297.

²⁴⁶ *See id.* at 300 & n.105.

²⁴⁷ *Id.* at 300 n.105 (citing *Commonwealth v. Cooke*, 7 Am. L. Reg. 417 (Mass. Police Ct. 1859)).

common schools of the land.”²⁴⁸ Such practices persisted well into the twentieth century, as even after the Court issued *Engel* and *Schempp*, those decisions were sometimes flouted in various regions of the country.²⁴⁹

The crucial question then becomes, as Professor Kent Greenawalt has posed it: “If prayer and devotional Bible reading were constitutionally unacceptable, why did the Court not say so before 1962 and 1963?”²⁵⁰ It strains credulity to believe that either historical practices or the Founding Fathers compelled the outcomes in *Engel* and *Schempp*.²⁵¹ Yes, the Court in *Engel* purported to avail itself of the past.²⁵² But even as assessed by the bleak standards of law office history, *Engel* left much to be desired. Perceptive commentators made this very criticism of *Engel* contemporaneously. In 1963, only one year after *Engel*, Professor Louis Pollak pressed this point with considerable force in his Foreword to the *Harvard Law Review*’s Supreme Court issue titled *Public Prayers in Public Schools*:

History, as used in *Engel*, offers no persuasive guide for distinguishing the unconstitutional menace of [*Engel*’s prayer] from the ceremonial platitude of the Supreme Court Marshal’s “God save the United States and this Honorable Court.” And for the Court to say, as it did say in *Engel*, that the many patriotic and ceremonial “manifestations in our public life of belief in God . . . bear no true resemblance to the unquestioned religious exercise that the State . . . has sponsored in this instance,” merely announces a demarcation without indicating how either history or law serves to place a challenged observance in one category rather than another.²⁵³

For many years, the Court in effect sidestepped this tension by underscoring the distinctive nature of public schools. But *Kennedy* dramatically undercut that reasoning, and history could soon be wielded to restore God to a central place in our common classrooms.

²⁴⁸ GEOFFREY R. STONE & DAVID A. STRAUSS, *DEMOCRACY AND EQUALITY: THE ENDURING CONSTITUTIONAL VISION OF THE WARREN COURT* 40 (2020) (alteration and omission in original).

²⁴⁹ See DRIVER, *supra* note 45, at 21. In the late 1990s, to offer only one example, Jewish students at an Alabama public school “reportedly were required to attend an in-school ‘birthday party’ for Jesus, bow their heads during prayer at school assemblies, and write an essay on ‘Why Jesus loves me.’” Thomas C. Berg, *The Story of the School Prayer Decisions: Civil Religion Under Assault*, in *FIRST AMENDMENT STORIES* 193, 224 (Richard W. Garnett & Andrew Koppelman eds., 2012); see also Sue Anne Pressley, *Tough Lessons in an Alabama Town*, WASH. POST (Sept. 2, 1997), <https://www.washingtonpost.com/archive/politics/1997/09/02/tough-lessons-in-an-alabama-town/62a9e5cd-256c-4491-bb88-4ef1d9128a3a> [<https://perma.cc/RU7X-X37C>].

²⁵⁰ KENT GREENAWALT, *DOES GOD BELONG IN PUBLIC SCHOOLS?* 38 (2005).

²⁵¹ Cf. Jeffries & Ryan, *supra* note 49, at 296 (observing in a related context that “[t]he conclusion that we draw from . . . [history is modest and (should be) uncontroversial. When the [Supreme] Court reached back . . . for the pedigree of modern separationism, the justices were not obeying a command from the Framers”).

²⁵² See *Engel v. Vitale*, 370 U.S. 421, 425–35 (1962).

²⁵³ Louis H. Pollak, *The Supreme Court, 1962 Term — Foreword: Public Prayers in Public Schools*, 77 HARV. L. REV. 62, 66 (1963) (omissions in original) (quoting *Engel*, 370 U.S. at 435 n.21).

* * *

Kennedy also demonstrated scant regard for the everyday realities of school athletics, an arena where the Court has previously demonstrated intimate familiarity. In *Vernonia School District 47J v. Acton*,²⁵⁴ the Supreme Court upheld a urinalysis drug testing policy that subjected student athletes to suspicionless searches against a Fourth Amendment challenge.²⁵⁵ Justice Scalia's opinion for the Court in *Acton* justified the outcome in large part by contending that athletes have reduced expectations of privacy in comparison to nonathletes.²⁵⁶ In so doing, Justice Scalia immersed readers in the important role athletics play in American culture, the outsized popularity of high school jocks, and even the grim realities of locker room conditions. At times, *Acton* sounded like nothing so much as a John Cougar Mellencamp song.²⁵⁷ "[I]n small-town America," Justice Scalia wrote, "school sports play a prominent role in the town's life, and student athletes are admired in their schools and in the community."²⁵⁸ After painting this tableau of Americana, *Acton* proceeded to detail the regrettable décor of locker rooms:

School sports are not for the bashful. They require "suing up" before each practice or event, and showering and changing afterwards. Public school locker rooms . . . are not notable for the privacy they afford. The locker rooms in Vernonia are typical: No individual dressing rooms are provided; shower heads are lined up along a wall, unseparated by any sort of partition or curtain; not even all the toilet stalls have doors.²⁵⁹

Justice Scalia captured this scene so graphically, so evocatively that it conjured the distinct aroma of moldy athletic equipment. Noting that "athletes were the leaders of [Vernonia's] drug culture,"²⁶⁰ *Acton* deemed it "self-evident that a drug problem largely fueled by the 'role model' effect of athletes' drug use . . . is effectively addressed by making sure that athletes do not use drugs."²⁶¹

The Court in *Kennedy* would have been well served by demonstrating even a fraction of the familiarity with the realities of school athletics that *Acton* demonstrated. Completely absent from *Kennedy* is the recognition that Bremerton football players might well feel compelled to participate in a prayer out of a desire to affirm their commitment to team unity. Athletic teams routinely emphasize the importance of not only working together as a unit toward a common goal (call it teamwork),

²⁵⁴ 515 U.S. 646 (1995).

²⁵⁵ *Id.* at 648, 664–65.

²⁵⁶ *Id.* at 657 ("Legitimate privacy expectations are even less with regard to student athletes.").

²⁵⁷ See JOHN MELLENCAMP, *Jack & Diane*, on WORDS & MUSIC: JOHN MELLENCAMP'S GREATEST HITS, at 00:27 (Island Records 2004) ("A little ditty 'bout Jack & Diane / Two American kids growing up in the heart land / Jack, he's gonna be a football star.").

²⁵⁸ *Acton*, 515 U.S. at 648.

²⁵⁹ *Id.* at 657.

²⁶⁰ *Id.* at 649.

²⁶¹ *Id.* at 663.

but also of sacrificing what may be best for any single individual to advance the joint enterprise. “There is no I in T-E-A-M” is a cliché for a reason. Many enormous, strapping football players, who pride themselves on nothing more than their toughness, hold hands with their teammates as they emerge onto the field of battle in order to display their commitment to each other.²⁶² Players often do so even if they might balk at clasping hands with another young man in any other circumstance. Such demonstrations of solidarity matter, as they bring dozens of assorted players into a collective. The impulse to gather with one’s teammates following a competition is strong in all sports, but nowhere is it stronger than in football, which one wag memorably called a game of “violence punctuated by committee meetings.”²⁶³ Having survived an intense, chaotic, violent contest — with the periodic, smaller group gatherings that are huddles — many players following games would yearn for the larger collective, regardless of what form it assumes.

Kennedy unwisely turned a blind eye to the considerable pressure that student athletes might feel to conform to their teammates’ expectations. *Weisman* expressed concern about “peer pressure” exerting itself in religious settings, noting that “though subtle and indirect,” this pressure “can be as real as any overt compulsion.”²⁶⁴ These peer pressure concerns appear at their zenith not in the classroom or even at graduation ceremonies, but on the field in the context of team sports. At various points during games, players draw close together, place their hands in the middle of the amassed humanity, receive some words of inspiration (or sometimes condemnation), and then bring those gatherings to a close by shouting — in unison — “Team!” Such displays, it seems safe to say, are seldom witnessed before a big calculus exam or after marching to “Pomp and Circumstance.” The pressure not to miss out on a postgame meeting that turns into a prayer — when a majority of the team attends — ought not be discounted.²⁶⁵ These peer pressure concerns regarding group displays of faith seem especially acute in the aftermath of violent team sports, like football, where player safety is far

²⁶² See H.G. BISSINGER, *FRIDAY NIGHT LIGHTS: A TOWN, A TEAM, AND A DREAM* (1991) (featuring an indelible image on the paperback edition’s cover of three Permian Panthers — Mike Winchell, Brian Chavez, and Ivory Christian — holding hands as they stride onto the field of play).

²⁶³ George F. Will, *Socialism at the 50-Yard Line*, WASH. POST (Aug. 26, 1982), <https://www.washingtonpost.com/archive/politics/1982/08/26/socialism-at-the-50-yard-line/247a482b-5527-41e6-9c1a-25e21b6a2247> [<https://perma.cc/7345-HAF8>].

²⁶⁴ *Lee v. Weisman*, 505 U.S. 577, 593 (1992). The Supreme Court has sometimes mentioned the importance of “peer pressure” in order to diminish students’ constitutional rights. In *Morse v. Frederick*, 551 U.S. 393 (2007), the Court held that students can be punished for speech that educators reasonably believe promotes illicit drug use. See *id.* at 403. Chief Justice Roberts wrote in *Frederick*: “[S]chool boards know that peer pressure is perhaps ‘the single most important factor leading schoolchildren to take drugs.’” *Id.* at 408 (quoting *Bd. of Educ. v. Earls*, 536 U.S. 822, 840 (2002)) (Breyer, J., concurring).

²⁶⁵ Justice Gorsuch in *Kennedy* noted that a majority of the team participated in some of Coach Kennedy’s postgame prayers. *Kennedy*, 142 S. Ct. at 2416.

from assured. If there are no atheists in foxholes, as the old expression runs, there are no loners either.

Apart from failing to consider the team dynamics of high school sports, *Kennedy* made no effort to convey with precision how the contested actions would have appeared on the field of play. Justice Stevens's opinion for the Court in *Santa Fe Independent School District v. Doe* went to elaborate lengths to portray the scene that would have likely unfolded as a student delivered a prayer:

It is fair to assume that the pregame ceremony is clothed in the traditional indicia of school sporting events, which generally include not just the team, but also cheerleaders and band members dressed in uniforms sporting the school name and mascot. The school's name is likely written in large print across the field and on banners and flags. The crowd will certainly include many who display the school colors and insignia on their school T-shirts, jackets, or hats and who may also be waving signs displaying the school name. It is in a setting such as this that "[t]he board has chosen to permit" the elected student to rise and give the "statement or invocation."²⁶⁶

If *Acton* forced readers to smell locker room mold, *Santa Fe* enabled them to catch a whiff of hot dogs. Repudiating this granular approach, Justice Gorsuch declined to note that when Coach Kennedy — wearing Bremerton School District-branded athletic apparel — would kneel down to pray at home games, his prayers apparently occurred smack dab in the middle of the enormous Bremerton School District insignia that adorns its field.²⁶⁷

²⁶⁶ *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 307–08 (2000) (quoting Joint Appendix at 104–05, *Santa Fe* (No. 99-62)).

²⁶⁷ See Photograph of Joseph Kennedy on the Bremerton High School Football Field, in Devin Dwyer, *Public School Coach Asks Supreme Court to OK Post-game Prayers*, ABC NEWS (Apr. 25, 2022, 10:18 AM), <https://abcnews.go.com/Politics/public-school-coach-asks-supreme-court-post-game/story?id=83445646> [<https://perma.cc/S4RX-36JG>]; *Kennedy v. Bremerton Sch. Dist.*, 869 F.3d 813, 819 (9th Cir. 2017) (noting that Coach Kennedy prayed in Bremerton-logoed attire). *Kennedy* draws a sharp, but deeply misguided, distinction between endorsement, on the one hand, and coercion, on the other. See *Kennedy*, 142 S. Ct. at 2428–29 (rejecting endorsement as a relevant Establishment Clause consideration and emphasizing the significance of coercion, even if in a diluted form). This distinction arose at least twice during oral argument, where Coach Kennedy's counsel — the redoubtable Paul Clement — sought to gain leverage by disparaging the importance of endorsement to the modern Establishment Clause. On one occasion, Clement sought to downplay *Santa Fe*'s relevance by classifying it as an endorsement case, rather than a coercion case. See Transcript of Oral Argument at 45, *Kennedy*, 142 S. Ct. 2407 (No. 21-418), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/21-418_j4ek.pdf [<https://perma.cc/5BFM-BWTJ>]. In addition, Clement disparaged Bremerton School District because it highlighted endorsement, not coercion, in expressing its concerns about Coach Kennedy's behavior. See *id.* at 26–27. In response, Justice Kagan stated: "Yeah, I mean, endorsement, coercion, . . . you're requiring a lot of a school board to figure out exactly which box in the Establishment Clause to put this in." *Id.* at 27.

Justice Kagan should have gone much further still and explained that endorsement and coercion are not completely distinct concepts, but instead are opposite sides of the same coin. School

Bizarrely, *Kennedy* does not even so much as mention *Santa Fe* — the most pertinent Supreme Court precedent — until the very end of the opinion, with only three paragraphs remaining.²⁶⁸ Nor does Justice Gorsuch tarry on *Santa Fe* for long, attempting to distinguish the most germane precedent by quickly noting “[t]he prayers for which Mr. Kennedy was disciplined were not publicly broadcast or recited to a captive audience.”²⁶⁹ But there is, of course, no Amplification Principle in the Establishment Clause, and some of Coach Kennedy’s players could almost certainly have felt compelled to behold their fearless leader’s postgame spectacle of devotion. Moreover, even accepting *Kennedy*’s feeble efforts to distinguish *Santa Fe*, the fact that Coach Kennedy was a school official — rather than a student, as in *Santa Fe* — would seem to render the facts in *Kennedy* at least as constitutionally troublesome as those at issue in *Santa Fe*.²⁷⁰

On this very point, *Kennedy* denied the basic realities of school athletics by giving short shrift to the revered status American society accords coaches — particularly football coaches.²⁷¹ It is no accident that

prayers are coercive, that is, precisely *because* they appear to carry the state’s endorsement. I borrow this insight from Justice Black’s opinion in *Engel*, where he wrote: “When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.” *Engel v. Vitale*, 370 U.S. 421, 431 (1962). The first clause of Justice Black’s statement conveys the notion of endorsement, and the second clause captures an impermissible end, that is, coercion.

²⁶⁸ *Kennedy*, 142 S. Ct. at 2431.

²⁶⁹ *Id.* at 2432.

²⁷⁰ Justice Gorsuch’s opinion in *Kennedy* repeatedly noted — perseverated, really — that the coach’s prayers were “brief.” *See, e.g., id.* at 2417 (stating that Kennedy “knelt to say a brief prayer of thanks”); *id.* at 2418 (observing that “Mr. Kennedy offered a brief prayer”); *id.* at 2422 (criticizing Bremerton School District for “forbidding Mr. Kennedy’s brief prayer”); *id.* at 2433 (noting that Kennedy “engag[ed] in a brief, quiet, personal religious observance”). But it is unclear how important brevity stands in the Court’s analysis. How would the analysis in *Kennedy* shift if a coach delivered a postgame prayer for one minute? Two minutes? Five minutes? One suspects that, in a country where religion is felt as widely and deeply as the United States, we will have an opportunity to find out. *See infra* pp. 248–49.

It is also not clear that Coach Kennedy’s prayers were even all that brief. Coach Kennedy’s postgame prayers typically lasted approximately thirty seconds. *See Kennedy*, 142 S. Ct. at 2416; *see also Kennedy v. Bremerton Sch. Dist.*, 991 F.3d 1004, 1010 (9th Cir. 2021) (noting that “Kennedy’s prayer usually lasted about thirty seconds”). But that period is roughly three times as long as the Regents prayer that the Court invalidated in *Engel*, *see supra* p. 218, and not quite as long as one of the pregame prayers that was delivered in *Santa Fe*. A *Santa Fe* student prayed:

Lord, thank you for this evening. Thank you for all the prayers that were lifted up this week for me. I pray that you watch over each and every person here tonight, especially those involved in the game, that they will demonstrate good sportsmanship, Lord, and that we’ll have safety. Just be with the fans, that they will exemplify good behavior as well, Lord. And just be with each and every one of us as we go home to our respective places tonight. In Jesus’ name, I pray. Amen.

Pamela Colloff, *They Haven’t Got a Prayer*, TEX. MONTHLY (Nov. 2000), <https://www.texasmonthly.com/news-politics/they-havent-got-a-prayer> [<https://perma.cc/UBT7-LBCU>]. One can, it seems, get a great deal of praying accomplished in thirty seconds.

²⁷¹ For an engaging account of the importance that a coach can have, see MICHAEL LEWIS, *COACH: LESSONS ON THE GAME OF LIFE* (2005).

the highest paid public employee in many states is the head coach of the flagship public university's college football team.²⁷² The high status of college football coaches is a supersized version of high school coaches' importance. These coaches are local celebrities and venerated leaders of not just the team, but the entire community. If one holds dreams of athletic glory (including hopes of securing a college athletic scholarship) or even a mere roster spot, staying in the coach's good graces is essential. As one former National Football League player put it: "The first commandment of football is the same today as it was in the leather helmet days: listen to your coach."²⁷³ *Kennedy's* sole acknowledgment of the exalted place that coaches occupy appeared almost in passing: "Teachers and coaches often serve as vital role models."²⁷⁴ But this truncated statement is a little like saying that valedictorians and prom kings often receive adulation from classmates. Coaches and prom kings, for better or for worse, are the subjects of fascination in a way that teachers and valedictorians are not and never will be. Underplaying the immense power that coaches wield at high schools around the country artificially minimizes the very real Establishment Clause concerns posed by *Kennedy*.

It may be tempting to believe that the studious collection of legal talent at the Supreme Court simply had no frame of reference for the actual role that coaches play in American life. Some textual evidence supports this proposition, as Justice Gorsuch's opinion for the Court never refers to the petitioner as "Coach Kennedy," but as "Mr. Kennedy."²⁷⁵ (Coaches, in my experience, cling to the honorific in a way that can be rivaled only by chefs, doctors, and professors.) But at least one Justice in the *Kennedy* majority has waxed eloquent on the import of coaches. At then-Judge Kavanaugh's confirmation hearings for the Supreme Court in 2018, he stated: "I know from my own life that those who . . . coach America's youth are among the most influential people in our country."²⁷⁶ Justice Kavanaugh has, perhaps not incidentally, served as a youth coach for one of his daughter's basketball teams.²⁷⁷

²⁷² See, e.g., Charlotte Gibson, *Who's the Highest-Paid Person in Your State?*, ESPN (Mar. 20, 2018), https://www.espn.com/espn/feature/story/_id/22454170/highest-paid-state-employees-include-naa-coaches-nick-saban-john-calipari-dabo-swinney-bill-self-bob-huggins [<https://perma.cc/9KNY-SXC7>].

²⁷³ Brief of Former Professional Football Players Obafemi D. Ayanbadejo, Sr., et al. as Amici Curiae in Support of Respondent at 13, *Kennedy*, 142 S. Ct. 2407 (No. 21-418) (quoting ROBERT W. TURNER II, *NOT FOR LONG: THE LIFE AND CAREER OF THE NFL ATHLETE* 57 (2018)).

²⁷⁴ *Kennedy*, 142 S. Ct. at 2425.

²⁷⁵ See *id. passim* (referring to "Mr. Kennedy"). Justice Sotomayor's dissent did once reference "Coach Kennedy." *Id.* at 2443 (Sotomayor, J., dissenting).

²⁷⁶ *Confirmation Hearing on the Nomination of Hon. Brett M. Kavanaugh to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. 111 (2018) (statement of Judge Brett Kavanaugh).

²⁷⁷ *Id.* at 217-18.

At oral argument in *Kennedy*, Justice Kavanaugh posed a most revealing question, one that indicated how coaches may — even unintentionally — coerce students into praying against their wishes: “What about the player who thinks, if I don’t participate in this [prayer], I won’t start next week, or the player who thinks, if I do participate in this [prayer], I will start next week, and the player, like, wants to start?”²⁷⁸ Justice Kavanaugh’s quite plausible hypothetical uncannily conveys a young athlete’s thought process, capturing a time when many people place an inordinate emphasis on the amount (and quality) of the playing time they receive. This question raises the distinct, haunting prospect of student athletes who are desperate for playing time attempting to engage in an unseemly exchange of pray for play. Even if the student athlete is laboring under a false impression, the coercion is all too real.²⁷⁹ Regrettably, Justice Gorsuch’s opinion in *Kennedy* evaded this essential query.

* * *

In 1973, Professor Alexander Bickel of Yale Law School reflected on the Supreme Court’s high-profile confrontations with school prayer decided a decade earlier. “Anyone who values American public education as perhaps the single most important nationalizing[,] and therefore secular, force in our pluralistic society must have regarded it as a near disaster if the Supreme Court had [upheld] the prayers in [*Engel*], let alone those in [*Schempp*],” Bickel contended.²⁸⁰ “For such an act of legitimation would have given enormous impetus to Heaven knows (!) what insistent and pervasive incursion into the public school system by organized religion.”²⁸¹ Bickel argued, in effect, that the Court validating a public school prayer would unleash a tremendous amount of religious energy that suffused American society. Five decades later, Bickel’s concern remains relevant, as *Kennedy* will surely invite organized religion’s widespread incursion into the public school setting.

Although Justice Gorsuch’s opinion sought to isolate Coach Kennedy’s “three prayers,” coaches around the nation will surely go well beyond those three Kennedy exhibitions in an effort to communicate

²⁷⁸ Transcript of Oral Argument, *supra* note 267, at 47. Justice Kavanaugh repeatedly struck this chord during oral argument in *Kennedy*. Having coaches pray in the manner of Coach Kennedy, Justice Kavanaugh allowed, gives rise to “the suspicion by parents that the reason Johnny’s starting and you’re not is he was part of the prayer circle. . . . [T]hat suspicion[,] I don’t think you can get around. That’s a real thing out there I don’t know how to deal with that, frankly, though.” *Id.* at 49. Justice Kavanaugh further observed: “[E]very player’s trying to get on the good side of the coach. And every parent is worried about the coach exercising favoritism in terms of the starting lineup, playing time, recommendations for colleges, et cetera.” *Id.* at 48.

²⁷⁹ As Stephen Carter has contended in a related context: “Coercion might not be the intention; it is, however, the effect.” CARTER, *supra* note 62, at 188.

²⁸⁰ ALEXANDER M. BICKEL, *POLITICS AND THE WARREN COURT* 205 (1973).

²⁸¹ *Id.*

religious fervor to their players — and their communities. Indeed, following *Kennedy*, several football coaches suggested that they had previously avoided prayer, but would now exercise their newly recognized free exercise rights.²⁸² Predictably, some football coaches and school board members misunderstood *Kennedy* as expressly authorizing coaches to lead their teams in prayer, despite the decision holding no such thing.²⁸³ Even public school coaches who have no interest whatsoever in emulating Coach Kennedy will now be pressured in many communities to take a knee following games. The Supreme Court placed its imprimatur on the practice, and by drawing the religious observance into the spotlight, the postgame Coach Kennedy prayer could very well become the new normal.²⁸⁴ Many coaches will undoubtedly decide to take a knee not because faith compels them, but because they would rather avoid a question shouted from the stands: “*Why isn’t he praying?*”²⁸⁵ Less than one week after the decision was handed down, one pastor with a national following had already declared that he would like to see coaches follow in Kennedy’s footsteps: “Football season’s coming soon. Let’s do this: Let’s all meet on the 50-yard line after a game. . . . After the game, let’s start a movement.”²⁸⁶ It seems safe to

²⁸² See, e.g., David Wilson, *What South Florida Football Coaches Are Saying About SCOTUS’ Ruling About Postgame Prayer*, MIAMI HERALD (June 28, 2022, 4:42 PM), <https://www.miamiherald.com/sports/high-school/article262957913.html> [<https://perma.cc/G2U4-B9GW>].

²⁸³ See, e.g., Cecil Joyce, *How Ruling Will Affect High School Athletics: Public Employees Still Can’t Lead Team in Prayer*, THE TENNESSEAN, July 4, 2022, at A1 (noting a football coach’s misapprehension); James Rainey et al., *Ruling Reopens Debate on Religion in Schools; Experts in California Weigh In: “There Will Be Much Litigation,”* L.A. TIMES, June 28, 2022, at B1 (noting a school board member’s misapprehension). Relatedly, Coach Brannon Rodgers of Sundown High School in Sundown, Texas, stated that he followed the *Kennedy* litigation closely and suggested that his commitments to football and faith were intimately connected: “We want to win state titles, but the ultimate goal is to press on toward the prize in Christ Jesus.” Scott Barkley, *Faith on the Field: Coaches Were Watching Supreme Court Decision Closely*, KY. TODAY (July 19, 2022) (internal quotation marks omitted), https://www.kentuckytoday.com/baptist_life/faith-on-the-field-coaches-were-watching-supreme-court-decision-closely/article_b12d21a8-06c6-11ed-8285-1fdb8ae1ae42.html [<https://perma.cc/WP3Q-SZYQ>].

²⁸⁴ Cf. Justin Driver, *The Supreme Court as Bad Teacher*, 169 U. PA. L. REV. 1365, 1387–411 (2021) (analyzing how the Supreme Court’s validation of a practice can help it become widespread in the contexts of, inter alia, sterilization laws and school flag salute measures).

²⁸⁵ Cf. *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 404 (5th Cir. 1995) (noting that a basketball game spectator asked of a seventh-grader, “[W]hy isn’t she praying?”).

²⁸⁶ Jay Clemons, *Pastor Jack Hibbs to Newsmax: “America Is Nation of Prayer,”* NEWSMAX (July 3, 2022, 11:44 AM) (internal quotation marks omitted), <https://www.newsmax.com/newsmax-tv/supreme-court-high-school-football-prayer/2022/07/03/id/1077132> [<https://perma.cc/6THA-U863>]. Following *Kennedy*, one football coach in Texas — speaking to the media anonymously — made clear that he had no intent to take a knee in the fall and identified his team’s religious diversity as informing his position. “I don’t think [the non-Christian players] would be bothered by a prayer, but I also think that religion and faith are deeply personal,” the coach stated. “It isn’t my place or my program’s place to make part of the team feel obligated to pray or listen to a prayer.” Brian Gosset, *In North Texas, Where On-Field Prayer Is Common, Support for Coach Who Won at Supreme Court*, FORT WORTH STAR-TELEGRAM (July 1, 2022, 10:41 AM) (internal quotation marks omitted), <https://www.startelegram.com/sports/dfwvarsity/article263054748.html> [<https://perma.cc/9RNB-QG73>].

say that the movement has already been started. What began on the football field, though, surely will not remain there.²⁸⁷

IV. PERILS OF THE FRACTURED DÉTENTE

What links the Court's outcomes in *Carson* and *Kennedy*? It is not difficult to see the pair of decisions as being largely motivated by a concern that American society views religious beliefs with a mixture of hostility and contempt. *Carson* and *Kennedy* thus both give voice to the politics of Christian aggrievement, a movement that has gained significant traction within elite conservative legal circles since the Reagan Revolution.²⁸⁸ Back in 1985, Clarence Thomas — before he ascended to the federal bench — was relatively unusual among the conservative legal cognoscenti for continuing to express skepticism of the Court's school prayer decisions. "My mother says that when they took God out of the schools," Thomas said, "the schools went to hell. She may be right."²⁸⁹

More than three decades later, though, the feelings of Christian aggrievement that Thomas's statement tapped into have become ubiquitous among his fellow leading conservative lawyers. In October 2019, Attorney General William Barr delivered a high-profile speech advancing the notion of an embattled faithful needing support against the overpowering forces of secularism. "[M]ilitant secularists today do not have a live and let live spirit — they are not content to leave religious people alone to practice their faith," he maintained.²⁹⁰ "[T]he bitter results of the new secular age," Barr noted, included "an increase in senseless violence[] and a deadly drug epidemic,"²⁹¹ the very same cultural afflictions that President Reagan had assigned to the Court's school prayer decisions in the 1980s.²⁹² In November 2020, a little more than one year after Attorney General Barr's broadside, Justice Alito echoed these ideas in a keynote speech at the Federalist Society's annual meeting. "It pains me to say this," Justice Alito asserted, "but in certain quarters, religious

²⁸⁷ See, e.g., Hannah Natanson, *After Court Ruling, Activists Push Prayer into Schools*, WASH. POST (July 26, 2022, 6:00 AM), <https://www.washingtonpost.com/education/2022/07/26/school-prayer-kennedy-church-state> [<https://perma.cc/U2YV-MPFS>] (describing a flurry of post-*Kennedy* activities to "push religious worship into public schools nationwide" and efforts "to blur the line dividing prayer and pedagogy").

²⁸⁸ See *supra* p. 220.

²⁸⁹ Nancy Gibbs, *America's Holy War*, TIME (Dec. 9, 1991) (internal quotation marks omitted), <https://content.time.com/time/subscriber/printout/0,8816,974430,00.html> [<https://perma.cc/3SC3-WP6X>].

²⁹⁰ William P. Barr, U.S. Att'y Gen., Remarks to the Law School and the de Nicola Center for Ethics and Culture at the University of Notre Dame (Oct. 11, 2019) (transcript available at <https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-remarks-law-school-and-de-nicola-center-ethics> [<https://perma.cc/PEH8-2N7C>]). Barr stated: "Among these militant secularists are many so-called 'progressives.' But where is the progress?" *Id.*

²⁹¹ *Id.*

²⁹² See *supra* p. 220.

liberty is fast becoming a disfavored right.”²⁹³ Justice Alito continued: “For many today, religious liberty is not a cherished freedom. It’s often just an excuse for bigotry, and it can’t be tolerated.”²⁹⁴ Last year, when the stalwart conservative Judge Ryan Nelson assessed Coach Kennedy’s claim on the Ninth Circuit, he distilled the politics of religious aggrievement into a slogan: “The way to stop hostility to religion is to stop being hostile to religion.”²⁹⁵

Carson’s effort to push back against a type of antireligious sentiment can be found in both the first and the final paragraphs of the opinion — if one knows where to look. In *Carson*’s third sentence, Chief Justice Roberts noted: “Most private schools are eligible to receive the [tuition] payments, so long as they are ‘nonsectarian.’”²⁹⁶ Similarly, Chief Justice Roberts began *Carson*’s concluding paragraph by noting: “Maine’s ‘nonsectarian’ requirement for its otherwise generally available tuition assistance payments violates the Free Exercise Clause.”²⁹⁷ Chief Justice Roberts’s highlighting of the word “nonsectarian” operates as a dog whistle, or — perhaps more accurately — calls attention to an anti-Catholic dog whistle contained in Maine’s statute.²⁹⁸ Chief Justice Roberts did not drive home this point about the sectarian terminology, but Justice Thomas has written an opinion noting that the label possesses a “shameful pedigree,” one “born of bigotry,” as “it was an open

²⁹³ Samuel Alito, Keynote Address to the Federalist Society (Nov. 12, 2020) (transcript available at <https://reason.com/volokh/2020/11/12/video-and-transcript-of-justice-alitos-keynote-address-to-the-federalist-society> [<https://perma.cc/5JBZ-U7R5>]). For commentary noting that Justice Alito’s speech was uncommonly political (and uncommonly heated) for a sitting Supreme Court Justice, see Adam Liptak, *In Unusually Political Speech, Alito Says Liberals Pose Threat to Liberties*, N.Y. TIMES, Nov. 14, 2020, at A20.

²⁹⁴ Alito, *supra* note 293. One month after the Supreme Court issued *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228 (2022), Justice Alito delivered a public address renewing his ardent defense of religious liberty. Justice Alito’s speech, some of which mocked foreign critics of *Dobbs*, suggested that religious freedom was in fact not so free. “When you step outside into the public square, in the light of day, you had better behave yourself like a good secular citizen,” Justice Alito remarked. See Robert Barnes, *Alito Dismisses Foreign Criticism of Supreme Court’s Abortion Ruling*, WASH. POST (July 28, 2022, 7:32 PM) (internal quotation marks omitted), <https://www.washingtonpost.com/politics/2022/07/28/alito-defends-roe-wade-abortion-ruling> [<https://perma.cc/2C24-V9NH>]. Justice Alito has articulated related concerns in his judicial writings. See *Obergefell v. Hodges*, 576 U.S. 644, 741 (2015) (Alito, J., dissenting) (contending that those who oppose same-sex marriage based on their religious scruples “risk being labeled as bigots”).

²⁹⁵ *Kennedy v. Bremerton Sch. Dist.*, 4 F.4th 910, 945 (9th Cir. 2021) (Nelson, J., dissenting). Judge Nelson’s statement paid homage to the most famous line that Chief Justice Roberts has written during his tenure. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (plurality opinion) (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”). For an evaluation of this statement’s origins, see DRIVER, *supra* note 45, at 297 n.*.

²⁹⁶ *Carson*, 142 S. Ct. at 1993.

²⁹⁷ *Id.* at 2002.

²⁹⁸ See IAN HANEY LÓPEZ, DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS *passim* (2014) (exploring the concept of dog whistles regarding race in the political and legal worlds).

secret that ‘sectarian’ was code for ‘Catholic.’”²⁹⁹ Justice Thomas offered these statements for a plurality in a case involving funding for religious schools, and *Carson* involved that same general issue. This notion that Maine’s program unfairly and unduly marginalized families who wanted their children to attend religious schools arose at *Carson*’s oral argument. Justice Kavanaugh asked: “[B]y excluding someone who’s religious from a state program and creating this feeling of exclusion for people who are told your school isn’t good enough solely because it’s religious . . . doesn’t that also create a possibility . . . of strife?”³⁰⁰

In *Kennedy*, the notion that the Supreme Court was striking a blow against antireligious sentiment appeared even more clearly. Justice Gorsuch contended that permitting Bremerton to sanction Coach Kennedy for his prayers would permit governmental entities to “treat religious expression as second-class speech.”³⁰¹ That is a powerful rhetorical frame, but it also might be readily translated as indicating simply that educators enjoy what are in effect junior-varsity free exercise rights due to the heightened Establishment Clause concerns that exist within public schools. Junior-varsity constitutional rights are, of course, a pervasive feature of public schools, even if they are typically conferred on students rather than teachers.³⁰² Nevertheless, one could quite easily envision a site-sensitive constitutional interpretation as reasonably affording public school educators reduced free exercise rights even as compared to other public employees.³⁰³

This idea that antireligious hostility has reduced the devout among us to second-class citizens runs throughout *Kennedy*. In a notable passage, Justice Gorsuch chided Bremerton for “fault[ing] Mr. Kennedy for not being willing to pray behind closed doors.”³⁰⁴ Conservative jurists

²⁹⁹ *Mitchell v. Helms*, 530 U.S. 793, 828–29 (2000) (plurality opinion). Jeffries and Ryan open their article exploring the Establishment Clause by highlighting Justice Thomas’s opinion in *Helms*. See Jeffries & Ryan, *supra* note 49, at 279.

³⁰⁰ Transcript of Oral Argument, *supra* note 141, at 84. At oral argument in *Carson*, Justice Alito also seized an opportunity to condemn critical race theory, suggesting that religious expression had been forced to take a backseat to ideologies prized by the left: “Would you say the same thing about a school that teaches critical race theory?” *Id.* at 77. Conservatives, of course, routinely use critical race theory as a cudgel and seem unburdened by familiarizing themselves with its concepts.

³⁰¹ *Kennedy*, 142 S. Ct. at 2425. At oral argument in *Kennedy*, Justice Thomas previewed this notion that causes traditionally embraced by the left enjoyed a preferred status over religious expression. Justice Thomas questioned Bremerton’s counsel as to how the school district would have responded if “instead of taking a knee for prayer, [a coach] took a knee during the National Anthem because of moral opposition to racism?” Transcript of Oral Argument, *supra* note 267, at 58.

³⁰² See *supra* pp. 213–14 (identifying the phenomenon of junior-varsity constitutional rights).

³⁰³ The leading public employee speech cases are *Garcetti v. Ceballos*, 547 U.S. 410 (2006); and *Pickering v. Board of Education*, 391 U.S. 563 (1968). Nothing in those cases precludes the approach sketched in the text, and *Garcetti* expressly refrained from declaring that the speech standard it articulated for public employees applied to “speech related to scholarship or teaching.” *Garcetti*, 547 U.S. at 425. For a prescient article that anticipated the future of public employee speech, see Randy J. Kozel, *Reconceptualizing Public Employee Speech*, 99 NW. U. L. REV. 1007 (2005).

³⁰⁴ *Kennedy*, 142 S. Ct. at 2419.

have often expressed alarm that overzealous secularists — to coin a term — have succeeded in driving religious worship underground, believing it is somehow either unseemly or unfit for public view. As one Ninth Circuit judge who would have ruled for Coach Kennedy put it: “No case law requires that a high school teacher must be out of sight of students or jump into the nearest broom closet in order to engage in private prayer”³⁰⁵ Such statements echo the fears advanced in Justice Scalia’s *Weisman* dissent, where he rebuked the Court for depicting religion as “some purely personal avocation that can be indulged entirely in secret, like pornography, in the privacy of one’s room.”³⁰⁶ Justice Scalia continued: “For most believers it is *not* that, and has never been. Religious men and women of almost all denominations have felt it necessary to acknowledge and beseech the blessing of God as a people, and not just as individuals”³⁰⁷ Public prayer at school events, Justice Scalia elaborated, serves “our society [as an] important unifying mechanism.”³⁰⁸ Eight years later, Chief Justice Rehnquist echoed this theme in his *Santa Fe* dissent, where he contended that the majority’s opinion “bristles with hostility to all things religious in public life.”³⁰⁹

Although my fellow liberals are typically loath to admit it, the incorrect notion that law requires religion to be abandoned altogether in public school settings is not *solely* a figment of the conservative legal imagination. In the aftermath of *Engel* and *Schempp*, some educators suffered from precisely this misapprehension. In 1991, for example, *Time* magazine reported that a grade school teacher in Illinois required her class of seven-year-old students to strike through the word “God” in their phonics workbooks because she believed that “it is against the law to mention God in a public school.”³¹⁰ This extreme example illustrates an all-too-common general misunderstanding. It is religious instruction and religious coercion that is typically forbidden in public schools, not the bare mentioning of religion. Indeed, it is difficult to teach some subjects competently without addressing the role that religion played. To discuss the civil rights movement of the 1950s and 1960s and avoid discussing religion — including the Black Church, the Reverend Dr. Martin Luther King, Jr., the Southern *Christian* Leadership Conference, and the rousing final line of King’s most enduring oration (“Free at last; free at last; thank *God Almighty*, we are free at last.”³¹¹) — would, in

³⁰⁵ *Kennedy v. Bremerton Sch. Dist.*, 991 F.3d 1004, 1025 (9th Cir. 2021) (Christen, J., concurring).

³⁰⁶ *Lee v. Weisman*, 505 U.S. 577, 645 (1992) (Scalia, J., dissenting).

³⁰⁷ *Id.*

³⁰⁸ *Id.* at 646. The notion that public prayers serve to unify is, of course, predicated on overlooking objectors.

³⁰⁹ *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 318 (2000) (Rehnquist, C.J., dissenting).

³¹⁰ Gibbs, *supra* note 289.

³¹¹ Martin Luther King, Jr., *I Have a Dream Speech* (Aug. 28, 1963) (quoted in Michiko Kakutani, *The Lasting Power of Dr. King’s Dream Speech*, N.Y. TIMES (Aug. 27, 2013), <https://www.nytimes.com/2013/08/28/us/the-lasting-power-of-dr-kings-dream-speech.html> [<https://perma.cc/22DU-CVC6>] (emphasis added)).

my view, constitute a dereliction of duty.³¹² Mentioning religion in this pedagogical context and several others besides would, of course, not run afoul of the Establishment Clause.

Regrettably, some highly distinguished legal liberals have offered imprecise understandings of the Court's Establishment Clause jurisprudence regarding public schools. Such imprecision — which wrongly suggests that the Court has set out to purge all religious expression from public schools — fuels conservative anxieties that the left views expressions of religious devotion with hostility. Justice Breyer's dissent in *Carson* offers several examples in rapid succession of falling into this trap. In the span of a single paragraph, Justice Breyer contended *Engel* held “no prayers in public schools,” *Schempp* held “no Bible readings in public schools,” *Weisman* held “no prayers during public school graduations,” and *Santa Fe* held “no prayers during public school football games.”³¹³

I view Justice Breyer with tremendous respect. But, respectfully: no, no, no, and no. There is an enormous difference between banning prayer in schools and banning school-sponsored prayers. The former at least possibly can be attributed to individuals, whereas the latter are attributed to the government, and are therefore impermissible under the Establishment Clause. *Engel* certainly did not prohibit students from, say, offering a prayer on their own before taking a big test.³¹⁴ *Schempp* did not attempt to ban the Bible from appearing on school premises, but instead prevented school officials from imposing Bible instruction.³¹⁵ Similarly, *Weisman* and *Santa Fe* prevented the utterance of official prayers,³¹⁶ but surely parents and students — and, yes, educators — can and do say individual prayers at graduation ceremonies and at football games without violating the Establishment Clause.³¹⁷ Justice Breyer's rendering of the Court's Establishment Clause holdings is

³¹² See CARTER, *supra* note 62, at 227 (noting that “[t]he [civil rights] movement's public appeals were openly and frankly religious” and exploring Reverend King's example at length).

³¹³ *Carson*, 142 S. Ct. at 2003 (Breyer, J., dissenting). Adding to the notion that liberals too often treat religion with indifference, Justice Breyer — when referring to the rich religious diversity that exists in the United States — mentioned the “African Methodist” religion. See *id.* at 2005. But the source that Justice Breyer cited for this religion (of which I had never heard) does not speak of “African Methodist.” Instead, it speaks of “African Methodist Episcopal,” or AME, as it is often rendered. See PEW RSCH. CTR., AMERICA'S CHANGING RELIGIOUS LANDSCAPE 21 (2015), <https://www.pewresearch.org/religion/wp-content/uploads/sites/7/2015/05/RLS-08-26-full-report.pdf> [<https://perma.cc/NC8G-S9K7>].

³¹⁴ See *Engel v. Vitale*, 370 U.S. 421, 435 (1962).

³¹⁵ See *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 223 (1963).

³¹⁶ See *Lee v. Weisman*, 505 U.S. 577, 599 (1992); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 313 (2000).

³¹⁷ Given Coach Kennedy's extensive history of leading team prayers that the Court in *Kennedy* in effect ignored — thereby contravening *Santa Fe*'s model — it is unpersuasive to construe Coach Kennedy's conduct as actually constituting “individual prayers.” See *supra* p. 211.

closer to the stuff of a George Wallace fever dream than a meticulous appraisal of the Court's jurisprudence.³¹⁸

Justice Breyer is not alone in offering such imprecision. In a book titled *The Religion Clauses* that appeared two years ago, Professors Howard Gillman and Erwin Chemerinsky stated: “[T]he Supreme Court has repeated for forty-five years that prayer, even voluntary prayer, does not belong in public schools.”³¹⁹ But, again, it has done no such thing.

It may initially seem as though I am attempting to slice the baloney a bit too thin here. Yet it hardly seems overly pedantic to ask that Supreme Court Justices and prominent legal scholars accurately reflect the holdings of opinions that occupy a central place within the canon of American constitutional law. Indeed, a favorite pastime of law professors is to grumble about what they perceive as the media's superficial, unnuanced, often inaccurate treatment of complicated legal disputes. But, with the Establishment Clause, our leading lights on the bench and in legal academia would do well to take notes from at least some journalists. Here is Adam Liptak's exemplary coverage of *Kennedy* in the *New York Times*: “Over the last 60 years, the Supreme Court has rejected prayer in public schools, at least when it was officially required or part of a formal ceremony like a high school graduation.”³²⁰ If readers of the *Gray Lady* can stomach that degree of nuance, surely readers of the U.S. Reports can, too.

Acknowledging this reality in no way means that conservatives' feelings of religious aggrievement should be indulged in all circumstances. To the contrary, it is, in my view, impossible to defend the notion that Christianity is — in any meaningful sense — under attack in the United States. That view is a right-wing delusion midwived by Fox News.³²¹ Public schools are not now and never have been God-free zones, and it is odd for believers to contend that it would be possible even for the mighty Supreme Court to abolish God Almighty. As Professor Stephen Carter has stated: “God, of course, has never been out of the classroom.

³¹⁸ See *supra* p. 220 (noting that Governor Wallace stated in 1963 that he “wouldn't be surprised if they sent troops into the classrooms and arrested little boys and girls who read the Bible and pray”).

³¹⁹ GILLMAN & CHEMERINSKY, *supra* note 84, at 65.

³²⁰ Adam Liptak, *Supreme Court Sides with Coach over Prayers at the 50-Yard Line*, N.Y. TIMES (June 27, 2022), <https://www.nytimes.com/2022/06/27/us/politics/supreme-court-coach-prayers.html> [<https://perma.cc/F9SP-KC59>].

³²¹ See Liam Stack, *How the “War on Christmas” Controversy Was Created*, N.Y. TIMES (Dec. 19, 2016), <https://www.nytimes.com/2016/12/19/us/war-on-christmas-controversy.html> [<https://perma.cc/W9AB-57JP>]; Jeremy Barr, “We Will Not Be Defeated”: 36 Hours of Fox News Covering Its Own Christmas Tree Fire, WASH. POST (Dec. 9, 2021, 5:01 PM), <https://www.washingtonpost.com/media/2021/12/09/fox-christmas-tree-coverage> [<https://perma.cc/PVZ5-G2Y8>]; Alvin Chang, Opinion, *Are White Christians Under Attack in America? No, But the Myth Is Winning*, THE GUARDIAN (Mar. 18, 2022, 6:00 AM), <https://www.theguardian.com/commentisfree/2022/mar/18/are-white-christians-under-attack-in-america-no-but-the-myth-is-winning> [<https://perma.cc/3LUA-R47T>].

It is difficult to imagine how a human law could remove God from, or put God, anywhere.”³²²

Although the Court has of late demonstrated great responsiveness to the hostility that it perceives being directed toward Christianity, it has too often ignored the very real hostility that is directed toward religious minorities. For instance, in 2018, the Supreme Court’s solicitous reception to an antigay Christian baker stood in stark contrast to its upholding of the policy that President Trump initially branded a “Muslim Ban” in *Trump v. Hawaii*.³²³ Continuing this trend, the Court’s decision in *Kennedy* fails as a school case because it disregards how vindicating a school official’s religious claim will redound to the detriment of students who are religious minorities at a vulnerable time in their lives. *Kennedy* should have adhered to the Court’s vigorous enforcement of the Establishment Clause in public schools to avoid subjecting religious minorities to increased hostility and harassment, and, in so doing, promote religious pluralism.³²⁴

Admittedly, liberals have long sounded these alarm bells in the Establishment Clause context, including in cases where predictions of social unrest have not been realized, and truth be told were unlikely to materialize. In 2002, the Court’s opinion in *Zelman v. Simmons-Harris* — upholding the ability to use vouchers at religious schools

³²² Carter, *supra* note 14, at 131–32. Elsewhere, Carter memorably expressed the idea that expelling God from public school classrooms is “a metaphorical banishment that would be a metaphysical impossibility.” CARTER, *supra* note 62, at 186.

³²³ 138 S. Ct. 2392 (2018). Compare *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1732 (2018) (siding with a religious baker who wished not to create a cake for a same-sex wedding because of antireligious comments offered by an official), with *Trump v. Hawaii*, 138 S. Ct. at 2423 (upholding the federal policy that President Trump, as a candidate, initially branded a “Muslim ban”). I agree with Gillman and Chemerinsky, who have argued regarding *Trump v. Hawaii*: “We find it hard to reconcile that when it was a non-Christian religion suffering discrimination, the five most conservative justices rejected a challenge based on the Religion Clauses.” GILLMAN & CHEMEKINSKY, *supra* note 84, at xii. For commentary on these matters, see ANDREW KOPPELMAN, GAY RIGHTS VS. RELIGIOUS LIBERTY?: THE UNNECESSARY CONFLICT (2020); Melissa Murray, *Inverting Animus: Masterpiece Cakeshop and the New Minorities*, 2018 SUP. CT. REV. 257 (2019); Leslie Kendrick & Micah Schwartzman, *The Supreme Court, 2017 Term — Comment: The Etiquette of Animus*, 132 HARV. L. REV. 133 (2018); Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516 (2015); Mark Tushnet, *Trump v. Hawaii: “This President” and the National Security Constitution*, 2018 SUP. CT. REV. 1 (2019).

³²⁴ Consistent with this concern about religious minorities, a rabbi at Bremerton’s only synagogue, which sits just a few blocks away from the football stadium, took a gimlet-eyed view of *Kennedy*. Rabbi Emily Katcher of Congregation Beth Hatikvah expressed longstanding concerns about Bremerton’s tiny number of Jewish students “be[ing] told that they were going to hell for not accepting Jesus” by classmates and feared that *Kennedy* would send the signal that “being an Evangelical Christian is part of what one must be at that school in order to be OK with all the teachers and coaches, in order to be safe with all the teachers and coaches, in order to be honored as a human being.” Andrew Binion, *For a Leader in Bremerton’s Jewish Community, Kennedy Ruling Isn’t a Win for Religious Freedom*, KITSAP SUN (July 22, 2022, 1:08 PM) (internal quotation marks omitted), <https://www.kitsapsun.com/story/news/2022/07/22/supreme-court-ruling-praying-football-coach-joe-kennedy-worries-bremerton-jewish-faith-minorities/10122089002> [<https://perma.cc/WSX6-ZPYB>].

against an Establishment Clause challenge — inspired liberals to engage in Olympian feats of pearl clutching and teeth gnashing. Writing in dissent, Justice Souter warned of the decision bringing “discord,” and “the intensity of expectable friction.”³²⁵ Not to be outdone, Justice Breyer’s dissent warned of the opinion generating “religious strife” and “harm[ing] the Nation’s social fabric.”³²⁶ Perhaps taking its cue from these apocalyptic dissents, the *New York Times* editorial page asserted: “It is hard to think of a starker assault on the doctrine of separation of church and state than taking taxpayer dollars and using them to inculcate specific religious beliefs in young people.”³²⁷ But, if that was the starkest example they could envision, the *Times* brain trust, evidently, was not thinking very hard.

Simmons-Harris was always unlikely to generate large amounts of social strife for the same reason that *Carson* seems unlikely to generate such conflict (assuming, of course, that its holding is not extended to the charter school context). Offering parents funds to send their children to private schools — including religious private schools — does not violate the Establishment Clause appreciably more than does permitting college students to use Pell Grants to attend the University of Notre Dame.³²⁸ Religious conduct that occurs in the truly private educational realm simply lacks the frisson that often accompanies religious conduct in the public educational realm. This statement finds ample support not only in the twenty-year period of relative tranquility on this front since *Simmons-Harris* was decided, but also in the two years since *Espinoza* was decided.

The hostility that *Kennedy* will visit upon religious minorities, however, is anything but a law professor’s hypothetical. To the contrary, several concrete legal disputes have highlighted the ugly, intense religious conflagrations that have arisen when school officials lead prayer in athletic arenas. In 2005, a high school football coach in East Brunswick, New Jersey, who had an extensive history of promoting team prayers, resigned his position after complaints arose about his conduct.³²⁹ (Sound familiar?) Following Coach Marcus Borden’s resignation, a student blog featured numerous anti-Semitic comments directed at Jewish cheerleaders, whom they blamed for scuttling the religious rituals. Under a blog heading titled, “Jewish Cheerleaders who suck!!!,”

³²⁵ *Zelman v. Simmons-Harris*, 536 U.S. 639, 715 (2002) (Souter, J., dissenting).

³²⁶ *Id.* at 725, 729 (Breyer, J., dissenting).

³²⁷ Editorial, *supra* note 18, at A26.

³²⁸ See DRIVER, *supra* note 45, at 412–15 (advancing and defending at some length the notion that vouchers do not violate the Establishment Clause, while acknowledging that powerful policy objections to vouchers do exist); see also *id.* at 413 (arguing that “the voucher program [at issue in *Zelman v. Simmons-Harris*] serves younger and therefore more impressionable students than, say, [Pell Grants],” but that this “distinction should not make a [constitutional] difference” in this context).

³²⁹ See *Borden v. Sch. Dist.*, 523 F.3d 153, 161 (3d Cir. 2008).

the following reprehensible comments appeared: “The jew is wrong. Borden is right. Let us pray,” “First they crucify Jesus, then they got Borden fired Jews gotta learn to stop ruining everything cool,” and

MAYBE if [Coach Borden] held a gun to the jjjjewwws head and was like b*tch get on ur knees and pray to jesus!! then that might be breaking the law . . . ehhe maybe not! . . . just suck it up if u don’t fu*king like whats going on in america then GO THE FU*K BACK TO YOUR COUNTRY AND STAY THERE AND PRAY³³⁰

Those remarks are, alas, by no means an exhaustive compilation of the hatred that appeared on the student blog.

Professor Jonathan Zimmerman has recounted an episode, involving one coach who directed his team to recite the Lord’s prayer, that resulted in fisticuffs before ultimately finding its way into court. “In Hardesty, Oklahoma, a self-described atheist was kicked off her high school basketball team in 2005 after refusing to join a postgame prayer circle with her teammates,” Zimmerman wrote.³³¹ “Her father confronted the school principal at his house, where the two came to blows; acquitted of assault, the father sued the school district.”³³² Those events bore a striking resemblance — sans altercation — to a conflict that engulfed a middle-school basketball player in Dallas County, Texas, who initially joined her team’s coach-led prayers in order to avoid being “singled out”

³³⁰ *Id.* at 184 (McKee, J., concurring). The notion that the United States is, fundamentally, a nation of Christianity also appeared in *Engel*’s aftermath. One of the missives directed toward a Jewish family who protested the Regents Prayer struck this theme: “This looks like Jews trying to grab America as Jews grab everything they want in any nation. America is a Christian nation.” DIERENFIELD, *supra* note 53, at 139 (internal quotation marks omitted). It may be tempting to believe that such views could be expressed only by a fringe figure. But, in the 1960s, one hardly needed to be a peripheral figure in the United States to believe that “America is a Christian nation.” It would be hard to imagine a more central figure of the American legal establishment in the 1960s than Dean Erwin Griswold of Harvard Law School, who eventually succeeded Thurgood Marshall as Solicitor General of the United States during the Johnson Administration. In 1963, however, Griswold criticized *Engel* for betraying America’s Christian identity:

This . . . has been, and is, a Christian country, in origin, history, tradition and culture. It was out of Christian doctrine and ethics . . . that it developed its notion of toleration. . . . But does the fact that we have officially adopted toleration as our standard mean that we must give up our history and our tradition? The [Muslim] who comes here may worship as he pleases That is as it should be. But why should it follow that he can require others to give up their Christian tradition merely because he is a tolerated and welcomed member of the community?

Erwin N. Griswold, *Absolute Is in the Dark — A Discussion of the Approach of the Supreme Court to Constitutional Questions*, 8 UTAH L. REV. 167, 176 (1963).

³³¹ ZIMMERMAN, *supra* note 80, at 206.

³³² *Id.*; see also Smalkowski v. Hardesty Pub. Sch. Dist., No. CIV-06-845-M, 2007 WL 2401891 (W.D. Okla. Aug. 17, 2007); Jay F. Marks, *Atheist Family Claims Officials Discriminated*, THE OKLAHOMAN (Aug. 12, 2006, 3:08 AM), <https://www.oklahoman.com/story/news/religion/2006/08/12/atheist-family-claims-officials-discriminated/61866189007> [<https://perma.cc/Y59S-65Z8>] (“The lawsuit contends school officials removed [the atheist player] from the girls basketball team . . . after she refused to participate in a recitation of the Lord’s Prayer at the coach’s direction.”).

and “creat[ing] dissension.”³³³ After her father assured her that she need not participate in those religious exercises, the player eventually decided that she would watch on in a respectful silence as all of her teammates participated in the coach’s prayer.³³⁴ Her simple nonparticipation garnered considerable unwanted attention, even though she lodged no formal objection. In addition to being heckled by a spectator, the student’s history teacher called her a “little atheist,” and her classmates asked: “Aren’t you a Christian?”³³⁵ The Court’s decision in *Kennedy* will lead that deeply unsettling question to proliferate.

The hostility directed toward religious minorities has also arisen in school prayer disputes that have made their way to the Supreme Court. The small town of Santa Fe, Texas — population 10,000 — was extremely homogeneous.³³⁶ A grand total of nine Black people lived in Santa Fe in 1990, and very few residents identified as non-Christians.³³⁷ So, after a lawsuit was anonymously filed contesting the school’s prayer policy at football games, it did not take long for Santa Fe residents to attempt to uncover the litigants’ identities. Local pastors encouraged members of their respective flocks to pursue this effort.³³⁸ Predictably, some members of religious minority groups — the likely suspects — were subjected to harassment.³³⁹ The school district itself was deeply implicated in efforts to uncover the culprits.³⁴⁰ These efforts became so intense so quickly that about one month after the lawsuit was filed, the district court judge issued a highly unusual order, revealing deep displeasure and frustration with the unfolding religious manhunt:

[A]ny further attempt on the part of District or school administration, officials, counsellors, teachers, employees or servants of the School District, parents, students or anyone else, overtly or covertly to ferret out the identities of the Plaintiffs in this cause, by means of bogus petitions, questionnaires, individual interrogation, or downright “snooping,” will cease immediately. ANYONE TAKING ANY ACTION ON SCHOOL PROPERTY, DURING SCHOOL HOURS, OR WITH SCHOOL RESOURCES OR

³³³ *Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160, 161–62 (5th Cir. 1993). This Comment’s second epigraph is drawn from these events. *See supra* p. 208.

³³⁴ *See Doe*, 994 F.2d at 162.

³³⁵ *See id.* at 162–63.

³³⁶ *See* MARK TUSHNET, *A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW* 180 (2005).

³³⁷ *Id.* For helpful background and discussion of the Supreme Court’s decision in *Santa Fe*, see Erwin Chemerinsky, *The Story of Santa Fe Independent School District v. Doe: God and Football in Texas*, in *EDUCATION LAW STORIES* 319 (Michael A. Olivas & Ronna Greff Schneider eds., 2008); Paul Horwitz, *Of Football, “Footnote One,” and the Counter-Jurisdictional Establishment Clause: The Story of Santa Fe Independent School District v. Doe*, in *FIRST AMENDMENT STORIES* 481 (Richard W. Garnett & Andrew Koppelman eds., 2012); Douglas Laycock, *Voting with Your Feet Is No Substitute for Constitutional Rights*, 32 *HARV. J.L. & PUB. POL’Y* 29, 38–40 (2009).

³³⁸ *See* TUSHNET, *supra* note 336, at 181.

³³⁹ *Id.*

³⁴⁰ *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 294 n.1 (2000).

APPROVAL FOR PURPOSES OF ATTEMPTING TO ELICIT THE NAMES OR IDENTITIES OF THE PLAINTIFFS IN THIS CAUSE OF ACTION, BY OR ON BEHALF OF ANY OF THESE INDIVIDUALS, WILL FACE THE HARSHTEST POSSIBLE CONTEMPT SANCTIONS FROM THIS COURT, AND MAY ADDITIONALLY FACE CRIMINAL LIABILITY. The Court wants these proceedings addressed on their merits, and not on the basis of intimidation or harassment of the participants on either side.³⁴¹

This language was sufficiently striking that Justice Stevens’s opinion for the Court in *Santa Fe* excerpted it in his very first footnote.³⁴²

The rampant hostility and harassment undergirding *Santa Fe* render one portion of Justice Gorsuch’s opinion in *Kennedy* particularly befuddling. Justice Gorsuch faulted Bremerton School District for “rely[ing] on hearsay” to communicate the concern that various football players felt coerced into participating in some of Coach Kennedy’s prayers.³⁴³ But *Santa Fe* made abundantly clear that the costs imposed on religious dissidents can be prohibitive.³⁴⁴ Perhaps, though, Justice Gorsuch and his colleagues in the majority view religious dissidents themselves as having invited hostility and harassment to their own doorsteps. After all, Justice Gorsuch contended: “[L]earning how to tolerate speech or prayer of all kinds is ‘part of learning how to live in a pluralistic society,’ a trait of character essential to ‘a tolerant citizenry.’”³⁴⁵ On this principle of toleration, the religious minority who objects to school prayer is demonstrating intolerance. One barber in *Santa Fe* expressed a down-home version of Justice Gorsuch’s relatively lofty formulation. “If somebody gets offended by somebody praying, they just shouldn’t listen,” the barber stated.³⁴⁶ “The government is trying to take the Lord out of

³⁴¹ *Id.* (alteration in original).

³⁴² *Id.* Professor Paul Horwitz has wisely drawn attention to this highly unusual footnote. See Horwitz, *supra* note 337, at 481 (including “Footnote One” in his article title). Every law student learns about Footnote Four of *United States v. Carolene Products Co.* and Footnote Eleven of *Brown v. Board of Education*. For scholarship examining those foundational footnotes, see J.M. Balkin, *The Footnote*, 83 NW. U. L. REV. 275 (1989); L.A. Powe, Jr., *Does Footnote Four Describe?*, 11 CONST. COMMENT. 197 (1994); Michael Heise, *Brown v. Board of Education, Footnote 11, and Multidisciplinarity*, 90 CORNELL L. REV. 279 (2005). See also Gregory Briker & Justin Driver, *Brown and Red: Defending Jim Crow in Cold War America*, 74 STAN. L. REV. 447, 454–55 (2022) (referring to the “most infamous footnote in constitutional law” and explaining that “an anticommunist lens is necessary to provide a complete picture of why, precisely, it proved so contentious”). Horwitz persuasively contends that Footnote One of *Santa Fe* should receive far more attention than it does in constitutional law communities.

³⁴³ *Kennedy*, 142 S. Ct. at 2430.

³⁴⁴ See *Santa Fe*, 530 U.S. at 312.

³⁴⁵ *Kennedy*, 142 S. Ct. at 2430 (quoting *Lee v. Weisman*, 505 U.S. 577, 590 (1992)).

³⁴⁶ DRIVER, *supra* note 45, at 389 (internal quotation marks omitted).

hearts and minds, and it's going to be the downfall of this country. . . . The devil is getting too much say here."³⁴⁷

* * *

It is here, finally, that we arrive at the third Hail Mary referenced in this Comment's title. After the Supreme Court — against all odds — attained a sustained period of détente in the deep-seated conflict over religion in schools, the Court's wrongheaded opinion in *Kennedy* has succeeded in upending that fragile achievement. If, as seems virtually assured, *Kennedy* ushers in a renewed era of widespread hostility and harassment in the nation's public schools, the Supreme Court would be well advised to recite a Hail Mary as penance for this flagrant judicial sin.³⁴⁸

CONCLUSION

Fourteen years ago, in the course of holding that the Second Amendment protects an individual's right to bear arms, the Supreme Court in *District of Columbia v. Heller*³⁴⁹ hastened to clarify that the opinion did not threaten all laws banning the possession of firearms.³⁵⁰ To the contrary, *Heller* acknowledged the legitimacy of site-specific laws, highlighting "schools" as the prototypical "sensitive places" where states and localities could prohibit firearms without violating the Second

³⁴⁷ *Id.* (omission in original) (internal quotation marks omitted). Professor Richard Epstein has also expressed misgivings about affording religious dissidents excessive sway over public events. See EPSTEIN, *supra* note 102, at 514 (contending that "[i]n *Lee v. Weisman* [the Court] unwisely accepted the . . . establishment claim that once a single person objects, everyone has to follow her command").

³⁴⁸ I wish to be very clear here that I am, of course, employing the terminology of sin only in a metaphorical sense, rather than a religious one. I have used this sort of terminology in the past. See DRIVER, *supra* note 45, at 69 ("[M]uch of the editorial coverage portrayed the [*Barnette*] opinion as an act of atonement for the Court's judicial sin from 1940."); cf. Justin Driver, *Judicial Inconsistency as Virtue: The Case of Justice Stevens*, 99 GEO. L.J. 1263, 1276 (2011) (encouraging jurists who change their minds about legal issues to explain "what, precisely, they saw on the Road to Damascus"). I further wish to emphasize that I do not suggest that any members of the *Kennedy* majority — or *Kennedy* minority, for that matter — reached the outcome they reached because of their religious backgrounds or religious commitments. I abhor such reductive reasoning and have lodged lengthy criticisms about such assertions in the past. See Justin Driver, *Divine Justice*, NEW REPUBLIC, Sept. 29, 2014, at 40, 43 (reviewing BRUCE ALLEN MURPHY, SCALIA: A COURT OF ONE (2014)) (criticizing a biography of Justice Scalia for its "fixation on Scalia's Catholicism" and because it gives the misimpression "that Scalia is primarily a religious figure who manages to squeeze in a little legal studying on the side"); *id.* at 44 (rejecting the assertion that Justice Scalia's "preferred interpretive techniques can be viewed as devices for transforming his religious doctrine into legal doctrine"). For an article that extensively assesses the piece that I wrote condemning reductive causal claims about jurists' religious views, see Steven G. Calabresi & Justin Braga, *The Jurisprudence of Justice Antonin Scalia: A Response to Professor Bruce Allen Murphy and Professor Justin Driver*, 9 N.Y.U. J.L. & LIBERTY 793 (2015).

³⁴⁹ 554 U.S. 570 (2008).

³⁵⁰ *Id.* at 626–27.

Amendment.³⁵¹ Some sophisticated professors skewered *Heller* for announcing that schools were special places for purposes of the Second Amendment, even though no constitutional text commands treating schools differently.³⁵²

There are, in my view, many, many legitimate grounds for criticizing the Court's outcome in *Heller*.³⁵³ But its recognition that schools present distinct constitutional settings is not among them. Acknowledging the special role that schools occupy in American society was not a deviation in *Heller*; it was, rather, a continuation of the Court's standard operating procedure.

Indeed, throughout the Supreme Court's last several decades of constitutional adjudication, it has routinely articulated a particularized set of constitutional rules that apply exclusively within the "sensitive place" that is the school. But the Court's opinions in *Carson* and *Kennedy* failed to distinguish adequately between the private school setting at issue in the former and the public school setting at issue in the latter. *Kennedy* erred, in other words, by demonstrating marked insensitivity to the public school environment. In so doing, it betrayed the Supreme Court's longstanding commitment to ensuring that the common schoolhouse is not transformed into a house of worship. *Kennedy* regrettably abandons the vigilance that has characterized the Court's approach to school-sponsored prayer and instead inaugurates an Establishment Clause approach marked by laxity. The opinion threatens to usher in the bad old days of widespread religious marginalization and oppression in public schools. Arriving in an era when the nation's divisions have seldom appeared starker, *Kennedy* seems poised to ignite lasting, profound, and deep-seated cultural conflict along religious lines. Of course, for the good of our public schools, and thus the good of our nation, I fervently hope that the passage of time proves my forecast of doom exaggerated, overheated, and downright unhinged.³⁵⁴ Let us pray.

³⁵¹ See *id.* at 626. The Court repeatedly endorsed *Heller*'s notion that schools presented special Second Amendment settings a few months ago in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022). See, e.g., *id.* at 2133 (quoting *Heller*'s language regarding "sensitive places such as schools"); see also *id.* at 2162 (Kavanaugh, J., concurring) (same).

³⁵² See, e.g., Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1296 (2009) (describing *Heller*'s statement as "ipse dixit," "in search of a theory," and "not a rule of decision" (internal quotation marks omitted)).

³⁵³ For a powerful contemporaneous critique of *Heller*, see Reva B. Siegel, *The Supreme Court, 2007 Term — Comment: Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191 (2008).

³⁵⁴ Law professors do — occasionally — misread current events. In 1980, Professor John Hart Ely noted that Bickel had misgauged whether some central Warren Court opinions would prove lasting. JOHN HART ELY, *DEMOCRACY AND DISTRUST* 69–70 (1980). But Ely suggested that Bickel's cloudy crystal ball on this score should not matter too much. "That only proves he was human — we've all mistaken ripples for waves." *Id.* at 70.