ENGEL WAS GRIEVOUSLY WRONG AND SHOULD BE OVERRULED

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A jurisprudential shift is underway in the area of Establishment Clause law. The slow and painful death of the long derided "*Lemon* Test" is merely a symptom of the Supreme Court's increasing adherence to text, history, and tradition.[1] Against that backdrop, this essay will briefly overview this recent shift as it pertains to Establishment Clause doctrine to suggest that there now exists a viable roadmap to chip away at and revisit *Engel v. Vitale*.[2] Then, after substantiating how this largely forgotten public prayer precedent is again relevant in light of this ongoing shift, this paper will elucidate why *Engel* was egregiously wrong and why it warrants being formally overruled at the earliest opportunity to do so.

I. BACKGROUND

From the early Republic through the mid-20th century, it was common practice for public schools to begin the day with a nonsectarian prayer or a Bible excerpt. In fact, as recently as 1960, 42% of public school districts nationwide tolerated or even required Bible reading and 50% reported practicing homeroom daily devotional exercises.[3] Thus, public school prayer is an entrenched American tradition—epitomizing our Founders' unrivaled commitment to religious tolerance as well as the role that religious pluralism can play in promoting public morality.[4] For almost two centuries, teacher-led public school prayer, while not required by the Constitution, was nonetheless *permitted*—and even embraced by at least half of the country's school districts.[5]

This all came to a screeching halt when the Supreme Court rendered its first decision on this activity in *Engel* and broke away from this custom of accommodationism. In a sweeping ruling, the Court determined that teacher-led public school prayer violated the Establishment Clause. In

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[1] Jack Balkin, *Text, History and Tradition: Discussion Questions on* New York State Rifle and Pistol Association, Inc. v. Bruen, BALKINIZATION (July 6, 2022), https://balkin.blogspot.com/2022/07/text-history-and-tradition-discussion.html [https://perma.cc/FGA9-8JLD]; *see also* Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641 (2013).

[2] 370 U.S. 421 (1962).

[3] Adam Laats, *Our Schools, Our Country: American Evangelicals, Public Schools, and the Supreme Court Decisions of 1962 and 1963*, 36 J. OF RELIGIOUS HIST. 319, 321–22 (2012).

[4] Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2109 (2003).

[5] Laats, *supra* note 3, at 322.

doing so, the Warren Court deemed voluntary nonsectarian public school prayer unconstitutional nationwide, catalyzing a series of subsequent judicial outcomes that cumulatively purged public schools of almost all semblances of traditional religiosity.[6] "Moments of silence" were outlawed based on the mere suspicion that silent prayer would be engaged in, commencement ceremonies were stripped of any benedictions, and student-organized prayers at high school sports games were summarily outlawed due to how they risked being "perceived."[7]

In arriving at this outcome, *Engel* relied on what is known as "offended observer standing," citing "*indirect* coercive pressure" felt by ten pupils.[8] In other words, *Engel* recognized the students' parents' legal standing and allowed them to sue the school district on the basis of what they considered to be offensive government conduct. Notably, *Engel* made no attempt whatsoever to substantiate any evidence of any direct and particularized injuries suffered by either the pupils or the parents.

In 2019, however, Justices Thomas and Gorsuch called into question the underpinnings of offended observer standing, asserting that: "[R]ecourse for disagreement and offense does not lie in federal litigation. Instead, in a society that holds among its most cherished ambitions mutual respect, tolerance, self-rule, and democratic responsibility, an 'offended viewer' may 'avert his eyes,' . . . or pursue a political solution."[9] They argued that merely taking personal "offense" at a public display of religion is insufficient to establish an Article III injury. At the time, this opinion only garnered two votes. Now, as of this past June, a 6-3 majority of the Court implicitly supports this reasoning: "'[A] school does not endorse,' let alone coerce [public school students] to participate in, 'speech that it merely permits on a nondiscriminatory basis' . . . . [S]ome will take offense to . . . prayer they are sure to encounter in a society where those activities enjoy such robust constitutional protection. But '[o]ffense . . . does not equate to coercion.'"[10] As Professor Josh Blackman recognized, this majority opinion sends a clear message: unless there is *direct* coercion involved, mere personal "offense" to public prayer is an insufficient basis to challenge its legality.[11] Justice Gorsuch goes on to conclude in *Kennedy* that: "[T]he 'shortcomings' associated with this 'ambitiou[s],' abstract, and ahistorical approach to the Establishment Clause became so 'apparent' that this Court long ago abandoned *Lemon* and its endorsement test offshoot . . . . In place of *Lemon* and [its infamous] test, this Court has instructed that the Establishment Clause must be interpreted by '*reference to historical practices and understandings*.'"[12] In summary, rather than avoiding these recurring questions, *Kennedy* affirmed that mere offense *does not*

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[6] *See* Santa Fe Indep. Sch. Dist. V. Doe, 530 U.S. 290, 318 (2000) (Rehnquist, C.J., dissenting) (characterizing the liberal Court's behavior as "bristl[ing] with hostility to all things religious in public life").

[7] *See* Sch. Dist. v. Schempp, 374 U.S. 203 (1963); Wallace v. Jaffree, 472 U.S. 38 (1985); Lee v. Weisman, 505 U.S. 577 (1992); *Santa Fe Indep. Sch. Dist*., 530 U.S. at 305 (2000).

[8] Engel v. Vitale, 370 U.S. 421, 423 (1962) (emphasis added).

[9] Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2103 (2019) (Gorsuch, J., dissenting) (citation omitted) (quoting Erznoznik v. City of Jacksonville, 422 U.S. 205, 212 (1975)).

[10] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2430 (2022) (fourth alteration and third omission in original) (citations omitted) (first quoting Bd. of Educ. v. Mergens, 496 U.S. 226, 250 (1990) (plurality opinion); then quoting Town of Greece v. Galloway, 572 U.S. 565, 589 (2014) (plurality opinion)).

[11] *See* Josh Blackman, *No Offense, But It's Just a Prayer*, REASON.COM: THE VOLOKH CONSPIRACY (July 3, 2022), https://reason.com/volokh/2022/07/03/no-offense-but-its-just-a-prayer/ [https://perma.cc/2G2Y-N44C].

[12] 142 S. Ct. at 2427–29 (second alteration in original) (emphasis added) (citations omitted) (first quoting *Am. Legion*, 588 U.S. at 2080; then quoting *Town of Greece*, 572 U.S. at 576).

amount to coercion and that *Lemon* is retired. This emerging doctrinal shift signaled by *Kennedy* sends ripples across several decades of Establishment Clause precedents.

There are at least four public prayer holdings seriously undermined by this marked doctrinal shift. From oldest to most recent, these are: *Engel v. Vitale*,[13] *Wallace v. Jaffree*,[14] *Lee v. Weisman*,[15] and *Santa Fe Independent School District v. Doe*.[16] *Engel* and *Lee* each hinged upon dubious findings of indirect coercion, whereas *Wallace* and *Sante Fe* each hinged upon applications of the *Lemon* Test. That said, *Engel*'s unexpected and radical departure from the text, history, and tradition of the Establishment Clause laid the precedential foundation for this 'separationist' cascade of holdings.[17] This goes to suggest that *Wallace*, *Lee*, and *Sante Fe* each built upon and extended *Engel*'s erroneous outcome to different domains. Although these more recent public school prayer precedents are better positioned to be revisited by the Court in the short-term, this essay will take aim at *Engel* so that it might be overruled in the long-term.[18]

II. GROUNDS FOR OVERRULING *ENGEL*

The Supreme Court is not infallible. The Court has overruled itself at least 234 times, dating all the way back to 1810.[19] Expounding on the legal doctrine of adhering to precedent, Justice Alito asserts in his *Dobbs* opinion that "*stare decisis* is *not* an inexorable command"[20] and that it "is at its weakest when [the Court] interpret[s] the Constitution."[21] He goes on to assert that many of the Court's most important constitutional decisions in American history have overruled prior holdings. Such flawed precedents (or "derelicts of constitutional law" as they have been referred to)[22] include *Plessy v. Ferguson*,[23] *Dred Scott v. Sandford*,[24] and now *Roe*[25] and *Casey*[26] according to *Dobbs*.[27] Justice Frankfurter also famously clarified this tension when he wrote that "the ultimate touchstone of constitutionality is the Constitution itself and not what [the Court has] said about it."[28]

But how can we know when a "constitutional derelict" warrants being overruled? The Court recently explained that: "[C]ases have attempted to provide a framework for deciding when a precedent should be overruled, and they have identified factors that should be considered in

[13] 370 U.S. 421 (1962).

[14] 472 U.S. 38 (1985).

[15] 505 U.S. 577 (1992).

[16] 530 U.S. 290 (2000).

[17] For more background on "strict separationism," *see* Joseph G. Prud'homme, *Questioning Strict Separationism in Unsettled Times: Rethinking the Strict Separation of Church and State in United States Constitutional Law*, 11 LAWS, Aug. 2022, File No. 74.

[18] *See* Akhil Reed Amar, *Separate or Equal*, AMARICA'S CONSTITUTION, at 38:00 (2022), https://akhilamar.com/podcast-2/page/3/ [https://perma.cc/J9F7-WALX].

[19] *Table of Supreme Court Decisions Overruled by Subsequent Decisions*, CONGRESS.GOV: CONSTITUTION ANNOTATED, https://constitution.congress.gov/resources/decisions-overruled/ (last visited Aug. 29, 2022).

[20] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2237 (2022) (emphasis added).

[21] *Id.* (alteration in original) (quoting Agostini v. Felton, 521 U.S. 203, 235 (1997)).

[22] *See* ORIGINALISM: A QUARTER-CENTURY OF DEBATE 1–43, 21, 200–03 (Steven G. Calabresi ed., 2007).

[23] 163 U.S. 537 (1896).

[24] 60 U.S. 393 (1857).

[25] Roe v. Wade, 410 U.S. 113 (1973).

[26] Planned Parenthood v. Casey, 505 U.S. 833 (1992).

[27] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

[28] Graves v. O'Keefe, 306 U.S. 466, 491–92 (1939) (Frankfurter, J., concurring).

making such a decision."[29] These factors are: the nature of the Court's error, the quality of the Court's reasoning, the workability of the rules the decision imposes, the decision's effect on other areas of law, and the degree to which reliance interests are at stake. This essay will evaluate each factor in turn to reveal that *Engel* was egregiously wrong and warrants being overruled.

A. The Nature of the Court's Error

Engel "was on a collision course with the Constitution from the day it was decided."[30] Subsequent public school prayer holdings such as *Wallace v. Jaffree*,[31] which ruled moments of silence to be unconstitutional, and *Lee v. Weisman*,[32] which ruled once-per-year graduation benedictions from guest speakers unconstitutional, have only perpetuated its grievous errors and exacerbated social division.[33] Justice Gorsuch underscored the significance of religious pluralism in *Kennedy*, noting that "[r]espect for religious expressions is indispensable to life in a free and diverse Republic."[34] That being understood, the Court was woefully "unrestrained" in *Engel*: by usurping the power to legislate on this profoundly important political issue, despite the Constitution leaving it for the People to determine.[35] The Warren Court circumvented the democratic process by 'settling 'this political question on behalf of the entire country, despite the majority of Americans supporting public school prayer at the time of the ruling.[36] As Justice Byron White explained, "decisions that find in the Constitution principles or values that cannot fairly be read into that document usurp the people's authority, for such decisions represent choices that the people have *never* made and that they *cannot* disavow through corrective legislation."[37] In these most severe situations, he asserted, "it is essential that [the] Court maintain the power to restore authority to its proper possessors by correcting constitutional decisions that, on reconsideration, are found to be mistaken."[38] Thus, *Engel* damaged the Court's reputation as a neutral arbiter of law by removing this debate from the People and from the democratic process.[39]

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[29] *Dobbs*, 142 S. Ct. at 2264 (citing Janus v. State, Cnty., and Mun. Emp., 138 S. Ct. 2448, 2478–79 (2018); Ramos v. Louisiana, 140 S. Ct. 1390, 1414–16 (2020) (Kavanaugh, J., concurring in part)).

[30] *Id.* at 2265.

[31] 472 U.S. 38 (1985).

[32] 505 U.S. 577 (1992).

[33] For increased polarization with regard to religion, *see* Americans Have Positive Views About Religion's Role in Society, but Want It Out of Politics, PEW RSCH. CTR. (Nov. 15, 2019), https://www.pewresearch.org/religion/2019/11/15/americans-have-positive-views-about-religions-role-in-society-but-want-it-out-of-politics/ [https://perma.cc/N5LN-Z366].

[34] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2432–34 (2022).

[35] *See, e.g.*, Michael W. McConnell, Accommodation of Religion: An Update and a Response to the Critics, 60 GEO. WASH. L. REV. 685 (1991).

[36] *See* Letter from Carmon S. Bowers, On behalf of Cent. Christian Church of Fort Lauderdale, to Emanuel Celler, Chairman of the H.R. Judiciary Comm., (June 11, 1964), https://history.house.gov/Records-and-Research/Listing/c_004/ [https://perma.cc/SS5J-4VTQ] (supporting school prayer). *See also* David G. Barnum, *The Supreme Court and Public Opinion: Judicial Decision Making in the Post-New Deal Period*, 47 J. POL. 658 (1985); Lauren M. Goldsmith & James R. Dillon, *The Hallowed Hope: The School Prayer Cases and Social Change*, 59 ST. LOUIS U. L.J. 430 (2015). As indicated by these three varied and independent sources, approximately 80% of Americans supported public school prayer at the time of the ruling.

[37] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2265 (2022) (emphasis added) (quoting Thornburgh v. Am. Coll. Of Obstetricians and Gynecologists, 476 U.S. 747, 787 (1986) (White, J., dissenting)).

[38] *Id.* at 2265 (quoting Thornburgh v. Am. Coll. Of Obstetricians and Gynecologists, 476 U.S. 747, 787 (1986) (White, J., dissenting)).

[39] For neutral arbiter of law reputation, *see* Jason Iuliano, *The Supreme Court's Noble Lie*, 51 U.C. DAVIS L. REV. 911 (2018).

B. The Quality of the Court's Reasoning

Even a rudimentary overview of *Engel*'s holding is enough to expose some of its exceptionally weak reasoning, most of which is premised upon the "anti-divisiveness" rationale.[40] The Court explicitly invoked this rationale in *Engel* when it insisted that: "[W]henever government [has] allied itself with *one particular* form of religion, the inevitable result [has] been that it [has] incurred the hatred, disrespect and even contempt of those who [hold] contrary beliefs."[41] In other words, the practical effect of accommodating nonsectarian teacher-led public school prayer is incessant competition between sects for public accommodation. Granted, this rationale appeals to our nation's turbulent religious history.[42] Yet quite confusingly, the end of the *Engel* opinion concedes the opposite, that the nonsectarian prayer in question "*does not* amount to a total establishment of *one particular* religious sect to the exclusion of all others . . . ."[43] Even if we disregard this blatant contradiction, this abstract doctrine nevertheless instructs against *Engel*'s outcome because while outlawing voluntary nonsectarian public prayer may indeed alleviate tension between varying sects, this prohibition foments a different kind of tension—and one that is far more fraught. While *Engel* and its progeny may have been somewhat successful in staving off sectarian strife within our country, rulings like these that impose strict separationism between church and state tend to inflame the tension between theists and atheists, or between those of faith and those who seek to subvert the integral role that religious pluralism plays in public life.[44] The Court must not only beware of the state favoring certain sects over others, such as favoring Protestantism over Catholicism, but it must also stymie any shortsighted attempts to advance or establish a "secular orthodoxy"—which arguably constitutes a de facto religion, even by the Court's own admission.[45] For the foregoing reasons, *Engel*'s shallow "anti-divisiveness" rationale cannot coherently justify its blanket prohibition of voluntary nonsectarian public school prayer.

Similarly, the "anti-corruption" rationale that *Engel* is predicated upon is not persuasive. This rationale says that any occasion of state entanglement with religion that is *neither* "ceremonial" *nor* "patriotic," is unduly "religious" and therefore problematic—because both religion and government are inevitably "degraded" and "destroyed" whenever they rely upon each other for support.[46] James Madison argued that "religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate."[47] While this concern is valid, there is no guarantee that the state-sponsored recital of nonsectarian religious language inevitably distorts its message or diminishes its "good fruit." Instead, it is actually quite plausible that public school prayer bolsters and reinforces basic quasi-religious tenets such as humility and gratitude.[48] Moreover, it

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[40] The anti-divisiveness rationale is extensively discussed in Richard W. Garnett, *Religion, Division, and the First Amendment*, 94 GEO. L.J. 1667 (2006).

[41] Engel v. Vitale, 370 U.S. 421, 431 (1962) (emphasis added).

[42] *See generally* KATHLEEN M. SANDS, AMERICA'S RELIGIOUS WARS: THE EMBATTLED HEART OF OUR PUBLIC LIFE (2019).

[43] 370 U.S. at 436 (emphasis added).

[44] Pew Rsch. Ctr., *supra* note 33, at 60–64 (2019).

[45] *See* Torcaso v. Watkins, 367 U.S. 488, 495 n.11 (1961), in which the Court referred to Secular Humanism as a "religion."

[46] *See Engel*, 370 U.S. at 431. For a detailed discussion of this rationale, see Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 WM. & MARY L. REV. 1831 (2009).

[47] *Engel*, 370 U.S. at 432 (quoting 2 JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments*, *in* THE WRITINGS OF JAMES MADISON 183 (Gaillard Hunt ed., 1901)).

[48] Lee v. Weisman, 505 U.S 577, 646 (1992) (Scalia, J., dissenting).

is not clear that the government becomes worse at serving its citizens' interests when it advances religion *in general*. On the contrary, a "religious" or Lockean conception of inalienable natural rights endowed unto us by "our Creator" (rather than a man-made government) could be vital to the limited nature of our self-government because it reminds the state that its officials cannot arbitrarily deprive us citizens of our most basic rights, given that our individual rights are derived from a "Higher Power."[49] To be clear, this "is *not* a matter of believing that God exists, though [citizens might personally] believe that," as Justice Scalia said.[50] Instead, as he explained: "It is a matter of believing, as our founders did, that belief in God is very conducive to a successful republic."[51] Thus, the government is able to acknowledge the existence of God as the fundamental source of our rights *philosophically* but not religiously. Again, this Founding Era notion of the "Philosophers' God" is a conception of God not predicated upon theological revelation, but instead upon intuitive human reason. The takeaway is that there is a sharp distinction between "the Creator" referenced in the Declaration of Independence and "the God" of sectarian faith traditions, and nonsectarian state-sponsored speech (such as public school prayer) merely pays homage to our nation's religious heritage.[52] This last point suggests that the Court erred when it did not classify nonsectarian public prayer as "patriotic" in the first place.[53] Even putting this misstep aside, however, the Court nevertheless failed to substantiate that this form of minimal entanglement corrupts either church or state.

Now that *Engel*'s two main rationales have each been debunked, the Court's legal determination that this bedrock American tradition amounts to "establishing an official religion" must be questioned. After all, despite concurring in *Engel*, Justice Douglas actually goes as far to admit that authorizing prayer does *not* establish a religion "in the strictly historic meaning of those words."[54] He goes on to concede that: "A religion is *not* established in the usual sense merely by letting those who choose to do so say [a] prayer that the public school teacher leads."[55] To Justice Douglas's credit, his damning admission is thoroughly borne out by a proper historical analysis of the Founding Era, which reveals that: "[A]lthough the laws constituting [official] establishment were ad hoc and unsystematic, they can be summarized by: (1) control over doctrine, governance, and personnel of the church; (2) compulsory church attendance; (3) financial support; (4) prohibitions on worship in dissenting churches; (5) use of church institutions for public functions; and (6) restriction of political participation to members of the established church."[56] As one can see, teacher-led, voluntary, nondenominational public school

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[49] Edwin J. Feulner, Ph.D., Commentary, *The Right Way to Think about Rights*, THE HERITAGE FOUND. (Aug. 27, 2013), https://www.heritage.org/political-process/commentary/the-right-way-think-about-rights [https://perma.cc/7HTS-EVY6].

[50] Juan Perez, Jr. & Tribune reporter, *Scalia Laments Decline in Civics Education*, CHI. TRIB. (Feb. 15, 2014) (emphasis added) (quoting Antonin Scalia, Address at the Union League Club of Chicago's 126th Annual George Washington Birthday Gala (Feb. 14, 2014), https://www.chicagotribune.com/news/ct-xpm-2014-02-15-ct-antonin-scalia-speech-20140215-story.html [https://perma.cc/9U7W-QFYT].

[51] *Id.*

[52] *See* KEVIN SEAMUS HASSON, BELIEVERS, THINKERS AND FOUNDERS: HOW WE CAME TO BE ONE NATION UNDER GOD 99 (2016).

[53] *See* Engel v. Vitale, 370 U.S. 421, 435 n.21 (1962) (describing voluntary nonsectarian prayer as unquestionably "religious" but not "patriotic").

[54] *Id.* at 442 (Douglas, J., concurring).

[55] *Id.* (emphasis added).

[56] *See* the six historical elements of establishment discussed in McConnell, *supra* note 4, at 2131.

prayer contains *none* of these elements—rendering *Engel*'s determination of "official establishment" dubious at best, if historical understandings are to serve as any reference point. Furthermore, an analysis of historical practices reveals that shortly following the ratification of the 14th Amendment, public school prayer was still being practiced in virtually every state in the country.[57] Therefore, we can be quite confident that the educated public did not commonly understand the ratification of the 14th Amendment in 1868 to prohibit public schools from accommodating nonsectarian prayer. This inference is only compounded by the fact that when the Establishment Clause was formally incorporated against the states in 1947 by *Everson v. Board of Education*, there did *not* follow any systematic or coordinated national effort to "disestablish" public schools of teacher-led prayer.[58] Thus, *Engel's* reasoning fails to comport with "references to historical practices and understandings," indicating that *Engel* misinterpreted the Establishment Clause.

C. Workability of the Rules this Decision Imposes

Not only is *Engel* predicated upon superficial reasoning, but the rationales it offers are also unworkable and confusing. Consider Justice Black's statement: "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."[59] On its own, this could mean that assessing the relative "coercive pressure" at play should be employed as a legal test for whether something has sufficiently "established a religion." Additionally, we might reasonably infer that the reverse is true—or that official establishments of religion necessarily entail some coercive element. Perplexingly, however, despite explicitly acknowledging some degree of interrelationship between "establishment" and "coercion," Justice Black goes on to specify that: "The Establishment Clause, unlike the Free Exercise Clause, *does not* depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion *whether* those laws operate directly to coerce non-observing individuals *or not*."[60] This second statement not only contradicts the first statement by downplaying any interrelatedness between "establishment" and "coercion," but it also lacks concrete historical support from the Founding Era. Recall *Engel*'s assertions that 1) a fully compulsory established church in the United States and in England historically had "incurred the hatred, disrespect and even contempt of those who held contrary beliefs," and 2) that established churches "go hand in hand" with religious persecution.[61] As Professor McConnell points out, "[t]hese facts seem merely to reinforce that compulsion—yes, even persecution—had been an element of the established church as our forefathers knew it."[62]

On top of lacking historical support, *Engel*'s decision to eschew coercion as a necessary element of any Establishment Clause claim lacked precedent support.[63] In *Cantwell v. Connecticut*

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[57] *See* Amar, *supra* note 18, at 10:00; *see also* STEVEN K. GREEN, THE BIBLE, THE SCHOOL, AND THE CONSTITUTION: THE CLASH THAT SHAPED MODERN CHURCH-STATE DOCTRINE 93–137 (2012).

[58] 330 U.S. 855 (1947).

[59] 370 U.S. at 431 (emphasis added).

[60] *Id.* at 430 (emphasis added).

[61] *Id.* at 431–32.

[62] Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933, 935 (1986).

[63] *Id.* at 934.

(1940), just 22 years prior to *Engel*, the Court had paraphrased the Establishment Clause as "forestall[ing] compulsion by law of the acceptance of any creed or the practice of any form of worship."[64] Making matters even worse, the presence or lack of compulsion had been central to the Court's decisions in *McCollum v. Board of Education* (1948)[65] and *Zorach v. Clauson* (1952),[66] which concerned release time programs in the public schools. And interestingly, just one year before *Engel*, Chief Justice Warren had actually explained the distinction between Sunday closing laws and the release time program in *McCollum* on the basis that Sunday closing laws did not *compel* religious participation. This indicates that the *Engel* Court conspicuously failed to supply any supporting precedential authority for its radical position.

Thus, by renouncing coercion as a necessary element for establishment, *Engel* relied upon a circular definition for "an establishment of religion." In doing so, *Engel* failed to provide any useful guidance on what *actually* constitutes establishing a religion. The resulting reality is that almost anything can be characterized as an "establishment" due to the lack of any objective legal test to gauge violations. The consequence is emboldened judges playing the role of policymakers: arbitrarily deciding how and when to advance their agenda—whether it be that of "revisionist secularization" or something else.[67] It is for this reason that lower courts have since been able "reach almost any result in almost any case."[68] This all goes to illustrate that *Engel* was "flawed in its fundamentals" and has proven "unworkable in practice."[69]

D. Effect on Other Areas of Law

Apart from being unworkable, *Engel* has led to the distortion of various legal doctrines. Its uniquely disruptive effect on the law provides further support for overruling this bad precedent.

Engel has rendered a large chunk of religious liberty jurisprudence incoherent because "entanglement" between church and state continues to be permitted by the Court in plenty of other contexts. The Court continues to permit Christian currency inscriptions, inauguration invocations, military chaplainship, public religious displays (including the Ten Commandments and the Cross), federal religious holidays (such as Christmas and National Prayer Day), and the words "one nation, under God" in the Pledge of Allegiance.[70] Hence *Engel* represents a postmodern departure from the traditional approach to the Establishment Clause known as "accommodationism," by which the state makes space for religious pluralism in the public sphere

[64] 310 U.S. 296, 303 (1940).

[65] 333 U.S. 203 (1948).

[66] 343 U.S. 306 (1952).

[67] McCreary Cty. v. ACLU, 545 U.S. 844, 910 (2005) (Scalia, J., dissenting).

[68] Michael W. McConnell, *Religious Participation in Public Programs: Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 119 (1992).

[69] Allegheny Cty. v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 669 (1989), *abrogated by* Town of Greece v. Galloway, 572 U.S. 565 (2014).

[70] *See* Patrick M. Garry, *The Myth of Separation: America's Historical Experience with Church and State*, 33 HOFSTRA L. REV. 475, 493 (2004). The Court never reached the merits of an Establishment Clause challenge to the words "under God" in a school's daily recitation of the Pledge of Allegiance, instead holding that the challenger lacked standing. *See* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 5 (2004). However, the history of unsuccessful challenges to the Pledge suggests that the phrase "under God" is here to stay.

without 'favoriting 'any one religion.[71] This incongruence only testifies to the uniquely disruptive effect *Engel* has had upon the rule of law—as *Engel* sticks out as an anomaly (or a "misadventure") both relative to the historical lineage of interpreting the Establishment Clause, as well as relative to the present-day landscape of Establishment-Clause-related holdings.[72]

Engel also distorts some important but unrelated legal doctrines; namely that pertaining to legal standing. Traditionally, federal courts may decide *only* cases and controversies that the Constitution and Congress have authorized them to hear. To establish legal standing, a plaintiff must show: (1) injury-in-fact, (2) causation, and (3) redressability.[73] Rather than dismissing *Engel*'s appeal on the basis of "lack of standing" due to "absence of injury-in-fact" in accordance with the aforementioned criteria, however, the *Engel* Court mistakenly granted standing to the petitioners on the basis that these parents felt sufficiently "offended" that their children were being exposed to the state-government-approved policy of voluntary nondenominational prayer.

But this "offended observer doctrine," according to Justice Gorsuch, "cannot be squared with this Court's [historical] teachings about the limits of Article III."[74] Recognizing the distorting effect *Engel* and its progeny had on standing doctrine, Justice Gorsuch asserts that: "[T]his Court has [since *Engel*] rejected the notion that offense alone qualifies as a 'concrete and particularized' injury sufficient to confer standing. We could hardly have been clearer: 'The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Article III's requirements.'"[75] "Offended observer standing is deeply inconsistent, too, with many other longstanding principles and precedents." "For example," he explained, "this Court has consistently ruled that "'generalized grievances" about the conduct of Government 'are insufficient to confer standing . . . ."[76] This all goes to show that the *Engel* Court departed from the usual demands of Article III (requiring a real controversy with real impact on real persons to make a federal case out of it), and unwittingly ushered in a new era of standing doctrine premised on arbitrary personal offense.[77]

Thus, despite masquerading as a long overdue First Amendment victory that corrected an obvious violation, *Engel* actually generated far more constitutional questions than it resolved. One of these questions is: does "social peer pressure" fit under the doctrine of coercion, or does legal "coercion" only recognize things that are backed with a penalty or threat of force?[78] Another quandary *Engel* leaves unresolved for other areas of law is whether there exists any meaningful distinction between preteens and teenagers here. After all, if it is indeed true that more mature audiences are less "susceptible" to being "indoctrinated" into religious creeds, then should the Establishment Clause apply more strongly against elementary schools compared to high schools

[71] For a detailed account of accommodationism, *see* Patrick M. Garry, *Religious Freedom Deserves More Than Neutrality: The Constitutional Argument for Nonpreferential Favoritism of Religion*, 57 FLA. L. REV. 1 (2005).

[72] Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2101 (2019) (Gorsuch, J., concurring).

[73] *See* Lujan v. Def. of Wildlife, 504 U. S. 555, 560 (1992).

[74] *Am. Legion*, 139 S. Ct. at 2100 (Gorsuch, J., concurring).

[75] *Id.* at 2098 (quoting Diamond v. Charles, 476 U.S. 54, 62 (1986)).

[76] *Id.* at 2100 (quoting Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 217 (1974)).

[77] *Id.* at 2103.

[78] Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 49 (2004) (Thomas, J., concurring).

for this reason?[79] This concern regarding maturity remains uncontended with. And as long as *Engel* remains valid precedent, there will remain little incentive to flesh out this legal ambiguity.

E. Reliance Interests

Traditional "reliance interests" arise "where advance planning of great precision is most obviously a necessity," according to the Court's case history.[80] In *Engel*, however, the majority opinion concedes that those traditional reliance interests are not implicated because the prayer is both "denominationally neutral" and "voluntary."[81] In other words, if we accept *Engel*'s descriptors, then it is exceedingly difficult to understand why a student would ever need to transfer schools *solely* as a result of their school district voting to reimplement teacher-led prayer, since students presumably 1) recognize the prayer's inclusive and nonsectarian nature and 2) recognize that they retain the choice to not participate in it. For these reasons, the *Engel* majority was correct that conventional, concrete reliance interests are not present in this case.

Unable to find reliance in the conventional sense, the controlling opinion in *Engel* perceives a far more intangible form of reliance related to America's national identity: as a nation founded by men fleeing "religions and religious persecution."[82] In this way, *Engel* misrepresents the historical purposes behind the First Amendment, which are significantly "more obscure and complex" than the six justices make them out to be.[83] The Court explained that the Framers inherited "well-justified fears . . . arising out of an awareness that governments of the past had shackled men's tongues to make them speak only the religious thoughts that the government wanted them to speak and to pray only to the God that the government wanted them to pray to."[84] By providing this truncated and selective account of the Founding Era zeitgeist (which has since been condemned by scholars as "seriously misleading as a matter of history"), the Court implied that the American citizenry actively relied upon some generalized libertarian notion of "freedom *from* religion" as citizens conducted their daily lives.[85] Again, it cannot be overstated that the *Engel* majority "never analyzed any of the books, essays, sermons, speeches, or judicial opinions setting forth the philosophical and political arguments *in favor* of an establishment of religion, and relied on only one, perhaps unrepresentative, example ['wall of separation'] from among the hundreds of arguments made *against* the establishment."[86]

As the Court explained in *Dobbs*, it "is ill-equipped to assess 'generalized assertions about the national psyche.'"[87] This tenuous notion of reliance thus finds little support in the Court's prior holdings, which instead emphasize very concrete reliance interests (like those that develop in

[79] Town of Greece v. Galloway, 572 U.S. 565, 590 (2014).

[80] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2276 (2022) (quoting Planned Parenthood v. Casey, 505 U.S. 833, 856 (1992)).

[81] Engel v. Vitale, 370 U.S. 421, 430 (1962).

[82] *Id.* at 434.

[83] McConnell, *supra* note 62, at 933–34.

[84] *Engel*, 370 U.S. at 435.

[85] McConnell, *supra* note 62, at 933.

[86] McConnell, *supra* note 4, at 2108.

[87] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2276 (2022) (quoting Planned Parenthood v. Casey, 505 U.S. 833, 957 (1992)).

cases involving property and contract rights).[88] Furthermore, "most members of the founding generation believed deeply that some type of religious conviction was necessary for public virtue, and hence for republican government."[89] Consider the Massachusetts Constitution of 1780, which declared that: "[T]he happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion and morality . . . ."[90] In other words, if the so-called "national psyche" of the American citizenry could be characterized by any single quotation, then the following one would be far more accurate: "We are a religious people whose institutions presuppose a Supreme Being."[91] This all goes to suggest that the United States has a far more robust legal history of religious accommodationism than it does a history of "complete and permanent separationism." Once again, as has been widely alluded to throughout this essay, "there is no persuasive evidence that the [Founding Fathers themselves] considered evenhanded support for all religions or religion in general . . . an establishment of religion."[92]

III. CONCLUSION

In summary, *Engel* was egregiously wrong from the start and its freewheeling analysis strayed far outside the bounds of the text, history, and tradition of the Establishment Clause. On top of being wrongly decided, its errant reading of this constitutional provision deepened national division, its reasoning was exceptionally weak, the rules it imposed on the country were imprecise and unworkable, it disrupted other areas of law, and it lacks concrete reliance interests. Thus, *Engel* satisfies all five modern criteria for being overruled. Accordingly, *Engel* should be strategically undermined via appellate litigation until the Court is left with no option but to revert to an earlier, longer-standing line of precedent that better fits with the legal landscape as a whole.

Opposing *Engel* and its progeny does not require one to desire the revival of public school prayer.[93] Instead, all such opposition requires is the mere recognition that school prayer was never addressed by the text of Constitution or voted upon via the passage of a federal statute. Therefore, States must be permitted to implement nonsectarian public school prayer how they so elect to, out of basic respect for federalism and self-government. Anything short of this constitutes judicial overreach whereby this issue is robbed of a fair hearing before the People.

The most viable pathway to overruling *Engel* is to view *Sante Fe*, *Lee*, and *Wallace* (in that order), each as dominos that may lead to the eventual toppling of *Engel*. With each successful overruling of these more recent public prayer precedents, momentum will build up against *Engel* until a critical mass is reached. It is this point of "critical mass" that must be arrived at in order for the Court to complete its transition away from its divisive "top-down theorizing habits"

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[88] Payne v. Tennessee, 501 U.S. 808, 828 (1991) (citing Swift & Co. v. Wickham, 382 U.S. 111 (1965); Or. *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977); United States v. Title Ins. & Trust Co., 265 U.S. 472 (1924)).

[89] McConnell, *supra* note 4, at 2109.

[90] MASS. CONST. art. III.

[91] Zorach v. Clauson, 343 U.S. 306, 313 (1952).

[92] McConnell, *supra* note 62, at 939.

[93] Scott Rasmussen, *Scott Rasmussen's Number of the Day For March 22, 2022*, BALLOTPEDIA (Mar. 22, 2022), https://ballotpedia.org/Scott_Rasmussen%27s_Number_of_the_Day_for_March_22,_2022, [https://perma.cc/58PF-UFKT]; *Expressing Religious Views at School: Yougov Poll: April 25–28, 2022*, YOUGOV AM. (June 9, 2022), https://today.yougov.com/topics/politics/articles-reports/2022/06/09/expressing-religious-views-school-yougov-poll-apri [https://perma.cc/NW5U-H8M8].

towards a "bottom up approach" that fosters civil disagreement—both between citizens of differing faiths and between States with differing constituencies.[94]

Perhaps this is a long shot, as it would almost certainly be met with fierce opposition both from within the conservative legal movement and from outside (just like any challenge to the "status quo" is inevitably met). However, if the path from *Roe* to *Dobbs* teaches us anything at all, it is that we ought to avoid suffering from a "poverty of political imagination."[95] Change really *can* happen. And as the Federalist Society has successfully demonstrated since its inception only 40 years ago, "our political world is far more fluid, malleable, and shapeable through the intentional action of committed political minorities" than we might be ready to admit to ourselves.[96] Now that *Roe* is finally dead along with the *Lemon* Test, it is time to identify new goals and to galvanize the conservative movement in new directions. Let us be open-minded.

[94] Will Haun, Opinion, *Perspective: What the Current Supreme Court Is Getting Right About Religious Liberty*, DESERET NEWS (Aug. 6, 2022), https://www.deseret.com/2022/8/6/23293453/perspective-after-a-half-century-the-supreme-court-is-getting-religious-liberty-right-again-founders?_amp=true [https://perma.cc/BBU4-2BVB].

[95] Adrian Vermeule, *"It Can't Happen"; Or, the Poverty of Political Imagination*, THE POSTLIBERAL ORDER (Nov. 19, 2021), https://postliberalorder.substack.com/p/it-cant-happen-or-the-poverty-of [https://perma.cc/TJ26-TA34].

[96] *Id*.