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

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Student Case Notes

Kennedy v. Bremerton Sch. Dist.
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I. INTRODUCTION

The Constitution of the United States demands of the government two absolute and opposing actions: first, the government shall establish no religion and secondly, the government shall not hinder people in the free exercise of their religion.[1] The recent *Kennedy v. Bremerton School District* decision explored the mid-field religious activities of a football coach who, after ceasing a long tradition of leading students in prayer in view of the public, later insisted he be allowed to continue his own silent prayer, without interference, at the fifty-yard line after games.[2] The Court considered whether coach Kennedy's public but silent prayer constituted private speech to which he was entitled under the Free Exercise clause or government speech constituting a violation of the Establishment clause.[3] The Court ultimately held in a 6-3 decision that Kennedy's prayer was private, protected speech.[4] A lengthy dissent, relying on an array of different operative facts, found the speech was government speech and constituted a violation of the Establishment clause.[5]

Here, the inherent tension between a constitutional directive that requires the government to neither hinder nor encourage religion is resolved seemingly in favor of free exercise of religion and away from the

1. 1 W. COLE DURHAM & ROBERT SMITH, RELIGIOUS ORGANIZATIONS AND THE LAW §7:2 (2d ed. 2021).
2. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2415-17 (2022).
3. *Id.* at 2424.
4. *Id.* at 2433.
5. *Id.* at 2442 (Sotomayor, J., dissenting).

Establishment clause.[6] This paper will first review the facts of the case, judicial reasoning, and outcome. Ultimately, this paper will argue the dissent better resolved the tension between the religion clauses in such a way to protect students' rights to an education free from religious coercion. Further, I will argue the decision leaves important questions unanswered, such as what role prior school prayer precedent should play in similar cases to come, and how lower courts are to apply the newly announced "history and tradition" test.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

Joseph Kennedy was an assistant football coach at Bremerton School District ("District") in Kitsap County, Washington.[7] The District serves about 5,000 students comprising myriad religions, including Bahá'ís, Hindu, Jewish, Muslim, Sikhs, Zoroastrians, Christians, and many secular people.[8]

For over seven years Kennedy led student athletes in prayer in the locker room before football games.[9] He also knelt and conducted silent prayer by himself at the fifty-yard line after games.[10] As time went on, students, opposing players, and other coaches began joining him in prayer after the games.[11] Eventually, the numbers grew to include most of the team, and Kennedy began to deliver short motivational speeches with "overtly religious references" at the fifty-yard line post game.[12]

In September of 2015, a coach from another school told the Bremerton Principal it was "cool" that the District allowed Kennedy to invite other teams and coaches into prayer after games.[13] The District investigated; at which time the athletic director told Kennedy not to conduct prayer with players.[14] That same day, "Kennedy posted on Facebook that he thought he might have just been fired for praying."[15]

Shortly thereafter, the District superintendent sent Kennedy a letter which identified his practices of leading prayer in the locker room prior to games and giving religious motivational talks on the fifty-yard line after games.[16] The letter directed Kennedy to avoid giving talks with religious expression, and to avoid "suggest[ing], . . . (or discourag[ing]), or supervis[ing]" any

6. *Id.* at 2433 (majority opinion).
7. *Kennedy,* 142 S. Ct. at 2411-12, 2435.
8. *Id.* at 2435 (Sotomayor, J., dissenting).
9. *Id.* at 2416 (majority opinion).
10. *Id.*
11. *Id*.
12. *Kennedy,* 142 S. Ct. at 2416.
13. *Id.* at 2435 (Sotomayor, J., dissenting).
14. *Id.* at 2436.
15. *Id.*
16. *Id.* at 2416 (majority opinion).

prayer students engaged in.[17] Further, the letter reiterated that staff is permitted to engage in private religious activity in "nondemonstrative [ways] or conducted separately from students, away from student activities."[18]

Kennedy ceased leading prayer in the locker room prior to games and giving motivational talks on the fifty-yard line post game.[19] However, on one occasion Kennedy returned to the stadium after it was empty to kneel at the fifty-yard line and pray.[20] The District expressed it had no objection to Kennedy returning to an empty field after games to pray.[21]

In mid-October, Kennedy's attorney sent the District a letter requesting Kennedy be able to continue private prayer on the fifty-yard line, in view of the public, once students were otherwise engaged after games.[22] The letter stated Kennedy would resume his fifty-yard line prayer activity after the October 16th homecoming game, and requested the school not interfere with any student athletes that wished to join him.[23] Before the game, Kennedy made several media appearances discussing his plan.[24] The District received emails, letters, and calls from the community, some of them threatening.[25]

Before the game, the District responded through a letter again directing Kennedy not to engage in any actions that could "appea[r] to a reasonable observer" as an endorsement of prayer during the time in which he was paid to coach.[26] This letter emphasized while Kennedy argued his fifty-yard line prayer was being conducted after his duties ended, that he was in fact still on duty, "in uniform, under the stadium lights, with the audience still in attendance."[27] As such, the District objected only to Kennedy praying while in uniform in front of students and community, but reaffirmed its commitment to permitting private religious activity out of the sight of students and in such a way that does not interfere with work duties.[28] Kennedy did not engage in the accommodation process, but rather, responded through his attorney stating he would "only accept demonstrative prayer on the 50-yard line."[29]

After the October 16th homecoming game, Kennedy knelt to pray at the fifty-yard line where he was quickly joined by players and coaches from the

17. *Kennedy,* 142 S. Ct. at 2416-17 (emphasis in original).
18. *Id.* at 2436-37 (Sotomayor, J., dissenting).
19. *Id.* at 2417 (majority opinion).
20. *Id.*
21. *Id.* at 2437 (Sotomayor, J., dissenting).
22. *Kennedy,* 142 S. Ct. at 2417 (majority opinion).
23. *Id.* at 2437 (Sotomayor, J., dissenting).
24. *Id.*
25. *Id.*
26. *Id.* at 2417 (majority opinion) (emphasis in original).
27. *Kennedy,* 142 S. Ct. at 2437 (Sotomayor, J., dissenting).
28. *Id.* at 2438.
29. *Id.* at 2439.

opposing team.[30] Media and members of the public swarmed the field, "knocking over student band members" in their effort to surround Kennedy.[31] The District received calls from Satanists saying if Christians were allowed to conduct religious ceremonies on the field that they would be conducting their own ceremonies on the field after games.[32]

At the October 23rd and 26th games, Kennedy again knelt and prayed on the fifty-yard line where he was joined, at times, by others.[33] The District then placed Kennedy on paid administrative leave.[34] In this action, the District reiterated its willingness to "discuss possible accommodations" of Kennedy's religious activity, if he was willing.[35] In a public letter the District stated they had no evidence of "direct coercion" by Kennedy to engage students in prayer.[36] However, the letter to Kennedy noted that under the Establishment clause, indirect coercion can constitute a violation of students' right to secular education.[37]

Several parents contacted the school saying their children only participated in the prayer because they did not want to feel separate from the rest of the team.[38] After Kennedy was put on leave, no students appeared to pray on the field.[39] Later, the head coach of the football team recommended Kennedy not be rehired in his annual review due to his failure to "follow [D]istrict policy" and for contributing "to negative relations between parents, students, community members, coaches, and the school [D]istrict."[40]

Kennedy sued the District in federal court under the Free Speech and Free Exercise clauses of the First Amendment.[41] The district court denied his motion for a preliminary injunction to reinstate him to his coaching position, finding under the *Lemon* test that a "reasonable observer" could have viewed his activity as orchestrating a "session of faith."[42] Kennedy appealed the denial of the preliminary injunction and the United States Court of Appeals

30. *Id.* at 2438.
31. *Id.*
32. *Kennedy,* 142 S. Ct. at 2438.
33. *Id.* at 2418 (majority opinion).
34. *Id.*
35. *Id.* at 2439-40 (Sotomayor, J., dissenting).
36. *Id.* at 2419 (majority opinion).
37. *Kennedy,* 142 S. Ct. at 2436 (Sotomayor, J., dissenting).
38. *Id.* at 2440.
39. *Id.*
40. *Id.*
41. *Id.* at 2419 (majority opinion).
42. *Kennedy,* 142 S. Ct. at 2419*; see also* Lemon v. Kurtzman*,* 403 U.S. 602, 613-14, 625 (1971) (Two state statutes providing government subsidies to religious schools were challenged. The Court held that governments and churches are to be "entirely excluded" from each other's spheres. The statutes were knocked down on ground that they fostered "excessive entanglement" between government and religious life.).

for the Ninth Circuit affirmed.[43] Kennedy sought certiorari, which the Supreme Court of the United States denied.[44]

The district court found that Kennedy's speech was unprotected because it constituted government speech through his capacity as a government employee.[45] Further, the court reasoned even if Kennedy's speech was private, "the District would have invited 'an Establishment clause violation'" if they permitted it.[46] The District, according to the court, had a "compelling interest" in prohibiting the speech.[47] The United States Court of Appeals for the Ninth Circuit affirmed, adding Kennedy's on-field prayer "coupled with . . . 'his pugilistic efforts to generate publicity'" would lead a "reasonable observer" to view the religious activity as being endorsed by the District, thus violating the Establishment clause.[48] "[T]he Ninth Circuit denied a petition to rehear the case en banc."[49] The Supreme Court of the United States granted certiorari.[50]

III. THE COURT'S DECISION AND RATIONALE

A. Majority Opinion by Justice Gorsuch

Justice Gorsuch delivered the opinion of the Court, joined by Justices Roberts, Thomas, Alito, and Barrett, and in which Justice Kavanaugh joined in part. The Court began its analysis by asserting the Free Speech and Free Exercise clauses of the First Amendment work in tandem, intentionally offering overlapping protection for religious speech and religious activity.[51] This was due primarily to "the framers' distrust of government attempts to regulate religion and suppress dissent."[52]

The Court stated a plaintiff bears the burden in demonstrating an infringement of his First Amendment rights.[53] If the plaintiff meets this burden, it shifts to the employer to show the limitations placed on the employee's speech are justified and narrowly applied in a way that is consistent with relevant case law.[54]

As to the Free Exercise clause claim, the first issue under this inquiry is whether Kennedy prayed in his capacity as a private citizen or whether his

43. *Kennedy,* 142 S. Ct. at 2419.
44. *Id.*
45. *Id.* at 2420.
46. *Id.*
47. *Id.*
48. *Kennedy,*142 S. Ct. at 2420.
49. *Id.*
50. *Id.* at 2421.
51. *Id.*
52. *Id.*
53. *Kennedy,* 142 S. Ct. at 2421
54. *Id.*

prayer constituted government speech attributable to the school District, as the Free Exercise clause protects religious "performance of . . . physical acts" even at work except in some circumstances.[55] In *Emp't Div. v. Smith*, two employees were fired for misconduct and denied unemployment benefits after they ingested a psychedelic cactus as part of a "sincerely held'' religious ceremony at the Native American Church where they were both members.[56] The case provided an important test for whether the employer's policy of denying unemployment benefits to those found guilty of felony drug charges unduly burdened an employee's sincerely held religious practice.[57] The Court in *Emp't Div.* held the Free Exercise clause does not permit an individual to violate a "neutral and generally applicable" law in the name of their religion.[58] The Court ruled the state law banning the drug made no prohibition on certain religious beliefs, communication of the beliefs, or raising children with the beliefs; therefore, the Free Exercise clause is not offended and the state may ban the practice of ingesting the substance just as they have validly banned other drugs.[59]

In the instant case, the Court found Kennedy met his burden in two ways. First, he sought to engage in a "sincerely motivated" religious practice.[60] Secondly, the District's disciplining of Kennedy failed to act in accordance with a "neutral and generally applicable rule."[61] The policy was not neutral because it, as evident in their letter to Kennedy, sought to prohibit "overtly religious" actions.[62] The District's policy also was not "generally applicable" because the performance evaluation recommended Kennedy for nonrenewal for failing to supervise students after games, a reference directly to his post-game religious activity.[63] Other members of the coaching staff were allowed to attend to personal phone calls or talk to friends for a brief period after the game.[64] The Court, therefore, asserted the applicability of the supervision expectation was targeted toward Kennedy only, not all of the coaches.[65]

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55. *Id.* (quoting Emp't Div. of Hum. Res. v. Smith, 494 U.S. 872 (1990)).
56. *Emp't Div.,* 494 U.S. at 874, 907 (O'Connor, J., concurring).
57. *Id.* at 873.
58. *Id.* at 879; *see also* Cutter v. Wilkinson 554 U.S. 709, 714-15 (2005). The "generally applicable" test was superseded by the Religious Freedom Restoration Act of 1993, which prohibited burdening religious activity even when the rule was "generally applicable" unless the government can show the rule furthered a compelling government interest and was the least restrictive means of doing so.
59. *Emp't Div.,* 494 U.S. at 882.
60. *Kennedy,* 142 S. Ct. at 2422.
61. *Id.*
62. *Id.*
63. *Id.* at 2423.
64. *Id.*
65. *Kennedy,* 142 S. Ct. at 2423.

Turning to precedent in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, the Court started their analysis of Kennedy's free speech claim.[66] The dissenters described the inherent tension existing between a teacher's rights as a private citizen and a government employee who speaks on behalf of the government.[67] While neither teachers nor students "shed their constitutional rights to freedom of speech . . . at the schoolhouse gate" it does not mean "the speech rights of public school employees are so boundless that they may deliver any message to anyone anytime they wish."[68]

In *Tinker,* several students wore black armbands to school to protest the Vietnam war.[69] They were suspended for refusing to remove the bands, pursuant to a policy prohibiting armbands, implemented just a few days before their protest.[70] The Court held the school district violated the students' free speech rights because there was no evidence the school had a reasonable belief the armbands would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."[71] Despite relying on this precedent in the *Kennedy* decision, the Court failed to explain why cases limiting the rights of students to engage in symbolic political speech while in school would apply to a case involving the religious prayer rights of teachers.

The Gorsuch opinion turned next to *Pickering v. Bd. of Educ.* and *Garcetti v. Ceballos* to further illustrate the complexity of these conflicting values and introduce the two step inquiry used to determine whether government employee speech is protected.[72] In *Pickering*, a teacher wrote a letter to the editor of the local paper criticizing the school district for the way it had handled past revenue raising efforts.[73] The school district dismissed her on the grounds that the letter was "detrimental to the efficient operation" of the school district.[74] Pickering sued the school district for violating her First Amendment right to free speech.[75] The district failed to introduce any evidence at Pickering's post-termination hearing that the operation of the school district had been impacted by the letter to the editor.[76] The Court held "[t]he problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and

66. *Id.; see* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).
67. *Kennedy,* 142 S. Ct. at 2445 (Sotomayor, J., dissenting).
68. *Id.* at 2423 (majority opinion) (quoting *Tinker*, 393 U.S. at 506).
69. *Tinker*, 393 U.S. at 504.
70. *Id.*
71. *Id.* at 509.
72. *Kennedy,* 142 S. Ct. at 2423; *see also* Pickering v. Bd. of Educ., 391 U.S. 563 (1968); Garcetti v. Ceballos, 547 U.S. 410 (2006).
73. *Pickering*, 391 U.S. at 564.
74. *Id.*
75. *Id.* at 565.
76. *Id.* at 567.

the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[77] In the first step of the inquiry the Court concluded Pickering's opinions expressed in the letter were on a subject of public concern and were not shown to have impeded her work duties nor the operations of the school.[78] In the second step of the inquiry, the Court balanced Pickering's interest as a member of the public over the district's interest in limiting teachers' opportunity to debate.[79]

As an important contrast, the *Garcetti* case concerned a District Attorney ("DA") who wrote a memo about his concerns over the method used to secure a search warrant.[80] Later, the DA was demoted and transferred to another courthouse.[81] He sued for retaliation under the Free Speech clause of the First Amendment.[82] The Court applied the two step test from *Pickering* to determine whether the DA had First Amendment Free Speech protection as a government employee: 1) whether the public employee "spoke as a citizen on a matter of public concern" and, if so, 2) whether the employer "had an adequate justification for treating the employee differently from any other member of the general public."[83] Ultimately, the Court found the DA's memo was not protected by the First Amendment because he was acting in his ordinary capacity as a prosecutor and investigator when he wrote the memo.[84] The Court held "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[85]

In the instant case, the Court asserted there is no debate on Kennedy's speech being a matter of public concern.[86] Thus, the issue before the Court within the *Pickering-Garcetti* inquiry was whether Kennedy's speech was that of a private citizen or a government official.[87] The majority held the test for determining whether speech is government speech or private "is whether the speech at issue is itself ordinarily within the scope of an employee's duties."[88] Applying this test, the majority found Kennedy's speech was private because the silent prayer on the fifty-yard line after the October games

77. *Id.* at 568.
78. *Pickering,* 391 U.S. at 572-73.
79. *Id.* at 573.
80. Garcetti v. Ceballos, 547 U.S. 410, 414 (2006).
81. *Id.* at 415.
82. *Id.*
83. *Id.* at 418 (citing *Pickering,* 391 U.S. at 568).
84. *Id.* at 421-22.
85. *Garcetti*, 547 U.S. at 421.
86. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2424 (2022).
87. *Id.*
88. *Id.* (quoting Lane v. Franks, 573 U.S. 228, 240 (2014)).

was not speech he engaged in "ordinarily within the scope" of his duties.[89] The Court relied on the operative fact that the time in which Kennedy prayed was a brief period of free time in which he and other coaches could attend to personal business.[90]

The majority then proceeded to prong two of the *Pickering* test to decide whether the school District justifiably limited Kennedy's religious freedom.[91] The District's argument was it had to limit Kennedy's speech in order to avoid violating the Establishment clause, thus it was justified.[92] The Court stated the District was flawed in its premise that the Establishment clause is violated whenever a "reasonable observer" could conclude the government endorsed a religion.[93] The District reasoned that "a reasonable observer could (mistakenly) infer that by allowing the prayer the District endorsed" the prayer, and therefore, it legally had to act to limit the speech.[94] The majority found fault with this analysis.

The Court went on to discuss the role of *Lemon* and *Cty. of Allegheny v. ACLU* in the District and the United States Court of Appeals for the Ninth Circuit's analysis of the case.[95] In *Lemon,* two state statutes were challenged on ground that they violated the Establishment clause of the First Amendment.[96] The two state statutes in question offered government subsidies of teacher salaries for non-religious subject areas being taught in private, religious schools.[97] The Court affirmed the statutes violated the Establishment clause because they fostered "excessive entanglement" between church and government.[98] The Court elaborated: "[u]nder our system the choice has been made that government is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government."[99]

In *Allegheny,* the county and city were sued over two holiday displays, one depicting a Christian nativity scene and one of a menorah.[100] The Court summarized the trilogy of tests introduced in *Lemon* for determining whether the government had violated the Free Exercise clause of the First

89. *Id.*
90. *Id.* at 2425.
91. *Kennedy,* 142 S. Ct. at 2425.
92. *Id.* at 2426.
93. *Id* at 2426-27*; see also* Cty. of Allegheny v. Am. Civil Liberties Union, 492 U.S. 573, 595 (1989) (O'Connor, J., concurring). The test for "endorsement" was described as "what viewers may fairly understand to be the purpose of the display" emphasizing the role of context in determining the question.
94. *Kennedy,* 142 S. Ct. at 2427.
95. *Id.*
96. Lemon v. Kurtzman, 403 U.S. 602, 606 (1971).
97. *Id.* at 606-07.
98. *Id.* at 609.
99. *Id.* at 625.
100. Cty. of Allegheny v. Am. Civil Liberties Union, 492 U.S. 573, 578 (1989).

Amendment.[101] They are: 1) a policy with a secular purpose is permissible, 2) a policy may not advance or inhibit religion, and 3) a policy may not "excessively entangle" the government with religion.[102] The Court further noted that the government cannot "endorse" religion by conveying any message that a certain religion is preferred.[103] Ultimately, the Court held while the nativity scene could be taken by a reasonable observer as an endorsement of religion given the context of the biblical phrase accompanying it, the context surrounding the menorah (a salute to liberty and a pine tree) would not necessarily be perceived by residents as an "endorsement" of religion.[104]

Here, the Court went on to state the *Lemon* test has been replaced by "reference to historical practices and understandings" as developed in the *Town of Greece* decision, among other cases.[105] Calling it a shortcoming of *Lemon* not to do so, the majority asserted governments must decide what is permissible and impermissible based on history and a faithful reflection of the original framers of the Constitution.[106] In *Town of Greece,* respondents brought suit over a practice the town had of beginning council meetings with prayer.[107] The town invited Christian leaders and lay leaders to deliver overtly religious prayers.[108] They also allowed those of any faith, including a wiccan, to deliver prayer, if they asked.[109] Plaintiffs sought a remedy of non-sectarian, generally applicable prayer, instead of any expression particular to a certain faith.[110] The Court held mandating generic religious references would be government overstepping into the religious field.[111] Incorporation of prayer for ceremonial purposes is a practice dating back to the framers of the Constitution and their own understanding of civic affairs, and as such, when it comports with original tradition, the practice does not offend the Establishment clause.[112]

The Court then went into an analysis of the District's "backup argument": even if Kennedy's prayer constituted private speech, they were justified in limiting it because failure to do so would have made the District guilty of coercion.[113] While conceding that making prayer mandatory would be

101. *Id.* at 592.
102. *Id.*
103. *Id.*
104. *Id.* at 612-13, 620.
105. Kennedy v. Bremerton Sch. Dist, 142 S. Ct. 2407, 2428 (2022).
106. *Id.*
107. Town of Greece v. Galloway, 572 U.S. 565, 572 (2014).
108. *Id.* at 571-72.
109. *Id.* at 572.
110. *Id*. at 572-73.
111. *Id.* at 581.
112. *Town of Greece,* 572 U.S. at 591.
113. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2428-29 (2022).

coercive, the Court found Kennedy's fifty-yard line prayer could not be coercive because Kennedy and the District both stated he never directly coerced students into prayer.[114] The Court highlighted Kennedy's ended practice of leading prayer in the locker room prior to games and of holding religious motivational talks after the games with students.[115] Thus, according to the majority, he was disciplined by the school only for the three October post-game prayers.[116] Citing back to the *Greece* decision, the Court stated although some people will be offended by witnessing certain prayer, it does not follow they have necessarily been coerced by having simply witnessed it.[117]

Next, the Court discounted the parental reports that children participated in the prayers "only because they did not wish to separate themselves from the team" as hearsay and potentially irrelevant because it may refer to the ended practice of locker room prayer.[118] Further, the Court stated Bremerton students must not have felt coerced to pray because not a single one participated in the post-game prayers in October.[119]

Finally, the Court drew a distinction between a school District tolerating the private prayer speech of its employees and a school District forcing students into prayers.[120] The Court discussed *Zorach v. Clauson,* in which a school district did not violate the Establishment clause when it permitted students to voluntarily attend off campus religious class because there was no evidence of coercion.[121] In comparison, in *Lee v. Weisman,* the Court found a school district had violated the Free Exercise clause by compelling attendance in a graduation ceremony in which a clergy member publicly recited a prayer.[122] Drawing a hard line between the previous locker room prayer/post-game motivational talks and the fifty-yard line prayer for which Kennedy was ultimately disciplined, the Court held this case is distinguishable from *Santa Fe* and *Lee* in that "[t]he prayers for which Mr. Kennedy was disciplined were not publicly broadcast [n]or recited to a captive audience. Students were not required or expected to participate."[123]

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114. *Id.* at 2429.
115. *Id.*
116. *Id.* at 2430.
117. *Id.*
118. *Kennedy,* 142 S. Ct. at 2430.
119. *Id.*
120. *Id.* at 2431.
121. *Id.;* Zorach v. Clauson, 343 U.S. 306 (1952).
122. *Kennedy,* 142 S. Ct. at 2431. *See also* Lee v. Weisman, 505 U.S. 577 (1992); Santa Fe v. Doe, 530 U.S. 290, 307 n. 21, 311 (2000) (public broadcasting of prayer over a speaker was deemed violative of the Establishment clause, observing that while attendance was not generally mandatory, it was for members of the team, band, and cheerleaders).
123. *Kennedy,* 142 S. Ct. at 2432.

The majority ended with an indictment of the District for their "mistaken view that it had a duty to ferret out and suppress religious observances."[124]

B. Concurring Opinion by Justice Thomas

In a brief concurring opinion, Justice Thomas noted while he agrees with the outcome of the majority's opinion, he added two unresolved issues.[125] Though the Court has held public employees are protected when they speak on "matters of public concern" the question remains whether that applies to the "history and tradition" test.[126] Also, the Court failed to decide what *would* justify a public employer in restricting the religious exercise of an employee.[127]

C. Concurring Opinion by Justice Alito

In an even shorter concurring opinion, Justice Alito stated this case is one of first impression as it involved an employee whose at work religious exercise occurred at a time when employees had a brief period to engage in private activity.[128] Though none of the standards discussed apply, the *Kennedy* Court has not decided what standard should apply to a situation in which an employee observes a religious practice at work during free time.[129]

D. Dissenting Opinion by Justice Sotomayor

Justice Sotomayor filed a dissenting opinion, in which Justices Breyer and Kagan joined.[130] In a notable contrast, the dissent began with a broadly different framing of the issue.[131] To the dissenters, "[t]his case . . . [was] about whether a public school must permit a school official to kneel, bow his head, and say a prayer at the center of a school event."[132]

The dissenters emphasized what they viewed as a misrepresentation of the facts of the case by the majority, first in its characterization of Kennedy's mid-field "prayers as private and quiet" when it actually caused a "severe disruption;" and secondly, in glossing over the long history of Kennedy inviting students into and leading them in prayer up until the October games.[133] The dissent called it an error for the majority to analyze only the

124. *Id.* at 2433.
125. *Id.* (Thomas, J., concurring).
126. *Id.*
127. *Id.*
128. *Kennedy,* 142 S. Ct. at 2433 (Alito, J., concurring).
129. *Id.* at 2433-34.
130. *Id.* at 2434 (Sotomayor, J., dissenting).
131. *Id.*
132. *Id.*
133. *Kennedy*, 142 S. Ct. at 2434.

fifty-yard line prayers in October, "divorced from the context" in which they arose.[134] Of particular note to the dissenters was the fact that Kennedy's discipline for continuing to pray on the fifty-yard line took place in the context of a long tradition of him "ministering religion to students as the public watched."[135] This, they said, provides relevant background for how the District would have violated the Establishment clause if they had allowed the practice to continue.[136]

The criticism did not end with how the majority characterized the facts of the case, but rather, the dissent further took issue with the overruling of *Lemon,* and replacement of its precedent with what they termed as a new "history and tradition" test.[137] The dissent described the new coercion analysis as "toothless" and overlooking "the unique pressures faced by students when participating in school-sponsored activities."[138]

Justice Sotomayor gave two reasons why heightened vigilance in separating church and state is relevant in public schools.[139] First, public schools play an important role in the promotion of democracy and as such families should be able to have trust that their children are not indoctrinated with religious views that may conflict with their private beliefs.[140] Further, the dissent cites to the *Lee* decision to offer support for the view that the Establishment clause prohibits schools from conveying to students "a particular religious belief is favored or preferred."[141]

Lee held prayer at a middle school graduation ceremony was unconstitutional because attendance was "in a fair and real sense obligatory."[142] Rejecting the school's argument to reconsider the decision in *Lemon,* the *Lee* Court concluded the principal's involvement in deciding to incorporate prayer into the graduation ceremony, selecting a Rabbi for the event, and attempting to control the content through a pamphlet on non-sectarian prayer constituted government speech "attributable to the state."[143] Whereas the Constitution provides, at a minimum, that schools may not coerce participation in religious activity, it also may not act in a way that tends to establish a preference for any religion.[144]

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134. *Id.*
135. *Id.* at 2441.
136. *Id.*
137. *Id.* 2434.
138. *Kennedy*, 142 S. Ct. at 2434.
139. *Id.* at 2442.
140. *Id.*
141. *Id.* (citing Lee v. Weisman, 505 U.S. 577, 604-05 (1992)).
142. *Lee*, 505 U.S. at 581, 586.
143. *Id.* at 581, 587.
144. *Id.*

Secondly, schools are higher risk environments for coercion due to the nature of their mandatory attendance requirements and the special nature of relationships between adults as mentors and the susceptibility of children to "religious indoctrination or peer pressure."[145] Thus, the dissent firmly concluded the incorporation of prayer into public schools is decidedly unconstitutional.[146]

The dissent's opinion turned on looking at Kennedy's prayer practice as a whole, concluding both the fifty-yard line prayer constituted an endorsement of religion under the Establishment clause and that it was coercive in light of the evidence that some students only participated out of social pressure.[147] The dissent posited the "highly visible and demonstrative prayer at the last three games before his suspension" cannot be separated from the greater context of his pre-game locker room prayers and his postgame religious talks.[148] In short, the Establishment clause requires a fact-specific analysis of the "practical reality of the specific practice" and the inquiry "must . . . include an examination of the circumstances surrounding" the practice.[149] As such, the dissent concluded that allowing the integration of prayer ceremony at a football game, in light of Kennedy's prior practice, would coerce students into religious activity.[150]

The dissent referred back to the *Pickering* and *Garcetti* cases cited in the majority opinion to reestablish precedent that although teachers and coaches do not shed all their rights to free speech when employed by a school District, they do accept some limitations on their speech.[151] Here, the opinion stated even if Kennedy's speech constituted private speech, the incorporation of it at the center of a school event justified the District in limiting the speech under the Establishment clause.[152] In short, the very facts of when, where, and how Kennedy prayed is what became problematic.[153]

Next, the dissent turned to whether the District's limitation on Kennedy's speech was the "least restrictive means of furthering a compelling state interest" as is required under precedent *Church of Lukumi Babalu Aye v. City of Hialeah*.[154] In *Lukumi,* a newly established church challenged city regulations prohibiting killing animals.[155] The Santeria faith practiced ritual

145. *Kennedy*, 142 S. Ct. at 2442 (Sotomayor, J., dissenting).
146. *Id.*
147. *Id*. at 2443-44.
148. *Id.*
149. *Id.* at 2444.
150. *Kennedy*, 142 S. Ct. at 2444.
151. *Id.* at 2445.
152. *Id.* at 2446.
153. *Id.*
154. *Id*.
155. Church of Lukumi Babalu Aye, Inc v. City of Hialeah, 508 U.S. 520, 528 (1993).

animal sacrifice.[156] The Court ruled the newly passed regulations were not "narrowly tailored" to accomplish a legitimate interest, holding "upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices" officials must remember their duty to the Establishment clause of the Constitution.[157]

Here, the dissent decided, unlike in *Lukumi,* the District's prohibition on fifty-yard line prayer was the "least restrictive means of furthering a compelling state interest."[158] The prohibition was "least restrictive" because Kennedy had refused the District's repeated offers of religious accommodations that would have allowed him opportunity to pray in such a way that did not violate the Establishment clause nor his supervisory duties.[159]

Next, the dissent objected to two of the majority's premises.[160] First, the dissent stated that in looking at the Free Exercise and Free Speech clauses as providing overlapping support for religious expression, the majority sidelined the Establishment clause.[161] Secondly, the majority minimized the real tension existing between the Establishment clause and the Free Exercise and Free Speech clauses.[162] The dissenters asserted the proper focus should be on balancing those conflicting interests, and in this case, that means the employer's legitimate concerns over violating the Establishment clause should weigh more heavily than Kennedy's "desired religious practice at the time and place of his choosing."[163]

The dissenting opinion then defended the "endorsement inquiry" and rejected the majority's exaggerated hypothetical "heckler" taking offense to a religious practice he simply observed.[164] Rather, the dissent viewed the holding of *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah* as a test to determine whether "the reasonable observer" who is "aware of the history and context of the community" would take the activity as being endorsed by the government.[165] Going on to disagree that the "endorsement test" and the three-prong *Lemon* tests have been "abandoned," the opinion stated *Am. Legion v. Am. Humanist Ass'n* merely concluded the *Lemon* test was "ill-advised for reasons specific to those contexts."[166] In *American Legion,*

156. *Id.* at 525.
157. *Id.* at 546-47.
158. *Kennedy,* 142 S. Ct. at 2446.
159. *Id.*
160. *Id*.
161. *Id.*
162. *Id.* at 2447.
163. *Kennedy*, 142 S. Ct. at 2447.
164. *Id.* at 2448.
165. *Id*.
166. *Id*. at 2449.

citizens challenged a World War I memorial depicting a cross alongside the names of soldiers from the town that perished in the war on ground that it offended the Establishment clause.[167] The *American Legion* Court held although the cross is a symbol of the Christian religion that when looked at in the historical context of when the memorial was erected (eighty-nine years earlier) the rows of plain white crosses depicting lives lost in the war was a cultural symbol "emblazoned on the minds of Americans."[168]

Finally, the dissent criticized the majority opinion for failing to provide any meaningful explanation of their newly announced "history and tradition" test.[169] The majority's instruction to evaluate claims "by reference to historical practices and understandings" offered no meaningful advice to school administrators on how to adapt their policies or to lower courts on how to decide cases of this kind.[170]

IV. EVALUATION AND ANALYSIS

A. Introduction

The tension existing between the Free Exercise and Establishment clauses is well documented.[171] This analysis will argue 1) the dissent better resolved the tension in cases of Establishment and Free Exercise conflicts in public schools specifically because of the vulnerability of students to religious coercion and because the choice between participation or not constitutes a violation of the Establishment clause, and 2) the *Kennedy* decision leaves unanswered questions such as how precedent on school prayer should be applied now that *Lemon* and the endorsement tests are struck down.

B. The Dissent Better Resolved the Tension Between the Religion Clauses in Public Schools

The dissent better resolved the tension between the religion clauses as it relates to Kennedy's prayer in public school because it considered the reality of peer pressure that students face and appropriately protected the interests of students.[172] The tension is summarized thus: to give "a full measure of

167. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2074, 2078 (2019).
168. *Id.* at 2074.
169. *Kennedy,* 142 S. Ct. at 2450 (Sotomayor, J., dissenting).
170. *Id.*
171. Crystal V. Hodgson, *Coercion in the Classroom: The Inherent Tension Between the Free Exercise and Establishment Clauses in the Context of Evolution*, 9 NEXUS 171, 172 (2004); Dr. Brett Geier & Ann E. Blankenship-Knox, *When Speech Is Your Stock in Trade: What Kennedy v. Bremerton School District Reveals About the Future of Employee Speech and Religion Jurisprudence*, 42 CAMPBELL L. REV. 31, 55-56, 61 (2020).
172. *Kennedy*, 142 S. Ct. at 2442.

religious free exercise" can reasonably be viewed as the government showing a preference for religion; whereas, strict adherence to separation makes government hostile to religion, which is "tantamount to the establishment of secularism."[173] The Court has struggled to walk a middle ground between respecting while not interfering with religion.[174] However, over the last half century the Court has more often resolved the tension by prioritizing the Establishment clause over the Free Exercise clause, eschewing many national "tradition[s]" such as posting the ten commandments in courthouses and prayer in school.[175]

Here, this inherent tension was prominently displayed in the selection and interpretation of facts between the majority and dissent. Where the majority called Kennedy's prayer "quiet and private" the dissent described it as a football-like blitz of media knocking over students to rush the field, Satanists, and angry parents.[176] The dissent considered the context of the broad religious diversity of the community in which Kennedy coached.[177] The majority stated that until it publicly came to light that the prayer was occurring, no one ever complained about Kennedy's religious activity on or off the field, entirely overlooking the diversity of the community in which the prayer occurred.[178] The majority claimed the Establishment and Free Exercise clauses not only aren't at war, but they coexist harmoniously, while Kennedy's right to religious exercise prevailed.[179] Consistent with the modern view of prioritizing the Establishment clause, the dissent took the side of secular government and education.[180]

Ultimately, the dissent's approach was better suited to protecting students' interests because students are highly vulnerable to subtle coercive pressure through peers or role models.[181] In an amicus brief to the Court, the ACLU argued Kennedy's fifty-yard line prayer constituted coercion of students into religious activity, thus the action of the school District to stop the public prayers was not only warranted, but required.[182] A special

173. DURHAM & SMITH, *supra*, note 1, at §7:2.

174. *Id*. *See also* Walz v. Tax Comm'n of City of New York, 397 U.S. 664, 676 (1970) ("Separation [of church and state] . . . cannot mean absence of all contact.").

175. DURHAM & SMITH, *supra*, note 1, at §7:2.

176. *Kennedy,* 142 S. Ct. at 2416, 2438-40.

177. *Id.* 2435.

178. *Id.* at 2416 (majority opinion).

179. *Id.* at 2421, 2433.

180. *Id.* at 2434 (Sotomayor, J., dissenting).

181. *Kennedy*, 142 S. Ct. at 2442 (quoting Edwards v. Aguillard, 482 U.S. 578, 584 (1987))*; see also* Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 683, 685 (1986) (the Court held the school district was "entirely within its permissible authority" when it suspended an elected student speaker for having delivered a lewd speech that shocked other students).

182. Brief for the American Civil Liberties Union and ACLU of Washington as Amici Curiae Supporting Respondent, *Kennedy*, 142 S. Ct. 2407 (No. 21-418), at 33-34, 37 [hereinafter Brief for Respondent].

relationship exists between a coach and players that is highly susceptible to subtle coercion and requires vigilant monitoring to avoid offending the Establishment clause.[183] Direct evidence in *Kennedy* provided support for this. Students felt they needed to pray to maintain proximity to their team, and at least one student indicated he prayed with the team against his beliefs fearing he would lose playing time if he refrained.[184]

Applying the susceptibility issue specifically to football, Edwards argues in her article *College Athletics, Coercion, and the Establishment Clause: The Case of Clemson Football,* that although the Court treats college-level athletes as "mature adults" when assessing their susceptibility to religious coercion they are in fact more susceptible to coercion than the typical college age student due to the uniquely coercive environments of football teams.[185] First, the nature of football programs is that they are more likely to be coercive because coaches have a powerful influence on athletes both on and off the field as they are the "most important person in determining the quality and success of an athlete's sport experience."[186] Further, student athletes face significant peer pressure from their teammates.[187] Studies show that peer to peer interaction in football programs contributes to "disordered eating behaviors . . . decisions about reporting concussion symptoms . . . the amount of alcohol that college student-athletes consume" among others.[188]

In her article, Edwards noted the problematic timing of the Clemson football team chaplain conducting team baptisms immediately following mandatory team practice.[189] Due to the nature of peer pressure, the influential role of coaches and team authority figures, and the timing, the baptisms would have been "experienced as obligatory" and thus constituted "a real and substantial likelihood" of coercion.[190] The first of such baptisms to be publicized was that of DeAndre Hopkins who climbed into a tub after practice, still in his football uniform, while most or all of his teammates watched.[191] Ten to fifteen additional baptisms were conducted over the next two years.[192] Though no student athletes have complained, Edwards

183. *Id.* at 33-34.
184. *Id.* at 30.
185. Erin B. Edwards, *College Athletics, Coercion, and the Establishment Clause: The Case of Clemson Football*, 106 VA. L. REV. 1533, 1559 (2020). One may also note that early-college athletes are the same age as high school seniors.
186. *Id.* at 1556.
187. *Id.* at 1558.
188. *Id.* at 1558-59.
189. *Id.* at 1565-66.
190. Edwards, *supra* note 185, at 1566.
191. *Id.* at 1565.
192. *Id.*

hypothesized that "[t]here is little doubt . . . players would have felt a 'real and substantial likelihood' of coercive pressure to attend the baptisms."[193]

Here, one can draw a parallel between the Clemson practice of baptizing students immediately after practice to Coach Kennedy's public practice of prayer on the field immediately following football games. The theory of student susceptibility further bears out in the *Kennedy* case, as parents contacted the school District to say their children only participated because they didn't want to be left out.[194] Thus, the dissent correctly identified that coaches inspire emulation, either because student athletes are positively motivated or concerned about potential negative consequences.[195] If team baptisms immediately following practice constitutes a violation of the Establishment clause under the "real and substantial likelihood" test used in adult coercion claims (a currently untested hypothesis), then the practice of praying publicly with younger and even more susceptible student athletes is equally or more suspect. As such, heightened protection against coercion, accidental or otherwise, is appropriate and the dissent's decision to discipline Kennedy for his refusal to comply with District policy appropriately protected student rights.[196]

Also conspicuously missing from the *Kennedy* decision is any significant discussion of important school prayer precedent, such as the story of *Santa Fe Independent School District v. Doe*, in which case a Jewish family challenged the practice of allowing an elected "student chaplain" to read a prayer over the loudspeaker before every varsity football game.[197] The lower court allowed the family to litigate anonymously to protect them from harassment in the heavily Christian dominated town of Santa Fe, Texas, including from school officials aggressively trying to seek the complaining family out.[198] Though the district changed its policy to allow for student-led, student-initiated prayer via an anonymous vote of the student body, the Supreme Court considered the question of whether this practice violated the Establishment Clause, and ultimately held that it did.[199] The Court rejected an argument by the district that the student-initiated prayer was private speech that happened to occur in public, noting that the "use of a student vote to decide whether to have graduation speakers and whom to elect . . . was 'problematic,' because it did 'nothing to protect minority views.'"[200] The Court held that the vote and student-led nature of the prayers did not insulate

193. *Id.* at 1566.
194. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2430 (2022) (majority opinion).
195. *Id.* at 2442 (Sotomayor, J., dissenting).
196. *Id.*
197. Santa Fe Sch. Dist., v. Doe, 530 U.S. 290, 294 (2000).
198. *Id.*
199. FIRST AMENDMENT STORIES 496 (Richard W. Garnett & Andrew Koppelman eds., 2012).
200. *Id.*

the school from having orchestrated the speech because the speech would be "delivered at a regularly scheduled school event[s] . . . and the pregame ceremony would be 'clothed in the traditional indicia of school sporting events.'"[201] Underlying the reasoning here is "[t]he notion that a person's constitutional rights may be subject to a majority vote"; but, "they depend on the outcome of no elections."[202]

Though the city of Bremerton was much more religiously diverse, and there is no argument that students ought to vote to determine whether and who will deliver prayer to the football team, factual similarities do exist.[203] For one, coach Kennedy demanded in his letter through counsel that students should be able to initiate participation in his prayer.[204] Similarly, the practice of pre-game locker room prayer also continued under the explanation that it was, ostensibly, student initiated and led.[205] Another similar fact that the Court in *Kennedy* overlooked was that Coach Kennedy continued to wear the traditional indicia of the school while engaged in his "private" post-game prayer, and the prayer occurred at regularly scheduled school events.[206]

A fair question in response to a decision with no discussion of a highly relevant and important school case precedent is: does *Santa Fe v. Doe* still apply? Once the *Lemon* and endorsement tests are struck down, are all cases relying on those tests no longer controlling precedent? What role does the newly announced "history and tradition" test play in cases involving school prayer?

Further, the dissent's conclusion better respects prior case law on the issue of whether religious activity violates the Establishment clause when students are allowed to "opt out." In *Engel v. Vitale,* the parents of ten public school students brought suit under the Establishment clause when the school board passed a regulation requiring all students to recite an overtly religious prayer in the presence of a teacher each morning before class, with the caveat that students who objected could refrain.[207] The Court in *Engel* highlighted an important concept that is absent from the majority opinion in *Kennedy*: while the Establishment and Free Exercise clauses may sometimes overlap, they also "forbid two quite different kinds of governmental encroachment upon religious freedom."[208] Where the Free Exercise clause requires a showing of direct government interference in religious activity, the

201. *Id.* at 497.
202. *Id.* at 501.
203. *Kennedy,* 142 S. Ct. at 2435.
204. *Id.* at 2416-17, 2422.
205. *Id.* at 2434.
206. *Id.* at 2443.
207. Engel v. Vitale, 370 U.S. 421, 423 (1962).
208. *Id.* at 430.

Establishment clause does not.[209] A violation of the Establishment clause is made out whenever the government establishes an official religion regardless of whether an individual was directly or indirectly coerced.[210] The Court explained three reasons for this: 1) when the government, with all its power and status, makes a preference for a certain religion apparent, religious minorities can and sometimes *do* feel indirect pressure to conform, 2) the framers of the Constitution believed "that a union of government and religion tends to destroy government and to degrade religion" and 3) due to the recent history between Great Britain and the American colonies, the framers were also acutely aware that "established religions and religious persecutions go hand in hand."[211] Thus, the Court in *Engel* held that a violation of the Establishment clause was not avoided by allowing students to opt out of religious activity as being made to choose itself constituted a violation of the clause.[212]

Noted in the ACLU amicus curiae brief and the dissenting opinion, this precedent is highly relevant to Kennedy's prayer on the fifty-yard line.[213] Though the District conceded that Kennedy never directly coerced students into joining him, there is evidence that students were presented with a choice.[214] Kennedy asked the District not to interfere with students who chose to join him in prayer.[215] Prior to the October games, Kennedy invited, but did not force, students to participate in the prayer sessions he offered both on and off the field.[216] Thus, students were allowed to choose between participation and abstention, a choice the decision noted left some students feeling like they had to pray in order to feel close to the team or maintain their playing time.[217] The dissent correctly recognized that the presentation of this choice, alone, qualified as a violation of the Establishment clause.[218]

C. Unanswered Questions

Future free exercise claims will implicate the "history and tradition" test as described in *Kennedy;* however, just forty one words are spent in the majority opinion.[219] In fairness, the majority claimed it is not a new test at

209. *Id.*
210. *Id.*
211. *Id.* at 431-32.
212. *Engel*, 370 U.S. at 430.
213. Brief for Respondent, *supra* note 182, at 26-27; Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2442 (2022).
214. *Kennedy,* 142 S. Ct. at 2416-17 (majority opinion).
215. *Id.* at 2437 (Sotomayor, J., dissenting).
216. *Id.* at 2434.
217. *Id.* at 2440.
218. *Id.* at 2453.
219. *Kennedy,* 142 S. Ct. at 2428 (majority opinion).

all, but rather was set forth in the *American Legion, Town of Greece,* and *Abington* decisions, among others.[220] Nevertheless, the majority gave no metrics, no significant analysis as to how *Kennedy's* facts apply to the test, and few examples of how the test was applied in other cases (Sunday closing laws and Church taxes, excepted).[221]

Failing to explain and provide thorough application of the *Kennedy* facts to the "history and tradition" test invites problematic analysis, as lower courts may struggle to apply to the test. The dissent noted in prioritizing "history and tradition" over the purpose of the amendment and relevant case precedent involves problems, such as misinterpreting historical readings.[222]

Where the facts are at odds in the majority and dissent one is led to questions of how much coercion is enough to offend the Establishment Clause. For example, Justice Gorsuch insisted that there is no evidence Coach Kennedy coerced students to pray with him.[223] However, the dissent correctly noted that several parents told the District their children participated because they felt pressured.[224] One cannot overlook the disparity between the characterization between these two facts, and the issues they raise as to interpretation. Is coercion required to find an Establishment Clause violation? How much coercion does it take to offend the Establishment Clause? Does coercion only count when it is the "force of law" kind at issue in *Lee* or does indirect coercion qualify*?*

Further, school administrators are left without specific advice on how to adapt their policies, and namely, what standard should be applied to determining whether an employee's right to free exercise offends the Establishment clause.[225] Given that this debate is particularly felt in public schools, the lack of clear directives muddies the water for the already complex system of family and community, religious tradition, and government sponsored education in the United States.

Viewed in this context, Kennedy's prayer activity on the fifty-yard line immediately following games is inseparable from his role as a supervisor of student activity and motivator of players on and off the field. In fact, he historically had a habit of incorporating his duty of supervision, prayer, and motivational talks with students immediately following games on the fifty-yard line.[226] Kennedy was a government employee, acting in his capacity as a government employee in the moments immediately before and after his

220. *Id.*
221. *Id.*
222. *Id.* at 2450 (Sotomayor, J., dissenting).
223. *Id.* at 2419 (majority opinion).
224. *Kennedy,* 142 S. Ct. at 2440 (Sotomayor, J., dissenting).
225. *Id*. at 2450.
226. *Id.* at 2416-17 (majority opinion).

public prayer, thus he should also be bound by the broader power of the government as an employer in limiting his private speech. Though the majority mentioned the *Lee* decision, the Court did not discuss whether its holding would apply in the same way to a situation involving scholarship or teaching, and it failed to address to what degree the government as an employer should be able to limit employee private speech in legitimate pursuit of protecting the Establishment clause in any scenario.

V. CONCLUSION

Since the 1970's, the decision in *Lemon v. Kurtzman* provided a trilogy of tests for determining when an employee's private speech constituted a violation of the Establishment clause.[227] *Kennedy v. Bremerton Sch. Dist.* has overruled and replaced the *Lemon* and "endorsement" tests with a "history and tradition" test which now requires courts to evaluate Free Exercise and Establishment clause claims "by 'reference to historical practices and understandings.'"[228] The decision marks a significant shift in thinking by the Court on the well-documented tension between the religion clauses, leaving lower courts and school administrators with indistinct guidance on how to evaluate future claims.[229] Private speech in the context of government employment is not limitless, but just how far it extends is unclear.

On the other hand, the dissent provided compelling context for the public school setting in two important ways.[230] First, the nature of football programs is that coaches are mentors with influence extending beyond the field.[231] The nature of public school is that students are uniquely susceptible to persuasion and peer pressure.[232] Secondly, important precedent from the *Engel v. Vitale* decision demonstrated more concretely where the Establishment clause should control over the Free Exercise clause when they conflict: choice.[233] Simply put, Bremerton and Coach Kennedy could not have avoided a violation of the Establishment clause by offering students the ability to pray with him on the field or opt out and miss valuable face time with peers and coaches. The choice itself is unfair to students' freedom of and freedom from religion.

Justice Sotomayor appropriately ended by characterizing the majority opinion as weakening of religious freedom, not a "victory for religious

227. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).
228. *Kennedy,* 142 S. Ct. at 2428 (quoting Town of Greece v. Galloway, 572 U.S. 565, 576 (2014)).
229. *Id*. at 2450.
230. *Id*. at 2442.
231. *Id*.
232. *Id.*
233. Engel v. Vitale, 370 U.S. 442, 430-31 (1962).

liberty."[234] In prioritizing "one individual's interest in personal religious exercise, in the exact time and place of that individual's choosing, over society's interest in protecting the separation between church and state . . . protections for religious liberty for all" are eroded.[235]

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234. *Kennedy*, 142 S. Ct. at 2453.
235. *Id*.