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The *Kennedy* Decision

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Does the First Amendment protect the right of a high school coach to lead-post game prayer sessions at the 50-yard line following a game? Does a government employee engaging in religious speech while on the job violate the Establishment Clause? In *Kennedy v. Bremerton School District*, the provisions of the Free Exercise Clause and Establishment Clause were pitted against each other.[1] In a 6-3 decision, the Supreme Court held that Kennedy's prayers at school athletic events amounted to private speech protected by the Free Exercise Clause of the First Amendment. This decision reinforces the Supreme Court's trend of favoring the Free Exercise Clause while limiting the Establishment Clause.

The case was brought by Kennedy, a former assistant coach at Bremerton High School who typically prayed at the 50-yard line following games. The school district requested that Kennedy stop his religious tradition because it was in violation of the Establishment Clause, but they did offer him accommodations, specifically to pray in a "private location" without students after the game or on the field once he was off duty.[2] Kennedy denied their accommodation and repeatedly ignored their requests for him to stop publicly praying at the end of games. He instead orchestrated a public spectacle of the event and encouraged local media to attend.[3] The effects of this event lead to threats from other groups, including Satanists, to conduct their own religious ceremonies on school grounds.[4] The district suspended Kennedy due to the constitutional liability of him potentially violating the Establishment Clause of the First Amendment.[5] Kennedy then sued the

[1] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022).
[2] *Id.* at 2418, 2438.
[3] *Id.* at 2437.
[4] *Id.* at 2438.
[5] *Id.* at 2418-19.

school district for putting him on administrative leave, alleging that the district violated the Free Speech and Exercise Clauses of the First Amendment by restricting his ability to practice religion.[6]

The Free Exercise Clause and Establishment Clause, when considered together, present, at times, polarizing provisions of the First Amendment. The Establishment Clause prohibits the government from making any law "respecting an establishment of religion."[7] In other words, this clause forbids the establishment of an official religion by the government as well as government actions that unjustly favor one religion over another or religion over non-religion. The Free Exercise Clause serves as its counterpart by safeguarding a person's right to practice their religion in accordance with their personal beliefs provided that doing so does not violate "public morals""' or a "compelling" governmental interest.[8]-To determine whether a government employee violated the Establishment Clause, it must be decided whether they engaged in unprotected "government speech" or in "private speech" protected by the Free Exercise Clause.

The central issue in *Kennedy* was whether the coach's act of praying at midfield constituted "government speech" in violation of the Establishment Clause, or "private speech" protected by the Free Exercise Clause.[9] In his majority opinion, Justice Gorsuch states that "the First Amendment's protections extend to 'teachers and students,' neither of whom 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'"[10] Justice Gorsuch further claimed that when Kennedy uttered the prayers, he was not engaging in speech that was "'ordinarily within the scope" of his duties as coach."[11] Justice Gorsuch added that he

[6] *Id.*
[7] U.S. CONST. amend. I.
[8] Harden v. State, 216 S.W.2d 708 (Tenn. 1948); Am. Party of Tex. v. White, 415 U.S. 767 (1974); see also Prince v. Mass., 321 U.S. 158 (1944)
[9] *Kennedy*, 142 S. Ct. 2407.
[10] *Id.* at 2423 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)).
[11] *Id.* at 2411.

was not speaking "pursuant to government policy" nor was he "seeking to convey a government-created message," "instructing players, discussing strategy, encouraging better on-field performance, or engaged in any other speech the District paid him to produce as a coach."[12]

To reach this conclusion, the court introduced a new test to determine whether an Establishment Clause violation has occurred. This new test asks courts to interpret the case by "reference to historical practices and understandings."[13] As for the details of this test, Justice Sotomayor's dissent notes that the Court elected to "reserve[] any meaningful explanation of its history-and-tradition test for another day."[14]

This case is notable because this holding overturned the long-standing *Lemon* test.[15] For the past 75 years, courts have applied the *Lemon* test to determine whether one is in violation of the Establishment Clause. Although the Court has weakened or ignored this test for the past several decades,[16] this test has shaped prior religion-based cases in education. It required the government conduct (1) must have a secular purpose, (2) must have a principal or primary effect that does not advance or inhibit religion, and (3) cannot foster "an excessive government entanglement with religion."[17] Later cases also required courts to determine whether a "reasonable observer" would find that the act constitutes a government endorsement of religion.[18]

The transition from the *Lemon* test to the "history-and-tradition" test has left the courts with many open-ended questions about its application. Applying the "history-and-tradition" test to Establishment Clause cases, courts are now forced to consider past traditions that may not be

[12] *Id.*
[13] *Id.* at 2428.
[14] *Id.* at 2450 (Sotomayer, J., dissenting).
[15] Lemon v. Kurtzman, 403 U.S. 602 (1971).
[16] See, e.g., Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067 (2019).
[17] *Id.* at 612-13.
[18] Cnty. of Allegheny v. ACLU, 492 U.S. 573, 630 (1989).

applicable in today's society. This may limit the power of the Establishment Clause in the future by expanding the definition of what constitutes "private speech" regarding government employees. Does this mean schools in which religion is part of their "history-and-tradition" will allow teachers to lead prayers? This is a continuation of the precedent set in *Carson v. Makin*, where the Court favored the Free Exercise Clause over the Establishment Clause six days before *Kennedy* was decided.[19] This case shows that the Supreme Court has taken a deliberate interest in the expansion of the Free Exercise Clause recently. What this means for the future is yet to be seen, but the movement of this Court appears to continue an expansive approach of the Free Exercise Clause over the Establishment Clause.

[19] Carson as next friend of O.C. v. Makin, 142 S.Ct. 1987 (2022).