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A "Mere Shadow" of a Conflict: Obscuring the Establishment Clause in *Kennedy v. Bremerton*

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INTRODUCTION

In *Kennedy v. Bremerton School District*,[1] the Roberts Court continued its move to carve out larger spaces for religious practice and expression in public spheres.[2] But in so doing it left lower courts and school districts with many more questions than answers concerning what the Establishment Clause means and what it requires of them. Can school districts still protect students from religious coercion by teachers, classmates, and others? Are entanglements between church and state or the appearance of endorsement no longer problematic?[3] Should the individual history and tradition of schools and communities influence decision making on these questions, or is the court solely concerned with the national history and tradition surrounding free expression, especially at the founding? While giving breathing space to religious expression is valuable, and may in fact provide a correction to what some believe was an overzealous pursuit of secularism in prior Courts,[4] there are risks resulting from the *Kennedy* decision that the Court seemingly discounted or simply ignored.

The first risk is one of religious coercion. The decision in *Kennedy* communicated to school districts that they cannot step in to

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

2. *See, e.g.*, Fulton v. City of Phila., 141 S. Ct. 1868 (2021); Espinoza v. Mont. Dept. of Revenue, 140 S. Ct. 2246 (2020); Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067 (2019).

3. *Kennedy*, 142 S. Ct. at 2427 (citing *Am. Legion*, 139 S. Ct. at 2079–81) (finding the Supreme Court abandoned the *Lemon* test—which sought to avoid excessive entanglement—and related endorsement test because they "invited chaos in lower courts, led to differing results in materially identical cases, and created a minefield for legislators") (internal quotations omitted).

4. *See* Richard Garnett, *Symposium: Religious Freedom and the Roberts Court's Doctrinal Clean-Up*, (Aug. 7, 2020 9:57 AM), https://www.scotusblog.com/2020/08/symposium-religious-freedom-and-the-roberts-courts-doctrinal-clean-up/.

preemptively address conduct among teachers, staff, and students that has a likely coercive effect on students.[5] Instead, administrators must seemingly wait for complaints and lawsuits from parents, or perhaps even proof of actual direct punishment to a student who fails to participate in a religious activity, rather than proactively addressing problems when they arise. Justice Gorsuch wrote: "[I]n no world may a government entity's concerns about phantom constitutional violations justify actual violations of an individual's First Amendment rights."[6] By minimizing the coercive effects of the coach's action here, and even seemingly mocking the school's concern for them, Justice Gorsuch makes clear that proactive actions from a school absent direct proof of coercion are not acceptable. A school district hands may be tied even where there is coercion, or the strong likelihood of it, because schools will be worried about interfering with any religious expression or speech.[7] In its ruling, the Court shined its spotlight on Free Exercise and Speech, leaving the Establishment Clause in their shadows.

The second risk is one of inherent bias in favor of Christianity resulting from the application of a pure history and tradition analysis of the Establishment Clause. When the majority signaled the final death knell to *Lemon v. Kurtzman*,[8] and also questioned the endorsement tests employed by previous courts,[9] calling them ahistorical, it signaled primary reliance on history and tradition to determine the application of the Establishment Clause.[10] There is an inherent risk in relying solely on a history and tradition test because the history of United States culture has long been dominated by Christian denominations, and thus examples or historical practices will skew Christian. The risk of trampling on the rights of religious minorities and persons who claim no religious affiliation

5. *Kennedy*, 142 S. Ct. at 2452 (Sotomayor, J., dissenting) ("In addition, despite the direct record evidence that students felt coerced to participate in Kennedy's prayers, the Court nonetheless concludes that coercion was not present in any event because 'Kennedy did not seek to direct any prayers to students or require anyone else to participate.'").

6. *Id.* at 2432 (majority opinion).

7. *See* Ira C. Lupu & Robert W. Tuttle, Kennedy v. Bremerton School District – *A Sledgehammer to the Bedrock of Nonestablishment*, Am. Const. Soc'y (June 28, 2022), https://www.acslaw.org/expertforum/kennedy-v-bremerton-school-district-a-sledgehammer-to-the-bedrock-of-nonestablishment/ (noting that "officials will be extremely wary of disciplining teachers and coaches for their in-school religious behaviors, and they will be highly unwilling to litigate against teachers and coaches who challenge them").

8. *Kennedy*, 142 S. Ct. at 2427.

9. *Id.* at 2428.

10. *Id.*

is significant especially in a school setting, where the potential for coercion has long been a serious concern for the Court.[11]

Both of these risks could have been mitigated if the Court had waited for a case with different facts—perhaps one that includes a coach who was actually fired for quietly praying after a game, or a teacher who was disciplined for saying a prayer over her lunch—and had provided a clearer articulation of what the history and tradition approach requires.[12] With disputed facts and a shadowy Establishment Clause approach, *Kennedy v. Bremerton* will require significant clarification in future cases to provide the necessary framework for schools and lower courts.

THE DISPUTED FACTS

Kennedy involves a football coach who prayed after football games at the 50 yard-line of the field.[13] He was dismissed by the School District after refusing to discontinue this practice.[14] Both sides agree to these facts, but beyond this there is little agreement.

The coach claimed his dismissal was a violation of his First Amendment rights under the Free Exercise Clause and Free Speech Clause.[15] The School District countered, defending the dismissal because his public prayers with students present were a violation of the Establishment Clause.[16] Further, the School District claimed that because the prayers took place while he was still working in his official capacity and still required to supervise students following games, there was no violation of free speech because, under the government speech doctrine, the School District need not be viewpoint neutral in its endorsement or restriction of speech while the coach was working.[17]

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11. *See* Lee v. Weisman, 505 U.S. 577, 578 (1992); *Sch. Dist. of Abington Twp.* v. *Schempp,* 374 U.S. 203 (1963); *Engel* v. *Vitale,* 370 U.S. 421 (1962).

12. *See generally* Richard L. Heppner Jr., *Let the Right Ones In: The Supreme Court's Changing Approach to Justiciability*, 61 DUQ. L. REV. 79 (2023). For reasons explained more fully by Professor Richard Heppner in his essay, there was truly no need for the court to hear this case. It had already been denied certiorari once, and was arguably moot based on the comments and actions of the plaintiff who moved from the area with no intent to return. *Id.* at 93. The coach, however, has more recently seemed to change his mind and indicated a possible intention to return to the position with Bremerton School District, though he has so far not done so. *See* Danny Westneat, *The Story of the Praying Bremerton Coach Keeps Getting More Surreal*, SEATTLE TIMES, https://www.seattletimes.com/seattle-news/the-story-of-the-praying-bremerton-coach-keeps-getting-more-surreal/ (last updated Sept. 17, 2022, 6:51 AM).

13. *Kennedy*, 142 S. Ct. at 2418.

14. *Id.* at 2418–19.

15. *Id.* at 2419.

16. *Id.*

17. *Id.* at 2420.

In a 6-3 decision authored by Justice Gorsuch, the Court sided with the coach, ruling that the school district violated both his right to free exercise and his right to free speech.[18]

Let us first consider the stark factual dispute. Writing for the majority, Justice Gorsuch noted:

> Joseph Kennedy lost his job as a high school football coach because he knelt at midfield after games to offer a quiet prayer of thanks. Mr. Kennedy prayed during a period when school employees were free to speak with a friend, call for a reservation at a restaurant, check email, or attend to other personal matters. He offered his prayers quietly while his students were otherwise occupied. Still, the Bremerton School District disciplined him anyway.[19]

Contrarily, in her strident dissent, Justice Sotomayor stated:

> The record reveals that Kennedy had a longstanding practice of conducting demonstrative prayers on the 50-yard line of the football field. Kennedy consistently invited others to join his prayers and for years led student athletes in prayer at the same time and location. The Court ignores this history. The Court also ignores the severe disruption to school events caused by Kennedy's conduct, viewing it as irrelevant because the Bremerton School District (District) stated that it was suspending Kennedy to avoid it being viewed as endorsing religion.[20]

So, which is it? Do we have a coach quietly kneeling in prayer after the game, students ignoring and unaffected by his actions?[21] Or is it a coach leading students in an on-field prayer and including invocations of God and religion in his speeches?[22] Both seem to have occurred, but in the three weeks leading up to his dismissal by the school district, the coach was careful not to involve students from his team or in any way encourage District student participation.[23] Because the coach's dismissal was based on his practices for those three weeks, it provided enough facts for a colorable narrative relied upon by the majority.[24] Yet, there is ample evidence of more

18. *Id.* at 2433.
19. *Id.* at 2415.
20. *Id.* at 2434 (Sotomayor, J., dissenting).
21. *Id.* at 2415 (majority opinion).
22. *Id.* at 2436 (Sotomayor, J., dissenting).
23. *Id.* at 2422 (majority opinion).
24. *Id.*

demonstrative speeches and prayers invoking God and religion.[25] There is evidence of students on the opposing teams being invited to participate,[26] and there is even evidence that students felt pressured to join.[27] None of this was enough to sway the majority who seemed inclined to look at nothing less than compulsion or direct statements requiring participation "or else" to rise to the level of coercion.[28]

Some experts have claimed the fact that the majority described the facts as a "coach quietly praying" on the field during his personal time is enough to narrow this decision to very fact specific contexts.[29] But others argue that simply reading the opinion illustrates the factual dispute underlying this case because of the alternative facts (and pictorial evidence) provided by the dissent.[30] In the short term at least, the decision is likely to lead to significant confusion in its application to the everyday context of school administration. It will have a chilling effect on any actions by school districts to curb religious conduct. While this would inspire more open, robust and widespread religious expression in schools, a result many will celebrate, it will be troublesome for others—particularly religious minorities and non-religious students who may not be able to rely on their school districts to step in when the conduct of teachers, coaches, or other students step over the line.

THE ESTABLISHMENT CLAUSE IN SCHOOLS AND THE RISK OF COERCION

The First Amendment requires that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . ."[31] These three clauses, the Establishment Clause, the Free Exercise Clause, and the Free Speech Clause, work together to allow citizens open, robust, and free religious belief and expression while avoiding, as much as possible, government interference.[32] The clauses are

25. *Id.* at 2436. (Sotomayor, J., dissenting).
26. *Id.* at 2435.
27. *Id.* at 2440.
28. *Id.* at 2430 (majority opinion).
29. *See* Lupu & Tuttle, *supra* note 7.
30. *Id.* at 2434 (Sotomayor, J., dissenting).
31. U.S. CONST. amend. I.
32. While this essay focuses on the religious clauses, the petitioner in *Kennedy v. Bremerton* also utilized the Free Speech clause to support his case. The Court noted in deciding whether the speech at issue was personal speech (given the most freedom) or government speech (able to be controlled by the school district) that the "critical question . . . is whether the speech at issue is itself ordinarily within the scope of an employee's duties." *Kennedy*, 142 S. Ct. at 2424.

complimentary, as Justice Gorsuch aptly pointed out,[33] but it is impossible to ignore that there is also a natural tension present among them.[34] While the Free Exercise Clause guarantees unlimited freedom to believe, limits to expression do exist,[35] and where the religious expression of government employees tends to coerce or seemingly endorse one religion over others, the conflict with the Establishment Clause cannot be clearer.

As Justice Gorsuch noted, teachers and students in public schools do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[36] But it is also true that there has been a special concern in elementary and secondary schools for religious expression that can tend toward endorsement of a particular religion or undue coercion of students toward certain types of religious expression.[37]

In 1971, in *Lemon v. Kurtzman*, the Court articulated a test to help lower courts determine when conduct rises to the level of an Establishment Clause violation. The *Lemon* Test, as it came to be known, examined whether a law had a secular purpose, whether its effects neither advanced nor inhibited religion, and whether there was potential for excessive entanglement with religion.[38] In later case law, the Court also examined whether a "reasonable observer" would consider the government's challenged action an "endorsement" of religion.[39]

While the *Lemon* Test has long been maligned, particularly by Justices skeptical of the practicality of the "wall of separation between church and state" and favoring an approach that yields to accommodation of varied religious practices, it had not yet been overruled and was applied as recently as 2005.[40] In *Kennedy*, Justice Gorsuch made it clear that *Lemon v. Kurtzman* and its approach to Establishment Clause questions is no longer good law.[41] In place of *Lemon* and the endorsement test, this Court, in

33. *Id.* at 2426.

34. *Id.* at 2447 (Sotomayor, J., dissenting) (citing Locke v. Davey, 540 U.S. 712, 718 (2004)).

35. *See* Reynolds v. United States, 98 U.S. 145, 166 (1878) (finding a law prohibiting plural marriage did not violate the Free Exercise Clause).

36. *Kennedy*, 142 S. Ct. at 2423 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U. S. 503, 506 (1969)).

37. *See* Lee v. Weisman, 505 U.S. 577 (1992); *Sch. Dist. of Abington Twp.* v. *Schempp,* 374 U. S. 203 (1963); *Engel* v. *Vitale, 370 U.S. 421* (1962).

38. Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

39. *Kennedy*, 142 S. Ct. at 2427 (citing Cnty. of Allegheny v. Am. Civ. Liberties Union, 492 U.S. 573, 593 (1989)).

40. *See* McCreary Cnty. v. ACLU, 545 U.S. 844 (2005).

41. *Kennedy*, 142 S. Ct. at 2427.

Kennedy, has instructed that the Establishment Clause must be interpreted by "reference to historical practices and understandings."[42]

Relying especially on *Town of Greece v. Galloway*, an opinion about legislative prayer authored by Justice Kennedy,[43] the Court pointed out that historical practices and traditions must be taken into account when determining if a particular practice would violate the Establishment Clause.[44] In *Greece*, the Court identified numerous examples of legislative prayer at the founding and beyond in our history.[45] In finding ample historical evidence and little risk of coercion because prayer before legislative sessions was not mandated and involved adults who were less likely to be easily coerced, the Court found no Establishment Clause violation.[46] But, the Court in *Greece* was careful to distinguish legislative prayer from school prayer because of the potential for coercion.[47]

In *Lee v. Weisman*,[48] a school prayer case involving a non-denominational graduation prayer, Justice Kennedy further teased out the risks of prayer in schools, even for those who favor an accommodation approach, stating:

> The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause. It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which "establishes a [state] religion or religious faith, or tends to do so."[49]

Justice Kennedy then went on to note: "As we have observed before, there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools."[50] He pointed out that prior case law has

42. *Id.* at 2428.
43. Town of Greece v. Galloway, 572 U.S. 565, 576 (2014).
44. *Kennedy*, 142 S. Ct. at 2428.
45. *Greece*, 572 U.S. at 576.
46. *Id.*
47. *Id.*
48. Lee v. Weisman, 505 U.S. 577 (1992).
49. *Id.* at 587.
50. *Id.* at 592 (citing School Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 307 (1963) (Goldberg, J., concurring); Edwards v. Aguillard, 482 U.S. 578, 584 (1987); Bd. of Educ. v. Mergens, 496 U.S. 226, 261–62 (1990) (Kennedy, J., concurring).

recognized "that prayer exercises in public schools carry a particular risk of indirect coercion."[51]

In *Kennedy*, Justice Gorsuch distinguished *Lee* because graduations are largely compulsory for students, and therefore listening to prayers would be directly coercive because students cannot avoid them.[52] While the majority noted that coercion remains a concern in school settings, there is little exploration of the risk of coercion or even the evidence that students felt pressured to join the football coach for his post-game prayers.[53] There is no mention of the risk of "subtle coercive pressure" discussed in *Lee* or any risk of indirect coercion.[54] The majority, on the contrary, stated that "in this case [the coach's] private religious exercise did not come close to crossing any line one might imagine separating protected private expression from impermissible government coercion."[55]

In *Kennedy*, the majority seems concerned that the school district's actions "suggest that *any* visible religious conduct by a teacher or coach should be deemed impermissibly coercive on students" and that ruling in the school district's favor would allow schools to prevent any visible religious expression such as a prayer over a school lunch, or the wearing of a headscarf, or display of a Star of David.[56] It seems the Court was concerned with school districts making decisions that might go too far to avoid establishment, but which violate free exercise.[57] Future cases will have to determine when the line of coercion is crossed and when school districts can step in; in the meantime, the Court has obviously valued free exercise over establishment, even at the risk of coercion. Gone is the concern for subtle or indirect coercion so important in *Lee*.

WHOSE HISTORY & TRADITION?

In addition to largely ignoring the problem of coercion, the Court in *Kennedy* was also unclear on the source of historical and traditional evidence to be used to test Establishment Clause cases

51. *Lee*, 505 U.S. at 592 (citing Engel v. Vitale, 370 U.S. 421 (1962); *Schempp*, 374 U.S. at 307) ("What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy.").

52. *Kennedy*, 142 S. Ct. at 2431.

53. *Id.* at 2435–36 (Sotomayor, J., dissenting).

54. *Lee*, 505 U.S. at 592.

55. *Kennedy*, 142 S. Ct. at 2429.

56. *Id.* at 2425.

57. *Id.* at 2432 ("And in no world may a government entity's concerns about phantom constitutional violations justify actual violations of an individual's First Amendment rights.").

following the repudiation of the *Lemon* Test. How should the historical record be weighed and what does the history and tradition approach require concerning prayer in schools? No doubt, a proponent of school prayer will be able to find ample historical examples to support a renewal of the practice similar to what was used by the majority to support legislative prayer in *Greece*. Is that sufficient to renew the practice of school prayer? Or should the history and tradition of a particular school play a role? Justice Gorsuch pointed out numerous examples of religious conduct at Bremerton School District even prior to Kennedy's employment.[58] Was that part of what convinced the Court there was no Establishment Clause violation? The opinion was not very clear on this standard or the evidence to be used, but it followed the general reasoning of the recent line of cases from this Court that focused on history and tradition tests.[59]

The risk of solely employing history and tradition approaches to constitutional questions is that they tend to skew toward the benefit of the majority at the time of the founding: white, wealthy, Christian men. It remains to be seen how the "history and tradition" tests will be applied to future Establishment Clause cases, but where there are likely a surfeit of examples of Christian prayer and exercise in schools, other religious minorities do not have such a benefit. If the Court desires history and tradition to fundamentally anchor legal reasoning in this area, it must be careful not to allow bias to condemn the approach to ignominy. Will the prayer of a Christian coach at the 50-yard line following a game be treated the same as the prayer of a Muslim coach in the same space? What about words said over a candle at a school dance by the teacher who practices Wicca? Only time will tell how the Court will handle these questions. But, the decision in *Kennedy* has already tied the hands of the school districts in addressing religious coercion in school settings. Christians, the majority in most public schools, will be

58. *Id.* at 2416.

59. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022); N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022). The employment of a history and tradition analysis to decide important several Constitutional questions this Term signaled this Court is likely to value such arguments in future cases on a variety of topics and advocates will adjust their arguments accordingly, but the approach is one that will face staunch criticism. One of the chief criticisms of a history and tradition framework is that U.S. history has often marginalized women, people of color, and those belonging to religious minorities. If the court relies exclusively, or even predominantly, on history and tradition to decide cases, it will be prone to perpetuate those inherent inequalities. Additional critics note that the Court has, at times, selectively chosen the history it considers it its decisions and this history it ignores, illustrating that a history and tradition approach can be just as subjective as other approaches to Constitutional analysis.

emboldened to proselytize and will have the backing of the majority community.[60] But the Muslim, Jewish, Hindi, or agnostic student will have neither community backing nor the protection of their school district administration when they face coercion, whether subtle or bold and whether on the field of sport or anywhere else in their school.

CONCLUSION

In *Kennedy*, Justice Gorsuch pronounced that there is only a "mere shadow" of a conflict between the Establishment Clause and Free Exercise and Speech Clauses of the First Amendment, attempting to minimize the perceived adversarial relationship among the constitutional principles. Through this mere shadow, however, one principle is eclipsed by the others. Placing the spotlight on protections of free exercise and speech naturally obscures establishment protections. The Roberts Court appears committed to supporting religious expression in public places, even schools. The broadening of the Free Exercise Clause means we must narrow our view of what constitutes establishment. Future cases are necessary to determine whether this Court will continue to recognize the particular coercive power of authority figures in school settings, and whether the history and tradition approach to Establishment Clause cases will allow for true accommodation or whether it will lead to Christian bias, or even a religious bias over secularism. Perhaps, as noted in the outset, this is an important correction to overemphasized secularization, but it is unfortunate that the Court chose this case with its factual problems to address the concern. Equally, the Court's decision to completely do away with precedent, such as *Lemon*, and to replace it with a vague "history and tradition" standard, leaves school districts and lower courts with almost no guidance in how to apply the ruling. Furthermore, it likely gives a de facto advantage to Christians and Christianity, perhaps just the sort of advancement of a particular religion that the Establishment Clause was written to avoid.

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60. *See* Lupu & Tuttle, *supra* note 7 ("Although any teacher or coach is now free to pray on school premises and on school time, there is every reason to expect that Christian prayer will dominate the scene. Christians remain a majority in most schools, and Christians are far more likely to proselytize than members of other faiths in America. Prayer by Jews, Muslims, and others is more likely to roil the school's fabric of cooperation and more likely to invite complaints by parents – not about prayer per se, but about the exposure of their children to prayer by 'others.'").