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Legal Sidebar

Kennedy v. Bremerton School District: School Prayer and the Establishment Clause

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On June 27, 2022, the Supreme Court released a 6-3 decision in *Kennedy v. Bremerton School District* that significantly altered Establishment Clause jurisprudence. In ruling in favor of a high school football coach who wanted to pray on the 50-yard line of the football field after games, the Court announced that it had broadly abandoned use of the so-called *Lemon* test, which had been the basis for church-and-state decisions over several decades but had seemed to fall into disfavor with many Justices on the Court in more recent years. The *Kennedy* opinion described the *Lemon* test as "abstract" and "ahistorical," and said that courts should instead interpret the Establishment Clause by reference to "original meaning and history." This Legal Sidebar discusses the *Kennedy* decision and its implications for the First Amendment's protection of free speech and the free exercise of religion, as well as the First Amendment's prohibition of religious establishment.

Facts and Procedural History

The plaintiff, Joseph Kennedy, was a high school football coach employed by Bremerton High School from 2008 to 2015. While the parties disputed how to view the facts of this case, they agreed that the school suspended Kennedy based on his practice of engaging in post-game prayers in which he knelt at the 50-yard line of the football field and prayed audibly. The conflict began in 2015, when the school discovered that Kennedy was engaging in this post-game prayer practice, and also that he had previously led students in prayer before games and conducted overtly religious inspirational talks with students after games. According to the principal, one parent said his son "had felt compelled to participate" in those prayers out of concern for his playing time. Although Kennedy stopped these additional practices after the school expressed concerns about them, the school emphasized that he continued his midfield prayers and raised awareness about the practice through media appearances. At one October game, the school said this led to spectators rushing the field and Kennedy leading a large group in prayer. Kennedy, by contrast, emphasized that he had stopped the earlier prayers with students and did not expressly invite his students—or others—to join his later post-game prayers. He said he only sought to engage in solitary prayer.

The school placed Kennedy on paid administrative leave based on his "overt, public and demonstrative religious conduct while still on duty as an assistant coach." Kennedy also received a poor performance

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evaluation that advised against his rehiring, and he did not reapply for a 2016 coaching position. Kennedy sued the school, arguing they had violated his constitutional rights under the First Amendment's Free Speech and Free Exercise Clauses by punishing him for this religious speech, and seeking injunctive relief that included his reinstatement and an order allowing him to resume his 50-yard-line prayer. Lower courts denied his motion seeking a preliminary injunction. The Supreme Court declined to review those rulings in 2019, although Justice Alito wrote separately to state that the lower court's "understanding of the free speech rights of public school teachers is troubling and may justify review in the future," and to note open questions under the Free Exercise Clause.

The trial court then granted summary judgment to the school, concluding that although the school had suspended Kennedy because of his religious conduct, its actions "were justified due to the risk of an Establishment Clause violation" if the school allowed its coach to continue his prayer practice. This ruling was affirmed by a federal appeals court, although an order denying en banc review by the full panel of circuit court judges drew separate opinions by several members of the panel, including three dissents. Although summary judgment and subsequent appellate review are generally based on facts that are not in dispute, even the judges reviewing the case held somewhat divergent views of the facts, particularly the question of whether Kennedy's prayers should be considered private. Indeed, one of the intermediate appellate court judges accused another judge of "succumb[ing] to the Siren song of a deceitful narrative of this case."

Legal Background

The ruling in *Kennedy v. Bremerton School District* implicates three separate clauses of the First Amendment: the Establishment and Free Exercise Clauses, collectively known as the Religion Clauses, as well as the Free Speech Clause. The text of the First Amendment prohibits the government from making any "law respecting an *establishment* of religion, or prohibiting the *free exercise* thereof; or abridging the *freedom of speech*." The Supreme Court has frequently interpreted these constitutional protections.

Free Exercise and Free Speech Clause Protections for Religious Speech

Kennedy argued that his religious speech was protected under both the First Amendment's Free Exercise and Free Speech Clauses. These two constitutional provisions are not coextensive: the Free Exercise Clause protects religious activity, while the Free Speech Clause protects expressive activity. Nonetheless, the Court has long recognized the "close parallels" between the two clauses, and has concluded in a number of cases that religious communication was protected under both the Free Exercise and Free Speech Clauses.

To say that activity is "protected" by the First Amendment, however, is not to say that it may not be regulated at all. The Supreme Court has outlined a variety of tests to determine whether government action unconstitutionally infringes on religious or expressive activity. Courts employ different tests to determine whether the government may regulate protected activity under the two clauses.

As discussed in more detail in this prior Legal Sidebar, most Free Exercise Clause analyses depend largely on whether a government action is neutral towards religion, or whether instead the government has discriminated against religion. If a policy is neutral and generally applicable, the Supreme Court has held that any "incidental effect" on religion will not violate the Free Exercise Clause. However, if a policy discriminates against religion, it will generally be subject to heightened constitutional scrutiny. The school conceded in the lower courts that its policy was not neutral and generally applicable, given that it restricted Kennedy's activities because they were religious. However, the school believed it satisfied strict constitutional scrutiny because it needed to avoid an Establishment Clause violation—discussed below.

The Free Speech Clause analysis implicated by Kennedy's claims was more complicated. Constitutional speech claims brought by public employees are generally evaluated under a rubric set out in *Pickering v. Board of Education*. In that case, the Supreme Court recognized that when employees speak in the course of their official duties, they are generally speaking on behalf of the government, and the government can control their speech in order to provide public services efficiently. Accordingly, courts have held that governments may discipline their employees for statements that were made as part of their ordinary job responsibilities. However, the Court also ruled in *Pickering* that when public employees speak as *citizens*, on issues of *public concern*, they do not completely "relinquish the First Amendment rights they would otherwise enjoy." If an employee is speaking outside the course of their ordinary job duties on an issue of public concern, *Pickering* instructs courts to engage in a balancing test, weighing the government's operational interests against the interests of the employee and the public in the protected speech.

Bremerton High School claimed that it could regulate Kennedy's speech because his post-game responsibilities were "an essential part of his job as coach"—but also argued in the alternative that even if the coach had spoken as a citizen, the school's interests in avoiding an Establishment Clause violation "outweighed Kennedy's desire to pray with students at the 50-yard line." In response, Kennedy argued that while *some* post-game speech might be "commissioned" by the school, he did not act "as the school's mouthpiece every moment he remained on the field." Kennedy asserted that the school conceded it would have allowed him to look at his phone or greet his spouse in that post-game period, demonstrating impermissible discrimination against his private religious activity.

Establishment Clause Limitations on School Prayer

The Supreme Court has stated that in contrast to the Free Speech Clause, which allows the government to participate in the marketplace of ideas, "the Establishment Clause is a specific prohibition on forms of state intervention in religious affairs." Accordingly, the Court has recognized that if a school would violate the Establishment Clause by hosting or sponsoring religious speech, that violation provides a compelling justification to restrict that speech. Bremerton High School justified suspending Kennedy by arguing that if it allowed his post-game prayer practice, the school would have violated the Establishment Clause. (Although the school's merits brief in the Supreme Court also raised other justifications, those arguments ultimately did not play a role in the Court's decision.)

Broadly, the Supreme Court has said that for the Founders, laws respecting "the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity." The Supreme Court has used a variety of tests to determine whether any given government action violates the Establishment Clause. The primary analysis has looked to three factors that were compiled (but not first announced) in a 1971 case, *Lemon v. Kurtzman*. The eponymous *Lemon* test says that for a government action to be constitutional, (1) it "must have a secular legislative purpose"; (2) "its principal or primary effect must be one that neither advances nor inhibits religion"; and (3) it "must not foster an excessive government entanglement with religion." The Court has sometimes also applied an endorsement variation on *Lemon* to ask whether a "reasonable observer" would think that a government practice "has the purpose or effect of 'endorsing' religion." Although the Court has described the *Lemon* factors as "no more than helpful signposts" and the test has faced significant criticism from scholars and judges, the Court continued to apply these factors in opinions through the early 2000s.

In 2019's *American Legion v. American Humanist Association*, the Supreme Court limited the applicability of *Lemon* in a split decision discussed in this prior Sidebar. Three Justices would have ruled that the *Lemon* test no longer applies in any circumstances, but the plurality opinion more narrowly ruled that *Lemon* would not apply to Establishment Clause review of "monuments, symbols, and practices with a longstanding history." The plurality pointed out that in a variety of cases over the years, the Court "has either expressly declined to apply the [*Lemon*] test or has simply ignored it." The plurality further said longstanding monuments and practices should instead be upheld so long as they are consistent with

historical practices and traditions. The Court had previously looked to historical practices as part of its Establishment Clause analysis in a number of cases. For instance, the Court upheld two legislative prayer schemes that it concluded were consistent with longstanding historical practices, ruling that opening legislative sessions with prayer "is deeply embedded in the history and tradition of this country."

A number of Supreme Court cases have specifically considered prayer in public schools. The Court has held that policies encouraging prayer in public grade schools violate the First Amendment when they have an impermissible purpose of sponsoring or endorsing religion, when they are unduly coercive, or when they violate historical understandings of the Establishment Clause. In the 1992 case of *Lee v. Weisman*, the Court held that a high school violated the Establishment Clause by directing prayers at high school graduations. The Court emphasized that while students were not required to attend graduation or join in prayer, there were "heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools," and students did not have a "real alternative" allowing them "to avoid the fact or appearance of participation" in the prayer exercise.

To take another example, in its 2000 decision in *Santa Fe Independent School District v. Doe*, the Court held that a school policy permitting student-led prayer at football games violated the Establishment Clause due to an impermissible perceived purpose of sponsoring prayer and due to impermissible coercion. Again, the question of coercion was important: the Court noted that some students were required to attend football games. However, even if all students attended voluntarily, the Court concluded that delivering a pregame prayer "over the school's public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public prayer" nonetheless had "the improper effect of coercing those present to participate in an act of religious worship." Bremerton High School cited *Santa Fe* to argue that Kennedy, a coach with "authority and influence over" his students, placed impermissible coercion on the students' religious exercise. The school also asserted that by allowing Kennedy to continue his prayer practice, it would be seen as impermissibly endorsing religion and "engaging in religious favoritism."

The Court's Decision in *Kennedy v. Bremerton School District*

The Supreme Court ruled for Kennedy in a 6-3 decision. The majority opinion, authored by Justice Gorsuch, first held that Kennedy's religious speech was protected under both the Free Exercise and Free Speech Clauses. For Free Exercise Clause purposes, the school did not contest that Kennedy sought "to engage in a sincerely motivated religious exercise" and the school restricted his activity because of its "religious character." Accordingly, the Court ruled that the school's policy was not neutral or generally applicable towards the coach's religious activity. The Court also concluded that Kennedy was speaking as a private citizen on a matter of public concern, triggering Free Speech Clause protections. Although Kennedy was still on the job and on the field while praying, the Court decided that the prayer was not offered "within the scope of his duties as a coach," observing that coaching staff were "free to engage in all manner of private speech" during this specific post-game time period.

The majority opinion next noted that the parties disputed which First Amendment test should apply. Kennedy sought strict scrutiny under the Free Exercise or Free Speech Clauses because the school's policy was not neutral towards religious speech, while the school advocated for *Pickering* balancing because the coach was a public employee. However, the Court concluded that it did not need to resolve this issue because the school failed either test. The sole justification that the Court considered for the school's decision was avoiding an Establishment Clause violation—and because the Court ultimately held that Kennedy's prayer did not violate the Establishment Clause, the school could not justify its actions under either First Amendment test.

The Supreme Court rejected the school's endorsement arguments. In a development likely to be significant in Establishment Clause jurisprudence, the Court disclaimed "*Lemon* and its endorsement test

offshoot." The Court stated that it had "long ago abandoned" the "abstract" and "ahistorical" *Lemon* test. Instead, the Court instructed "that the Establishment Clause must be interpreted by 'reference to historical practices and understandings,'" using an "analysis focused on original meaning and history." The majority seemed to accept a coercion analysis as consistent with this approach, saying coercive religious observance "was among the foremost hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment." However, the majority concluded that Kennedy's prayer practice was not as coercive as school prayer practices the Court had previously invalidated. The Court decided evidence about prior instances when the coach prayed with students was irrelevant because the school's disciplinary action focused on later instances when the coach "did not seek to direct any prayers to students." In comparison to *Santa Fe*, the Court stated that the coach's prayers "were not publicly broadcast or recited to a captive audience," and students were not "expected to participate." Broadly, the Court ruled that the school could not require teachers to "eschew any visible religious expression," because that would impermissibly "preference secular activity."

Justices Thomas and Alito both joined the majority opinion in full but also wrote separate concurrences to emphasize open free exercise and free speech questions not definitively resolved by the majority opinion.

Justice Sotomayor's dissent (joined by Justices Breyer and Kagan) claimed the majority opinion paid "almost exclusive attention to the Free Exercise Clause's protection for individual religious exercise while giving short shrift to the Establishment Clause's prohibition on state establishment of religion." Taking issue with the majority's view of which facts were relevant, Justice Sotomayor argued that Kennedy's prayers at the 50-yard line had to be viewed in light of their full history and context, which revealed "a longstanding practice of the employee ministering religion to students as the public watched." In her view, Kennedy's practice violated Establishment Clause concerns about both endorsement and coercion. Further, she claimed the majority's approach to evaluating whether Kennedy's prayer practice was coercive was inconsistent with prior school prayer cases, saying Kennedy's prayers raised "precisely the same concerns" as the practice in *Santa Fe*.

The dissent also contested the majority's assertion that the Court had "long ago abandoned *Lemon* and its endorsement offshoot." She stated that *American Legion* limited *Lemon*'s applicability only in certain contexts, and other decisions merely "not applying" the test did not amount to an "implicit overruling." Justice Sotomayor claimed that "the purposes and effects of a government action matter in evaluating whether that action violates the Establishment Clause, as numerous precedents beyond *Lemon* instruct in the particular context of public schools." She was also concerned about the practical value of the Court's "history-and-tradition test," believing it offered "essentially no guidance for school administrators."

Implications for Congress

The Court's analysis in *Kennedy v. Bremerton School District* makes this more than a simple school prayer case. The majority announced a clear break with earlier Establishment Clause precedent, both by finding a school prayer practice constitutional for the first time and by expressly announcing for the first time that the Court had broadly abandoned the *Lemon* test in all contexts. The opinion contains a strong requirement for government accommodation of religious practices and a clear statement in favor of an originalist approach to interpreting the Establishment Clause. The Court's suggestion that government policies insisting on secularity evidence a *hostility* to religion elevates similar concerns voiced in earlier concurring and dissenting opinions. The opinion leaves open a number of questions about how these principles will play out in future cases.

Although the Court announced that "*Lemon* and its endorsement test offshoot" were "abandoned," it has never (including in *Kennedy*) overruled that case or a number of other Supreme Court rulings concluding that specific government actions supporting religious activity were unconstitutional because of their purpose or effect. Accordingly, it is unclear how courts will apply those rulings as precedent in the future.

The Court has instructed lower courts to follow controlling Supreme Court precedent even if a case "appears to rest on reasons rejected in some other line of decisions." Lower courts must leave to the Supreme Court "the prerogative of overruling its own decisions." Some lower courts might attempt to integrate decisions based on *Lemon* into a historical practices analysis that follows *Kennedy*, but the precedential status of those decisions will likely be disputed until the Supreme Court revisits the issue.

Kennedy announced that in the future, courts should evaluate Establishment Clause challenges by reference to historical practices and original meaning, and further suggested that coercion is an appropriate factor to consider. However, the majority noted that the Justices "have sometimes disagreed on what exactly qualifies as impermissible coercion in light of the original meaning of the Establishment Clause." Justice Sotomayor's dissent argued that the Court focused too much on direct coercion and did not properly account for earlier Supreme Court precedent recognizing that "indirect coercion may [also] raise serious establishment concerns." Future Establishment Clause cases will likely litigate these open questions about what types of coercion run afoul of historical understandings of the Establishment Clause.

Congress—and state governments—concerned about possible Establishment Clause violations stemming from government support of religion may now face judicial review that looks more directly to original understandings of the Clause as well as historical traditions. While this mode of analysis has long been employed in Supreme Court cases interpreting the Establishment Clause, as mentioned, it has not always been the *primary* mode of analysis. In addition to the legislative prayer context, there are some scattered examples of government actions the Court previously considered using a historical practice analysis, including religious test oaths (ruled unconstitutional), laws prescribing the forms of prayer (ruled unconstitutional), and tax exemptions (ruled constitutional). Outside those contexts, courts faced with Establishment Clause claims will have to determine what historical analysis may be relevant, considering the varied and evolving historical approaches to religious establishments. That kind of inquiry is already the subject of scholarly debates, and it appears likely those debates will continue.

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