Volume 27 | Issue 2 Article 2

6-15-2020

Justices Answer Coach Kennedy's Prayer With Play In The Joints Audible: Kennedy v. Bremerton School District And Public-School Sports Prayer Post- The American Legion v. American Humanist Association

Samuel England

Comments

JUSTICES ANSWER COACH KENNEDY'S PRAYER WITH PLAY IN THE JOINTS AUDIBLE: *KENNEDY V. BREMERTON SCHOOL DISTRICT* AND PUBLIC-SCHOOL SPORTS PRAYER POST-*THE AMERICAN LEGION V. AMERICAN HUMANIST ASSOCIATION*

I. "Play in the Joints": An Introduction

The first words ever added to the ratified United States Constitution are "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."[1] While the Court has recognized the "internal tension" between these two clauses—the Establishment and Free Exercise Clauses respectively, also known as the Religion Clauses—it has nevertheless characterized the clauses' relationship as having "play in the joints" therebetween.[2] The subject of this Comment is how that "play in the joints" manifests and, more specifically, how it operates in the context of sports in public middle and high schools as well as public colleges and universities.[3] The primary context for this assessment is two 2019 cases: *Kennedy v. Bremerton School District*[4] and *American Legion v. American Humanist Association*.[5] In the first, four members of the Supreme Court telegraphed their willingness to address this inter-clausal tension in a case about a potential Free Exercise claim of a high school football coach, who his school district placed on paid administrative leave and recommended to not rehire after

1. U.S. Const. amend. I (providing text of Constitution's Religion Clauses).

2. *See* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2019 (2017) (citing Locke v. Davey, 540 U.S. 712, 718 (2004)) (decoding "play in the joints" to convey that which is allowed under Establishment Clause is not necessarily mandatory under Free Exercise Clause); *Locke*, 540 U.S. at 719 (2004) (citing Walz v. Tax Comm'n of City of N.Y., 397 U.S. 664, 669 (1970)) ("[T]here are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause."); Tilton v. Richardson, 403 U.S. 672, 677 (1971) (asserting "numerous" Supreme Court cases have recognized this inter-clausal tension); Walz v. Tax Comm'n of City of N.Y., 397 U.S. 664, 669 (1970) (originating Supreme Court's "play in the joints" phrase about Religion Clauses; reasoning this inter-clausal tension must be allowed some variance between intolerable poles of state "sponsorship" and "interference", for "rigidity" would otherwise be antithetical to clauses' purpose).

3. For further discussion of how this "play in the joints" has been manipulated, see *infra* notes 27–165 and accompanying text.

4. 139 S. Ct. 634 (2019), *denying cert. to*, 869 F.3d 813 (9th Cir. 2017).

5. 139 S. Ct. 2067 (2019).

contract expiration because he had engaged in various prayers on the job.[6] In the second, the Court denied an Establishment Clause claim about a four-story-high, cross-shaped veterans' memorial that came to be on state-owned land many decades after its erection.[7]

While these cases may, at first blush, seem to harbor an attenuated relationship at best, this Comment descriptively argues these two cases are the latest in the Court's narrowing of the Establishment Clause in a post-*Lemon v. Kurtzman*[8] era and its re-broadening of the Free Exercise Clause in a post-*Employment Division, Department of Human Resources of Oregon v. Smith*[9] era.[10] This Comment goes further by normatively arguing the Court ought to abandon these trends and readopt its *Lee v. Weisman*[11] formulation of the "internal tension" between the Establishment and Free Exercise Clauses: "the principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause."[12] Part II of this Comment traces the

6. *See Kennedy*, 139 S. Ct. at 635 (Alito, J., concurring in denial of certiorari, joined by Thomas, Gorsuch, and Kavanaugh, JJ.) (asserting, *sua sponte*, Coach Kennedy's "live" Free Exercise Clause claim). For further discussion of *Kennedy*, see *infra* notes 123–139 and accompanying text.

7. *See* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2090 (cobbling together seven members for narrow consensus on long-standing memorials; summarizing effects of "destroying or defacing the Cross that has stood undisturbed for nearly a century" as running counter to "neutrality[,] . . . respect and tolerance embodied in the First Amendment").

8. 403 U.S. 602 (1971). In the process of invalidating two schema for state aid to private school, the *Lemon* Court articulated a new, broad test for Establishment Clause cases: state action must (1) "have a secular . . . purpose," (2) "neither advance[ ] nor inhibit[ ] religion" by its "principle or primary effect," and (3) avoid "'excessive government entanglement with religion.'" *See id.* at 612–13 (quoting Walz v. Tax Comm'n of City of N.Y., 397 U.S. 664, 674 (1970)) (citing Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen, 392 U.S. 236, 243 (1968)).

9. 494 U.S. 872 (1990). The *Smith* Court handed down a narrower test for Free Exercise cases while upholding a state's unemployment benefits restrictions based on illegal drug use; holding (1) the state's criminal statute interdicting substance's use failed to run afoul of Free Exercise Clause when use of substance was pursuant to religious reasons because criminal interdiction was "'valid and neutral law of general applicability'" and, thus, (2) the state unemployment benefits scheme conditioned on that statute also passed constitutional muster. *See id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (Stevens, J., concurring)).

10. For further discussion of the post-*Smith* re-broadening of the Free Exercise Clause, see *infra* notes 43–53 and accompanying text. For further discussion of the post-*Lemon* narrowing of the Establishment Clause, see *infra* notes 71–87 and accompanying text.

11. 505 U.S. 577 (1992). In *Lee*—the fountainhead of the Court's modern school prayer jurisprudence—the Court found a public school's graduation prayer policy and practice unconstitutional because the "undeniable fact" of "public . . . as well as peer pressure" accruing therefrom amounted to impermissible government coercion. *See id.* at 593.

12. *Id.* at 587 (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984)).

Court's Free Exercise and Establishment Clause jurisprudence in tripartite formulations: (1) from the clauses' selective incorporation by way of the Fourteenth Amendment's Due Process Clause to the clauses' touchstone case, (2) the touchstone cases themselves, and (3) the clauses thereafter.[13] The final section of Part II offers a look at significant developments in each clause's jurisprudence from 2019.[14] Part III offers an analysis of what the developments in Part II portend for the future of the Court's Religion Clauses jurisprudence, especially with regard to coaches, administrators, and student-athletes in the context of public school sports, and argues for a return to a previous Court's formulation of its Religion Clauses jurisprudence.[15] This Comment concludes in Part IV with a brief restatement of its descriptive and normative claims: while the Court has re-broadened the Free Exercise Clause since *Smith* and narrowed the Establishment Clause since *Lemon*, it must ultimately reverse course for public school student-athletes, coaches, and administrators alike by re-adopting its *Lee* holding that the Establishment Clause shall not be sacrificed on the altar of the Free Exercise Clause.[16]

II. SYNOVIAL JOINTS: A DYNAMICALLY MOVING BACKGROUND

The current Religion Clauses tests were not handed down on stone tablets at the founding.[17] Rather, the Court has grappled with the sixteen words and one comma found in the Religion Clauses in a litany of cases for over a century, fashioning evolving rules that have regulated governments' relationships with religions as well as those religions' practitioners and those who abstained therefrom.[18] While much of this litigation springs from facts off the

13. For further discussion of the history of the Free Exercise Clause, see *infra* notes 27–53 and accompanying text. For further discussion of the history of the Establishment Clause, see *infra* notes 58–116 and accompanying text.

14. For further discussion of these significant developments, see *infra* notes 117–165 and accompanying text.

15. For further discussion of the descriptive analysis of these developments and normative argument thereabout, see *infra* notes 171–232 and accompanying text.

16. For further discussion of this Comment's conclusions, see *infra* notes 233–241 and accompanying text.

17. *See, e.g.*, Reynolds v. United States, 98 U.S. 145, 166–67 (1878) (construing Free Exercise Clause for first time, eighty-seven years after First Amendment's ratification; upholding bigamy conviction despite challenge on, *inter alia*, Free Exercise grounds because even if governments may not regulate beliefs, they must still be allowed, to some extent, to regulate practices to prevent "permit[ting] every citizen to become a law unto himself").

18. *Compare* Barron v. City of Baltimore, 32 U.S. 243 (1833) (illustrating early Court understanding of Bill of Rights—including Religions Clauses—was limited

field and even out of the classroom, the Court's Religion Clauses jurisprudence nonetheless effects public school coaches and teachers, administrators, and student-athletes alike, constructing the arena in which they are to litigate their own Free Exercise and Establishment Clause concerns.[19] First, this section tracks and analyzes the Court's Free Exercise jurisprudence, descriptively arguing the Court has been steadily re-broadening the Free Exercise Clause since narrowing it in *Smith*.[20] Second, this section turns to the Court's Establishment Clause jurisprudence, performing a similar analysis thereon and descriptively arguing the Court has steadily narrowed that clause since *Lemon*.[21] The analysis of each of these clauses is organized around an epochal moment: each clause's touchstone case.[22] Finally, this section concludes with an assessment of the Court's treatment of these two clauses in its most recently completed term, which concluded in June 2019, descriptively arguing these newest cases fit each of the aforementioned trends—re-broadening Free Exercise Clause post-*Smith* and narrowing Establishment Clause post-*Lemon*.[23]

---

in scope to protections from *federal* infringement), *with* Cantwell v. Conn., 310 U.S. 296 (1940) (applying one Religion Clause against *states* more than one century after *Barron*).

19. *See, e.g.*, Kennedy v. Bremerton School District, 139 S. Ct. 634, 635 (2019) (Alito, J., concurring in denial of certiorari, joined by Thomas, Gorsuch, and Kavanaugh, JJ.) (noting high school football coach placed on paid administrative leave and receiving administrative recommendation to not rehire due to initiating prayers "still has live claims under the Free Exercise Clause"); Borden v. Sch. Dist. of the Twp. of E. Brunswick, 523 F.3d 153, 174–79 (3d Cir. 2008) (holding unconstitutional high school football coach's participation in student-initiated prayer); Doe v. Duncanville Indep. Sch. Dist., 70 F.3d 402, 406–07 (5th Cir. 1995) (finding violation of Establishment Clause when middle school basketball coach's initiated and participated in his team's prayers).

20. For further discussion of Free Exercise Clause jurisprudence, see *infra* notes 27–54 and accompanying text.

21. For further discussion of Establishment Clause jurisprudence, see *infra* notes 58–116 and accompanying text.

22. *See* Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990) (articulating touchstone of Court's Free Exercise Clause jurisprudence); Lemon v. Kurtzman, 403 U.S. 602 (1971) (announcing touchstone of Court's Establishment Clause jurisprudence). For further discussion of *Smith*, see *infra* notes 24–42 and accompanying text. For further discussion of *Lemon*, see *infra* notes 55–70 and accompanying text.

23. For further discussion of the 2019 cases (*Kennedy*, *Am. Legion*, and two death penalty stay docket cases), see *infra* notes 117–165 and accompanying text.

A. Pivot Joint: An Oscillating Free Exercise Clause History

The touchstone of the Court's modern Free Exercise jurisprudence is *Smith*.[24] However, like a pendulum nearly swinging its full amplitude, the Court's Free Exercise jurisprudence has swung from relatively broad pre-*Smith*, to narrow in *Smith*, and is now swinging back to a pre-*Smith* broadness once more.[25] This section explores this period of oscillation, arguing the Court has pivoted a significant magnitude, reconsidering in all but name much of *Smith* already.[26]

1. *Pre-*Smith*: Forming a Free Exercise Framework*

Before a provision of the Bill of Rights applies against the states, the litigation pursuant thereto is usually minimal.[27] Selectively incorporating one of these provisions triggers an avalanche of landmark decisions thereon because previously unprotected litigants are extended new rights to vindicate in court; the Free Exercise Clause follows this pattern.[28] In *Cantwell v. Connecticut*,[29] the

24. 494 U.S. 872 (1990). For further discussion of *Smith*, see *infra* notes 37–42 and accompanying text.

25. *Compare* Sherbert v. Verner, 374 U.S. 398, 406–09 (1963) (granting broad challenge to state unemployment benefits refusal due to unwillingness to work on Sabbath), *with Smith*, 494 U.S. 872 (narrowing Free Exercise Clause to disallow challenge to state unemployment benefits on basis of religious use of illegal drug), *and* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2024–25 (2017) (re-broadening Free Exercise Clause to forbid exclusion from state playground-resurfacing program "solely because of [the beneficiary's] religious character," especially when benefit was not, itself, religious or being used for directly religious ends but, instead, merely protected against "a few extra scraped knees"). These three cases are emblematic of how the Court has oscillated—from broad to narrow and back to broad again—on the concept of "play in the joints" that the *Trinity Lutheran* Court deciphered above: the gap between that which is allowed by the Establishment Clause and required by the Free Exercise Clause. *See Trinity Lutheran*, 137 S. Ct. at 2019 (quoting Locke v. Davey, 540 U.S. 712, 718 (2004)) (noting tension "between what the Establishment Clause permits and the Free Exercise Clause compels").

26. For further discussion of this re-broadening post-*Smith*, see *infra* notes 43–54 and accompanying text.

27. *See, e.g.*, Reynolds v. United States, 98 U.S. 145 (1878) (construing Free Exercise Clause for first time, eighty-seven years after First Amendment's ratification).

28. *See* Cantwell v. Conn., 310 U.S. 296 (1940) (incorporating selectively First Amendment's Free Exercise Clause). Even from this early stage, the extension of the Free Exercise Clause to children was considered. *See* Prince v. Mass., 321 U.S. 158 (1944) (reviewing Jehovah Witness' conviction under child labor laws for having nine-year old niece pass out religious pamphlets); *see also id.* at 172 (Murphy, J., dissenting) ("Religious training and activity, whether performed by adult or child, are protected by the Fourteenth Amendment against interference by state action . . . .").

29. 310 U.S. 296 (1940).

arrest of several Jehovah's Witnesses for solicitation without approval led the Court to consider whether the Free Exercise Clause of the First Amendment ought to be incorporated against the states; the Court answered in the affirmative.[30] In the decades following the Free Exercise Clause's incorporation, the Court interpreted it broadly.[31] In *Sherbert v. Verner*,[32] a Seventh-day Adventist challenged a South Carolina state agency's interpretation of a state statute that disqualified from the pool of persons eligible for unemployment benefits persons who were not willing to work on Saturdays, the challenger's Sabbath.[33] The Court announced government action that "substantial[ly] burden[ed]" religious exercise must be justified by a compelling interest therein and that the South Carolina statute as interpreted by the state's agency failed to do so, making it unconstitutional.[34] The Court continued this broad construction of the Free Exercise Clause when it vindicated three Amish families' challenge to a Wisconsin compulsory high school attendance statute by holding the statute was repugnant to their Free Exercise Clause rights.[35] These cases exhibited the high-water mark of the Court's Free Exercise Clause jurisprudence; the Court drastically narrowed the clause roughly two decades later.[36]

2. Smith*: Articulating the Free Exercise Test, Narrowing Significantly the Free Exercise Clause*

In *Smith*, the Court dramatically retreated from the position it had held in its previous Free Exercise Clause cases such as *Sherbert*, exempting from the *Sherbert* Court's compelling interest and substantial burden test "'neutral law[s] of general applicability,'" which framed a much narrower conception of the Free Exercise

30. *See id.* at 303–04 (holding Fourteenth Amendment's Due Process Clause applies Free Exercise Clause's "fundamental concept of liberty" against states).

31. *See, e.g.*, Wis. v. Yoder, 406 U.S. 205 (1972) (regarding challenge to compulsory high school attendance by Amish); Sherbert v. Verner, 374 U.S. 398 (1963) (concerning challenge by Seventh-day Adventist to disqualification of unemployment benefits).

32. 374 U.S. 398 (1963).

33. *See id.* at 399–401 (describing challenger's religious objections and state's administrative process and denial of benefits).

34. *See id.* at 406–09 (finding no sufficiently compelling interest).

35. *See Yoder*, 406 U.S. at 234–36 (emphasizing long Amish history and permissible proffered alternative thereby).

36. *See* Employment Div., Dep't. of Human Res. of Or. v. Smith, 494 U.S. 872 (1990) (narrowing Free Exercise Clause significantly by coming out dissimilarly in case similar to *Sherbert*).

Clause that was less stringent on the government.[37] In *Smith*, members of the Native American Church were terminated after they tested positive for the hallucinogenic cactus peyote, which they had ingested for religious purposes; this caused the state employment agency to classify their termination as caused by "misconduct," disallowing them unemployment benefits.[38] The Court distinguished *Smith* from *Sherbert*, where a state employment agency's interpretation of an employment statute led to disqualification for benefits, by situating the law at issue as the underlying law that criminalized peyote—not the agency's interpretation of "misconduct."[39] Then, the Court applied *Smith*'s new "neutral law of general applicability" test to the controlled substances criminal statute to find the denial of benefits constitutionally permissible.[40] By carving out from the rigors of the compelling interest test state action that met the modest standard of "neutral laws of general applicability," the *Smith* Court drastically rolled back Free Exercise protections, giving legislatures a blueprint by which they could, if so desiring, limit Free Exercise.[41] As a result, the Court constitutionally incentivized criminal prohibitions on religious conduct if cloaked in sufficiently sizeable statutory strokes.[42]

3. *Post-*Smith*: Recent, Steady Re-broadening of Narrowed Free-Exercise Test*

Following *Smith*, the Court steadily re-broadened the Free Exercise Clause, which suggests some student-athletes and coaches seeking religious exercise may, now, have a more accessible defense to administrator action.[43] Soon after *Smith*, the Court took up a

37. *See id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)) (synthesizing different, more permissive test from non-*Sherbert* cases).

38. *See id.* at 874–75 (recounting challengers' use of peyote, Oregon's relevant employment and criminal law, as well as relevant federal criminal law).

39. *See id.* at 884–86 (distinguishing *Sherbert* from instant case, rejecting compelling interest test, and declining to extend *Sherbert*'s Free Exercise protection to conduct criminal statute had prohibited).

40. *See id.* at 879, 885–86 (assessing Oregon law as "an *across-the-board* criminal prohibition on a *particular* form of conduct") (emphasis added).

41. For further discussion of how government actors attempted to use *Smith* to carry their Free-Exercise-limiting freight, see *infra* notes 44–45 and accompanying text.

42. For discussion of uncertainty *Smith* still causes today and appetite for reconsideration thereof, see *infra* notes 137–139 and accompanying text.

43. *See, e.g.*, Masterpiece Cakeshop v. Colo. Civil Rights Comm'n., 138 S. Ct. 1719 (2018) (rejecting animus found in state civil rights commission's hearing for baker who refused to bake specifically for same-sex wedding); Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017) (challenging state's

challenge to an ordinance prohibiting animal sacrifice if not intended for consumption.[44] The Court found the ordinance impermissibly infringed on the Free Exercise rights of members of the Santeria religion who practice as a religious rite animal sacrifice because the ordinance failed to meet *Smith*'s constitutional requirements of neutrality and general applicability.[45] Despite the Santeria church's triumph at the Court, Congress, in response to the *Smith* Court lowering the standard by which Free Exercise claims are assessed from a compelling interest and substantial burden test to one permitting neutral laws of general applicability, passed the Religious Freedom Restoration Act (RFRA), which purported to raise the same standard to strict scrutiny, an extremely less deferential tier of review.[46] However, the Court soon struck down RFRA as it applied to the states, so while RFRA's strict scrutiny standard as against the federal government remained in place, the states were bound, again, only by *Smith*.[47] Although *Smith* still

policy of excluding religious institutions from public funding for playgrounds); City of Boerne v. Flores, 521 U.S. 507 (1997) (seeking building permit for expansion of urban Catholic church after being denied); Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993) (arguing against city ordinance proscribing ritual animal slaughter).

44. *See Church of the Lukumi Babalu Aye*, 508 U.S. at 527 (indicating ordinance limits is proscription "to unnecessarily kill, torment, torture, or mutilate an animal in a public or private ritual or ceremony not for the primary purpose of food consumption").

45. *See id.* at 545–46 (finding city, via ordinance at issue, unconstitutionally targeted its Santeria members as opposed to promulgating ordinance that would have affected other acts of animal slaughter as well (i.e. one that was not facially underinclusive)).

46. *See City of Boerne*, 521 U.S. at 512–13 (detailing how Congress reacted to *Smith*).

47. *See id.* at 520 (establishing "congruence and proportionality" test for assessing congressional action taken pursuant to Amendment XIV § 5 power). Section Five of the Fourteenth Amendment provides Congress with "the power to enforce, by appropriate legislation, the provisions of th[e Amendment]." U.S. CONST. amend. XIV § 5 (providing Congress's legislative enforcement power). A recent phenomenon in California, which lacks a state analogue to RFRA, that highlights the fallout of *Boerne* (and *Smith*) is the establishment of cannabis churches, such as Jah Healing Kemetic Temple of the Divine, that claim cannabis as a sacrament—the practice of which would otherwise violate a neutral law of general applicability. *See* Arit John, *Inside the War for California's Cannabis Churches*, N.Y. TIMES (Nov. 23, 2019), https://www.nytimes.com/2019/11/23/style/weed-church-california.html [https://perma.cc/XP38-ECJH?type=image] (reporting on one of many cannabis churches facing accusations of acting as illegal dispensaries by *state* district attorneys from whom RFRA provides no protection post-*Boerne*). While this Comment was being drafted, the Court granted the writ of certiorari in another RFRA case, which presents the question whether RFRA allows plaintiffs to seek monetary relief (damages) when the defendant is one or more federal employees. *See* Tanzin v. Tanvir, 894 F.3d 449 (2d Cir. 2018), *cert. granted*, 140 S. Ct. 550 (2019) (arising from Muslim men seeking damages against FBI agents who placed men on "No Fly List" and threatened deportation when men declined to act as infor-

governs in claims levied against state infringements on religious liberty, RFRA still remains potent against those by the federal government and, in fact, has accounted for the litigation success of, *inter alia*, a church that challenged the federal government's seizure of, and threat of prosecution for, the hallucinogenic hoasca tea that church members ingested as a sacrament during communion and contained a Schedule I drug under the Controlled Substances Act.[48]

Recently, the Court continued its march toward a broader Free Exercise Clause when it ruled a policy excluding, *per se*, religious institutions from a playground resurfacing fund ran afoul of the Court's Free Exercise Clause jurisprudence.[49] While a plurality of the Court explicitly limited that holding to "playground resurfacing," the Court, in January 2020, heard argument in a case that could serve as a vehicle to extend that holding therebeyond as early as May or June 2020—the Court's opinion had not been published when this Comment went to print.[50] In one of its latest and high-

mants). Commentators have argued this case presents a conflict in the current political binary because a win for Tanvir could mean other RFRA plaintiffs, which have often been members of the so-called "Christian right" such as Hobby Lobby in *Burwell*; put another way, "the biggest winner is unlikely to be religious minorities like Tanvir. Rather, the biggest winner is likely to be the Christian right." *See* Ian Millhiser, *A Heartbreaking Supreme Court Case Could be a Huge Win for the Christian Right*, VOX MEDIA (Nov. 26, 2019, 8:30 AM), https://www.vox.com/policy-and-politics/2019/11/26/20982273/supreme-court-religion-tanvir-tanzin-rfra [https://perma.cc/95C4-6HXC].

48. *See* Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418 (2006) (holding RFRA protected church members from prosecution for religious use of tea made from two Amazonian plants—one of which consisted, in part, of dimethyltryptamine, Schedule I drug under Controlled Substances Act). Recall, while this case presents as almost a post-RFRA *Smith*, that case involved an *Oregon* criminal statute and unemployment benefits scheme, so RFRA would offer similarly situated litigants no protection post-*Boerne*. *Compare id.* (disallowing *federal* government's prohibition on ayahuasca), *with* Employment Div., Dep't of Human Res. of Or. v. Smith 494 U.S. 872 (1990) (permitting *state's* neutral law of general applicability on peyote and unemployment benefits conditioned thereon).

49. *See* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2025 (2017) (denominating Missouri Department of Natural Resources policy "odious to our Constitution" despite "a few extra scraped knees" being likely impacted otherwise).

50. *See* Espinoza v. Mont. Dep't of Revenue, 139 S. Ct. 2777 (2019) (granting cert. in case about state tax credit fund-matching program that resulted in money to sectarian schools); *Espinoza v. Montana Department of Revenue*, OYEZ, https://www.oyez.org/cases/2019/18-1195 [https://perma.cc/7CFD-ALSN] (last visited May 10, 2020) (providing oral argument audio recording synced with transcript); *Trinity Lutheran*, 137 S. Ct. at 2024 n.3 (narrowing scope of holding exclusively to "playground resurfacing"). This potential extension of *Trinity Lutheran* has already begun in the Executive Branch, where the Department of Education recently claimed a proposed rule that would expand some of the Department's grants' eligibility to more "faith-based entities" was in response to the Court's *Trinity Lutheran*

est-profile broadenings of the Free Exercise Clause, the Court found a state's civil rights commission expressed impermissible religious animus—violating *Smith*'s clarion call for neutrality—toward a baker who refused to bake a cake specifically for a same-sex wedding.[51] Remarkably, both of these latest developments in the Court's Free Exercise jurisprudence enjoyed broad support, counting seven members of the Court signing on to the majority opinion or concurring in the judgment.[52]

In the almost thirty years since *Smith*, the Court has, through the above cases, steadily broadened the *Smith*-constricted Free Exercise Clause; however, while *Smith* is still the touchstone of Free Exercise jurisprudence, that may not be the case for much longer.[53] The Court's Free-Exercise-broadening trend has made it easier for student-athletes and coaches to use the Free Exercise Clause as a shield to defend against administrative action, worsening correlatively the chances of success of other student-athletes and coaches filing Establishment Clause claims against the very same religious

holding. *See* Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, Direct Grant Programs, State-Administered Formula Grant Programs, Developing Hispanic-Serving Institutions Program, and Strengthening Institutions Program, 85 Fed. Reg. 3190 (proposed Jan. 17, 2020) (to be codified at 2 C.F.R. pt. 3474, 34 C.F.R. pt. 75–76, 106, 606–09) (proposing clarification of eligibility of "faith-based organizations" and subsequent retention of "autonomy, right of expression, religious character, and independence from Federal, State, and local governments" should grant be awarded).

51. *See* Masterpiece Cakeshop v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1729–31 (2018) (exemplifying Herculean power of *Smith*'s neutrality requirement). By settling on an anti-"hostility" rationale for invalidating the Colorado Civil Rights Commission's decision (as opposed to deciding whether the baker's underlying conduct was constitutional), the six-member majority avoided passing on whether the baker's Free Exercise claim would have succeeded in the absence of the Commission's animus. *See id.* at 1732 ("The outcome of cases like this in other circumstances must await further elaboration in the courts . . . .").

52. *See id.* at 1722 (reporting seven justices who agreed with judgment); *Trinity Lutheran Church of Columbia, Inc.*, 137 S. Ct. at 2016 (reporting seven justices who agreed with judgment). Whether such a coalition will endure may soon be tested as a petition for certiorari in a case, which was originally vacated and remanded for reconsideration in light of *Masterpiece*, has been filed and distributed for conference. *See* Wash. v. Arlene Flowers, 441 P.3d 1203 (2019), *petition for cert. filed* (No. 19-333, Sept. 12, 2019).

53. *See* Fulton v. City of Phila., 140 S. Ct. 1104 (2020), *granting cert. to*, 922 F.3d 140 (3d Cir. 2019) (providing Court opportunity to reconsider *Smith* via challenge to city's conditions on eligibility for foster care participation to which religious agency objected on religious grounds); *see also* Ricks v. Idaho Contractors Bd., 435 P.3d 1 (Idaho Ct. App. 2018), *petition for cert. filed*, (U.S. Jul. 10, 2019) (concerning challenge to state agency's denial of contractor license to applicant who refused to comply with request for Social Security Number (SSN) because he believed SSNs are "a form of the mark, and in substance (essence) the number of the 2-horned best written of in the Holy Bible"). For further discussion of potential reconsideration and demise of *Smith*, see *infra* notes 137–139 and accompanying text.

activity, which is at stake in any political discourse about Free Exercise as well.[54]

B. Hinge Joint: An Establishment Clause History Bending Close

The touchstone of the Court's modern Establishment Clause jurisprudence is *Lemon v. Kurtzman*.[55] However, like an open door creaking towards its close, the Court's Establishment Clause jurisprudence has narrowed from its relative openness in *Lemon* and before to barely ajar.[56] This section surveys this steadily closing hinge, paying special attention to school-related Establishment Clause claims in the fourth and fifth sub-sections, and argues the Court has significantly retreated from *Lemon*, bending close the availability of Establishment Clause remedies that will include, for example, fewer protections, for students seeking to be free of a coach's Free Exercise or a weaker basis for administrative action thereagainst.[57]

---

54. For further discussion of the impact of this trend on student-athletes, coaches, and administrators in public schools, see *infra* notes 171–232 and accompanying text. This judicial trend has affected Executive Branch instruction from the Department of Education to state and local agencies regarding school prayer in a variety of contexts, including "[d]uring [n]on-instructional [t]ime;" by "[t]eachers, [a]dministrators, and [o]ther [s]chool [e]mployees;" and "at [g]raduation." U.S. Dep't of Educ., *Guidance on Constitutionally Protected Prayer and Religious Expression in Public Elementary and Secondary Schools* (Jan. 16, 2020) https://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html [https://perma.cc/6R5E-FNXW] (purporting to, *inter alia*, "clarif[y] the extent to which prayer in public schools is legally protected" in nine "particular contexts"). *See also* Updated Guidance on Constitutionally Protected Prayer and Religious Exercises in Public Elementary and Secondary Schools, 85 Fed. Reg. 3257–72 (Jan. 21, 2020) (publishing guidance as official Rule). Several of the Court's members have cautioned "turning the First Amendment into a sword[ ] and using it against workaday economic and regulatory policy . . . in such an aggressive way" in the Free Speech Clause context, and there is no reason to believe such caution would not equally be applied by those Justices in the Free Exercise Clause context. Janus v. Am. Fed'n of State, Cty., and Mun. Emps., 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting, joined by Ginsburg, Breyer, and Sotomayor, JJ.) (sounding alarm against weaponization of First Amendment against regulations).

55. 403 U.S. 602 (1971). For further discussion of *Lemon*, see *infra* notes 65–70 and accompanying text.

56. *Compare* Engle v. Vitale, 370 U.S. 421 (1962) (striking down school prayer statutes and practices broadly), *with Lemon*, 403 U.S. at 612–13 (building on broad foundation to articulate broad test for Establishment Clause), *and* Van Orden v. Perry, 545 U.S. 677 (2005) (narrowing Establishment Clause to not cover Ten Commandments statue on state capitol grounds by rejecting *Lemon* for "passive" memorials and monuments and embracing, instead, test based on "Nation's history" and "nature of the monument").

57. For further discussion of this post-*Lemon* narrowing, see *infra* notes 71–87 and accompanying text. For further discussion of Establishment Clause operating in schools, see *infra* notes 89–116 and accompanying notes.

1. *Pre-*Lemon*: Forming the Framework for a Broad Establishment Clause*

In the same manner *Cantwell*'s incorporation of the Free Exercise Clause opened the possibilities for suits thereon, the selective incorporation of the Establishment Clause provided for precedent-building-jurisprudence theorizing for religious liberty litigants as well.[58] The Court upheld the constitutionality of a neutral New Jersey law of general applicability that provided for public funding of all schoolchildren's transportation costs to schools—including to parochial ones—but, in the process, had to first reach the question of whether the Establishment Clause applied against the states, which it answered affirmatively.[59] As will be discussed further below, schools remained hotbeds for Establishment Clause litigation.[60] Two of the most notable instances of this litigation were concerned with the challenges to daily, school-sponsored, religious programming during schooldays.[61] First, the Court took up and struck down daily, state-sponsored, and God-invoking prayer in schools.[62] Then, it invalidated state-mandated, daily Bible readings and recitations of the Lord's Prayer in schools.[63] In each of these cases, the Court broadened the Establishment Clause to encompass more protections against state-imposed religious activity, laying the foundation for the impending touchstone Establishment Clause case: *Lemon*.[64]

---

58. *See* Everson v. Bd. of Educ. of Ewing Twp. , 330 U.S. 1 (1947) (incorporating selectively First Amendment's Establishment Clause when affirming New Jersey court of last resort's invalidation of statute that permitted state reimbursement via tax revenue of parochial school students' busing costs).

59. *See id.* at 15–17 (concluding Establishment Clause requires only neutrality and that New Jersey cleared that bar).

60. For further discussion of Establishment Clause jurisprudence in schools, see *infra* notes 93–112 and accompanying text.

61. *See generally* Sch. Dist. of Abington Twp. v. Shempp, 374 U.S. 203 (1963) (regarding challenge to school bible readings and prayer recitation); Engle v. Vitale, 370 U.S. 421 (1962) (discussing constitutionality of school prayer).

62. *See Engle*, 370 U.S. at 424. For further discussion of *Engel*, see *infra* note 100 and accompanying text.

63. *See Shempp*, 374 U.S. at 223 (highlighting, and finding constitutionally infirm, coercive nature of Bible reading and prayer recitation statutes).

64. *See, e.g.*, *id.* at 225 (arguing for broad Establishment Clause that imposes stringent neutrality by writing, "[t]he breach of neutrality that is today a trickling stream may all too soon become a raging torrent").

2. Lemon*: Articulating a New Test*

In *Lemon*, the Court synthesized its Establishment Clause precedent and formulated a new test to govern the jurisprudential area.[65] The test has three parts: the challenged government action must have (1) "a secular legislative purpose," (2) a "principle or primary effect . . . that neither advances nor inhibits religion," and (3) an absence of "'excessive government entanglement with religion.'"[66] At issue in *Lemon* were a Rhode Island and a Pennsylvania program that appropriated state funds to non-public schools to improve the quality of education therein by paying for instructional materials and salary supplements.[67] While the Court found no sectarian purpose and passed on the "effect" prong's line-drawing inquiry, it held the states' programs presented an "excessive . . . entanglement with religion" and, thus, violated the Establishment Clause.[68] While passing on the second prong provided future Courts an opportunity to mold that prong in their own image, the *Lemon* test, after hanging on for nearly fifty years in a relatively volatile area of constitutional law, increasingly started to fall out of favor with many on the Court, especially the conservatives.[69] Those on the Court with whom *Lemon* has fallen out of favor have successfully narrowed the Establishment Clause considerably since 1971 and, as will be discussed further below, now seek to ring its death knell and usher in some vehicle that will facilitate even further constriction of the already anemic clause.[70]

3. *Post*-Lemon*: Narrowing the Establishment Clause*

In the years following *Lemon*, it has remained, at least until 2019, the perfunctory test in the Court's Establishment Clause jurisprudence, which means all students attempting to use the Clause as a shield against school-endorsed religion must run through *Lemon*

65. *See* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (presenting new test as natural outflow from Court precedent).

66. *See id.* at 612–13 (quoting Walz v. Tax Comm'n of City of N.Y., 397 U.S. 664, 674 (1970)) (citing Bd. of Educ. of Ctr. Sch. Dist. 1 v. Allen, 392 U.S. 236, 243 (1968)) (synthesizing Establishment Clause precedent into one, three-part test).

67. *See id.* at 607, 609 (detailing specific qualifications for reception of public funds by private schools pursuant to each statutory scheme).

68. *See id.* at 613–14 (supporting both states' efforts at creating secular-purposed solutions, passing on effect prong, and, finally, rejecting both statutes as excessively entangling public and private).

69. For further discussion of one of the most recent displays of the conservative justices' overwhelming disdain of *Lemon*, see *infra* notes 140–148 and accompanying text.

70. For further discussion of *Lemon*'s current state, see *infra* notes 144–147 and accompanying text.

despite the test being characterized disapprovingly by many on the Court.[71] These varying levels of support for the test have led the Court through repeated encounters with the Establishment Clause to add significant gloss thereto—even re-adopting pre-*Lemon* gloss—as it encounters new and unexpected challenges and new Justices have fresh opportunities to tinker with *Lemon*, narrowing the clause over time.[72] One of the more litigated fact patterns in post-*Lemon* suits is that of religious displays.[73] In a pair of 1980s cases before the court five years apart, holiday displays were at issue.[74] In the first of this duo, *Lynch v. Donnelly*,[75] the Court allowed a Rhode Island city's nativity scene to remain on display, finding no Establishment Clause violation due to compliance with *Lemon*'s three factors.[76] The latter of the duo, *County of Allegheny v. American Civil Liberties Union*,[77] however, saw the Court invalidating Pittsburgh's nativity scene as violative of the Establishment Clause primarily as a result of not passing muster with regard to the second *Lemon* prong, effect, because it appeared—without any secular counterpart—at the foot of the courthouse's grand staircase along-

71. *See, e.g.*, Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring) ("Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again . . . ."); Van Orden v. Perry, 546 U.S. 677, 686 (2005) ("Whatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds.").

72. *See* Locke v. Davey, 540 U.S. 712, 718 (2004) (announcing "'there is room for play in the joints'" even in post-*Lemon* era (quoting *Walz*, 397 U.S. at 669)).

73. *See, e.g.*, McCreary County v. Am. Civil Liberties Union, 545 U.S. 844 (2005) (determining Establishment Clause implications of Ten Commandments display in Kentucky courthouse); *Van Orden*, 545 U.S. 677 (analyzing constitutionality of Ten Commandments statue on Texas state capitol grounds); Cty. of Allegheny v. Am. Civil Liberties Union, 492 U.S. 573 (1989) (regarding Pittsburgh's holiday display of multiple holidays); Lynch v. Donnelly, 465 U.S. 668 (1984) (concerning Rhode Island city's display of nativity scene).

74. *See Lynch*, 465 U.S. at 671 (reporting on city's holiday display on privately owned land as menagerie of, *inter alia*, crèche, reindeer, elephant, teddy bear, clown, Santa, Christmas tree and "Season's Greetings" banner); *Cty. of Allegheny*, 492 U.S. at 579, 581, 587 (recounting city's holiday display on grand staircase of courthouse as crèche owned and set up by Catholic organization with "Gloria in excelsis deo" banner and, one block away, forty-five-feet tall Christmas tree, eighteen-feet tall menorah, and sign proclaiming liberty).

75. 465 U.S. 668 (1984).

76. *See Lynch*, 465 U.S. at 681–85 (finding secular purpose, lack of effect of advancement of religion, and absence of excessive entanglement therewith when purpose is to "recognize historical origins of . . . traditional event long recognized as a National holiday," effect is merely "indirect, remote and incidental," and entanglement economically "*de minimus*" and politically without "divisiveness").

77. 492 U.S. 573 (1989).

side a banner proclaiming, in Latin, "Glory to God in the Highest."[78] However, the Court allowed Pittsburgh to continue displaying its less intrusive and relatively more inclusive holiday display that also had secular elements, underscoring the significance the Court places on context when it deploys *Lemon*'s effect prong to evaluate a religious display.[79] Comparing these two religious holiday display cases decided with so few intervening years illustrates the Court's fact-specific emphasis on setting and level of endorsement as key factors in determining *Lemon*'s effect prong for religious display cases.[80]

Two decades later, the Court preserved this emphasis in another duo of cases; these two were about the display of the Ten Commandments on state property, were handed down on the same day, and, similar to the Court's bi-directional outcomes in the holiday display cases above, resulted in different conclusions of constitutionality from the Court.[81] In *McCreary County v. American Civil Liberties Union*,[82] where the Ten Commandments were in gilded frames on display in prominent locations in Kentucky county courthouses, the Court ruled the Establishment Clause had been violated and, thus, that the Ten Commandments must be removed.[83] In *Van Orden v. Perry*,[84] where a Texas monument was outside and among other monuments and indicators of historical events, the Court allowed the monument to stand, and a plurality thereof rejected the archetypal *Lemon* test for static, religious displays and focused, instead, on history and the display's characteristics.[85]

The inability of this plurality to garner support of an additional colleague allowed the uncertainty surrounding *Lemon*'s application to religious monuments to linger fourteen more years before the

78. *See Cty. of Allegheny*, 492 U.S. at 598, 601–02 (prohibiting city from stamping with its imprimatur an "undeniably religious" and "patently Christian message: Glory to God for the birth of Jesus Christ").

79. *See id.* at 621 (placing particular emphasis on space in which displays reside in deciding Establishment Clause was not violated).

80. For further discussion of displays' differences, see *supra* note 74 and accompanying text.

81. *See* Van Orden v. Perry, 545 U.S. 677 (2005) (regarding six-by-three-and-one-half-foot Ten Commandments monument among thirty-seven other markers around Texas state capitals twenty-two-acre grounds); McCreary Cty. v. Am. Civil Liberties Union, 545 U.S. 844 (2005) (concerning two, Kentucky county courthouses displaying inside "large, gold-framed" facsimile of Ten Commandments).

82. 545 U.S. 844 (2005).

83. *See id.* at 873–74 (upholding preliminary injunction against Kentucky courthouses' Ten Commandments displays due to first prong of *Lemon*: purpose).

84. 545 U.S. 677 (2005).

85. *See id.* at 687 (plurality opinion) (passing on *Lemon*'s overall fate on way to roundly rejecting *Lemon* for religious monument assessment).

Court accepted the plurality's position.[86] Remarkably, this duo, *McCreary County* and *Van Orden*, paralleled the last, *Lynch* and *County of Allegheny*: the setting was dispositive, endorsement level was central, and the Establishment Clause was more narrow than originally announced.[87] This Establishment-Clause-narrowing trend has not only made it harder for student-athletes to use the Establishment Clause as a shield to defend against impermissible religious action by coaches and administrators but also has altered the calculus of administrators attempting to delicately balance, for example, coaches' Free Exercise rights with students' Establishment Clause ones, making it correlatively easier to successfully bring Free Exercise claims against the very same religious activity.[88]

4. *Establishment Clause in Public Schools Generally*

The Court has cultivated a related but somewhat distinct jurisprudence for the application of the Religion Clauses in public schools, which draws on the definition of students' general rights therein.[89] Last year marked the fiftieth anniversary of the Court's declaration that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," asserting the right did "not embrace merely classroom hours" where students are "supervised" and dialogue is "ordained" but rather extended to other venues including "on the playing field" and "even to controversial subjects."[90]

86. *See* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067 (2019) (coalescing support of seven justices for *Lemon*'s inapplicability to long-standing memorials). For further discussion this limitation on *Lemon*, see *infra* notes 144–147 and accompanying text.

87. For further discussion of display similarities, see *supra* notes 74, 81 and accompanying text.

88. *See* Kennedy v. Bremerton Sch. Dist., 869 F.3d 813, 817 (9th Cir. 2017) (reporting tension between administrators' constitutional obligations). Such a balancing act was at issue in the first of this Comment's titular cases, *Kennedy v. Bremerton School District*, where Bremerton School District officials were left to ascertain an appropriate course of action when Coach Kennedy's Free Exercise rights collided with students' Establishment Clause rights. *See id.* at 817–20. For further discussion of the impact of this trend on student-athletes, coaches, and administrators in public schools, see *infra* notes 171–232 and accompanying text.

89. *See, e.g.*, Tinker v. Des Moines Ind. Sch. Dist., 393 U.S. 503 (1969) (ensuring students' right to express in school their opposition to Vietnam War); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (preserving students' religious objection to compulsory flag salute at school).

90. *Tinker*, 393 U.S. at 506, 512–13 (asserting existence of fifty years of Court precedent supporting claim; declaring students' rights at school are not confined to uncontroversial subjects or within classroom walls). While asserting broad subject matter and venue ambits of students' rights, the Court also recognized there were some subject matter restrictions on those rights: conduct that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others

Similarly, the previous year marked the seventy-fifth anniversary of the Court overruling its precedent, holding as repugnant to the Constitution a compulsory flag salute and pledge statute—enforced in schools—by a related declaration that "[i]f there is any fixed star in our constitutional constellation it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[91] Ever since these now-famous pronouncements, the Court has recognized public schools as hotbeds for the clashing of constitutional rights, particularly of competing First Amendment interests.[92] However, this litigation hotbed has not always been a consistent one, morphing and retreating even to the point of the Supreme Court overruling itself over the course of only twelve years.[93]

What is more, is that school Establishment Clause cases are not always cut and dry with isolated issues cleavable from other multifaceted legal questions, leaving this particular area of the law intricate at best and convoluted at worse.[94] This mess, however, also elucidates a key characteristic of this area of the law: it is not a matter of who possesses which right but rather whose interest therein outweighs whom.[95] In schools, this weighing endeavor, between a student's Establishment Clause rights and a coach's Free Exercise rights for example, is the onerous job of administrators, whose calculations are made in reference to both the Supreme Court's juris-

---

is, of course, not immunized by the constitutional guarantee of freedom of speech." *Id.* at 513.

91. *Barnette*, 319 U.S. at 642 (situating as First Amendment's paramount protected matters—even for schoolchildren—"the sphere of intellect and spirit").

92. *See, e.g.*, Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988) (permitting "reasonable" administrator oversight of publication decisions of student articles in school newspaper as it was *limited* public forum); Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986) (allowing for school-imposed punishments for prurient student speech at school due to speech's "disrupti[on] of the educational process").

93. *See* Agostini v. Felton, 521 U.S. 203, 237 (1997), *overruling* Aguilar v. Felton, 473 U.S. 402 (1985) (overruling precedent regarding public school teachers staffing parochial schools after all but one member of original majority had retired); *see also* Zelman v. Simmons-Harris, 536 U.S. 639, 648–49 (2002) (broadening *Agostini* to uphold as *Lemon*-compatible Cleveland school voucher program that resulted in ninety-six percent of voucher-receivers applying funds to religious schools); *but see* Locke v. Davey, 540 U.S. 712 (2004) (reversing course again to allow state refusal to fund student aid for theology program).

94. *See, e.g.*, Good News Club v. Milford Cent. Sch., 533 U.S. 98, 112–19 (2001) (analyzing attempted Establishment Clause defense to viewpoint discrimination).

95. *See id.* (illustrating freight carried by interest weighing at intersection of competing First Amendment rights even when parties' claims are grounded in same amendment).

prudence and to the Circuit's precedent interpreting and filling in the gaps of the Supreme Court's relevant case law.[96]

High schools and middle schools are not the only setting from which these suits arise; advocates for and those against religious activity at public universities have also commenced similar challenges.[97] When a federal provision of construction funding for colleges and universities was appropriated to several "church-related" colleges contingent on twenty-years of secular building usage, the Court struck down the building-use contingency, pointing out (1) older students are less likely to be susceptible to religious indoctrination, (2) religious indoctrination was not the purpose of the institutions of higher education at issue, and (3) the discrete nature of construction funding lessens potential entanglement between government and religion.[98] When compared to other analogous cases, it is apparent the Court weighs heavily—and, more importantly, as dispositive—fact-specific inquiries when assessing alleged Establishment Clause infringements.[99]

---

96. *See, e.g.*, Kennedy v. Bremerton Sch. Dist., 869 F.3d 813, 817 (9th Cir. 2017) (recounting administrators' balancing act between their constitutional obligations to allow Coach Kennedy's Free Exercise without exhibiting endorsement thereto rising to Establishment Clause violation); *see also id.* at 822 (summarizing Ninth Circuit's application of relevant Circuit Establishment Clause precedent, *Eng v. Cooley*, that allowed it to "decline to reach" Coach Kennedy's Establishment Clause claim as such); *see generally*, Eng v. Cooley, 552 F.3d 360 (9th Cir. 2009) (providing Ninth Circuit five-factor framework for First Amendment Retaliation claims, including dispositive factor in *Kennedy*: whether spoken by private citizen or public employee).

97. *See, e.g.*, Tilton v. Richardson, 403 U.S. 672 (1971) (considering punitive measures, as provided by Higher Education Facilities Act of 1963, against "church-related" higher education institutions after using federal construction funds).

98. *See id.* at 684–89 (distinguishing from more susceptible students in parochial schools with more than one-time interaction with government-funded resources in *Lemon*).

99. *Compare id.* (suggesting, and finding dispositive, younger students are more impressionable than their collegiate counterparts), *with* Marsh v. Chambers, 463 U.S. 783, 792 (1983) (presuming adults in Nebraska State Legislature are more mature than schoolchildren and, therefore, less "susceptible to 'religious indoctrination'" (quoting *Tilton*, 403 U.S. at 686)), *and* Town of Greece, N.Y. v. Galloway, 572 U.S. 565, 590 (2014) (recounting precedent holding coercion rationale weakens disputatively when audience is adults, not children). *See also Tilton,* 403 U.S. at 688–89 (assessing constitutional challenge by holistically considering all fact-sensitive factors). While the *Marsh* presumption that adults are less likely to fall prey to attempted religious indoctrination and coercion and subsequent emphasis of this point in *Town of Greece* were both handed down in legislative prayer cases, the Court's recognition of a potentially dispositive difference between children and adults may indicate the Court would also be more permissive of, for example, coaches' on-the-job religious behavior around adult, college student-athletes than it might be when the same is around children, middle- or high-school student-athletes. *See Marsh*, 463 U.S. at 792 (reasoning adults are "presumably not readily susceptible to 'religious indoctrination' or peer pressure") (internal cita-

While the aforementioned constitutional competitions were concerned with student protests, parochial use of public resources, and building use, this area of litigation has most notably—or at least most relevantly—extended to the realm of prayer in public schools, starting in earnest with the landmark removal of daily, state-sponsored, and God-invoking prayer from schools.[100] Since that time, litigants have brought to the Court a number of permutations of public school prayer cases, starting with a challenge to Alabama's attempted replacement to the more explicit practice the *Engle* Court struck down: daily silent periods.[101] Like the administration-initiated prayer in *Engle*, this, too, was likewise held to be at odds with the Establishment Clause because of its failure to pass the first prong of the *Lemon* test: secular purpose.[102] Initiating prayer for a sectarian purpose is not the only constitutionally problematic avenue down which an administrator may stray, for the second and third *Lemon* prongs—effect of advancing or inhibiting religion and excessive entanglement—can each also prove constitutionally fatal.[103] The above precedent lays the broad foundation for regulation of state officials specifically tailored for the context of public schools at all educational levels, attempting to balance the multiple—and often conflicting—interests of schools' many stakeholders and providing the basis for further development of Establishment Clause jurisprudence outside the classroom as well.[104]

---

tion omitted); *see also Town of Greece, N.Y.*, 572 U.S. at 590 (reiterating *Marsh*'s less-susceptible-adult presumption).

100. *See* Engle v. Vitale, 370 U.S. 421, 422, 424 (1962) (invalidating as "a practice wholly inconsistent with the Establishment Clause" New York policy of decreed daily prayer, which read, "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country").

101. *See* Wallace v. Jaffree, 472 U.S. 38, 40 (1985) (describing Alabama statutes, which required in every public-school daily sixty-second pauses for "meditation or voluntary prayer").

102. *See id.* at 56 (observing absence of secular purpose by underscoring statute's provision of words for prayer). The prayer invoked "Almighty God . . . Creator and Supreme Judge of the world" as prescribed by statute. ALA. CODE § 16-1-20.2 (1975).

103. *See* Lee v. Weisman, 505 U.S. 577, 590, 599 (1992) (recognizing Establishment Clause violation due to state's coercive power being brought to bear on vulnerable students as well as state's imprimatur via significant involvement in graduation prayer).

104. For further discussion of how this further development occurs in the context of, as the *Tinker* Court put it, "on the playing field," see *infra* notes 105–116 and accompanying text.

5. *Establishment Clause in Public School Sports*

It is on the above tailored foundation a further jurisprudential subset has begun to arise and take shape: the Establishment Clause in the context of public school sports.[105] While focus of the general Establishment-Clause-in-public-school jurisprudence has been administrator-initiated prayer, when the venue shifts to sports, student- or coach-initiated prayer emerges as the focus.[106] There, despite the prayer not being administrator-initiated, the Court still disallowed the public-school prayer practice.[107] Even though students initiated the prayer, the Court held the school's mere broadcast thereof conveyed sponsorship by the school, unconstitutionally coercing those in attendance.[108]

While coach-involved prayer has yet to be fully considered by the Court, several Circuit Courts of Appeals have weighed in thereon.[109] The Third Circuit held a high school football coach

105. *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (holding unconstitutional high school policy and practice for student-led prayer at football games); Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Village Sch. Dist., 624 F.3d 332 (6th Cir. 2010) (denying to extend *Tinker*'s to conversion of teachers to both "employer *and* employee"); Borden v. Sch. Dist. of the Twp. of E. Brunswick, 523 F.3d 153, 174–79 (3d Cir. 2008) (determining high school football coach's participation in student-initiated prayer was repugnant to Establishment Clause); Mayer v. Monroe Cty. Cmty. Sch. Corp., 474 F.3d 477 (7th Cir. 2007) (framing teacher-school relationship as one in which school district "*hires*" teacher speech rather than regulating it); Doe v. Duncanville Indep. Sch. Dist., 70 F.3d 402, 406–07 (5th Cir. 1995) (ruling middle school basketball coach's initiation of and participation in his team's prayers infringed on their Establishment Clause rights).

106. *See, e.g.*, *Santa Fe*, 530 U.S. at 294 (detailing how Texas high school allowance of prayer by students before kickoff of its football games caused "Santa Fe High School student[s] [to] unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval"). The Court also emphasized that by permitting the prayer to be given by the same student at every game and allowing the students to popularly elect that person, the school "guarantees, by definition, that minority candidates [for the student chaplain position] will never prevail and that their views will be effectively silenced." *See id.* at 291, 304–05 (quoting W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) ("[F]undamental rights may not be submitted to vote; they depend on the outcome of no elections.")).

107. *See id.* at 313 (explaining even student-initiated prayer runs afoul of Establishment Clause jurisprudence when impermissibly endorsed by government).

108. *See id.* at 312 (acknowledging counterfactual where every students' attendance was voluntary and dismissing that, too, as impermissibly coercive).

109. *See, e.g.*, *Borden*, 523 F.3d at 174–79 (determining high school football coach's participation in student-initiated prayer was repugnant to Establishment Clause); Doe v. Duncanville Indep. Sch. Dist., 70 F.3d 402, 406–07 (5th Cir. 1995) (ruling, *inter alia*, middle school basketball coach's initiation of and participation in his team's prayers infringed on their Establishment Clause rights). For further discussion of teachers' First Amendment rights outside of prayer context, see Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Village Sch. Dist., 624 F.3d 332

violated the Establishment Clause when he silently bowed his head during his football team's prayer for their pre-game meal and knelt with his team in the locker room during an additional pre-game prayer.[110] Similarly, the Fifth Circuit held a middle school basketball coach also violated the Establishment Clause when he initiated and participated in his team's prayers.[111] The Court has yet to grant a writ of certiorari to one of these coach-initiated prayer cases, but it appears poised to do so in the not-so-distant future.[112]

Upon zooming out to examine the Court's Establishment Clause jurisprudence as a whole in June 2018, two members of the Court went as far as to assert the "Court's Establishment Clause jurisprudence is in disarray."[113] In a dissent from the denial of the grant of certiorari, Justice Thomas joined by Justice Gorsuch argued the Court had been inconsistent in its approach to Establishment Clause cases, frustrating the administration of justice in lower courts by embracing a mercurial jurisprudence over a uniform one.[114] Describing the Fourth Circuit's holding in a legislative

(6th Cir. 2010) (denying to extend *Tinker*'s to conversion of teachers to both "employer *and* employee") and Mayer v. Monroe Cty. Cmty. Sch. Corp., 474 F.3d 477 (7th Cir. 2007) (framing teacher-school relationship as one in which school district "*hires*" teacher speech rather than regulating it). Although the Court has yet to give sustained examination to coach-involved prayer, the Department of Education published a guidance asserting teachers, administrators and other school employees are "prohibited by the First Amendment . . . from actively participating in [prayer] with students" unless "the overall context makes clear that they are not participating in their official capacities" or when undertaken "at a time when it is permissible to engage in other private conduct such as making a personal telephone call." U.S. Dep't of Educ., *Guidance on Constitutionally Protected Prayer and Religious Expression in Public Elementary and Secondary Schools* (Jan. 16, 2020) https://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html [https://perma.cc/6R5E-FNXW] (updating Executive Branch secondary-and-below level public school religious expression).

110. *See Borden*, 523 F.3d at 175 (citing *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 308) (denouncing coach's behavior as violative of Supreme Court's endorsement test).

111. *See Duncanville Indep. Sch. Dist.*, 70 F.3d at 406–07 (distinguishing facts from Fifth Circuit precedent about high school graduation prayer by highlighting, here in middle school basketball games, younger age of students and dramatically decreased solemnity and frequency of occasion); *but cf.* Lee v. Weisman, 505 U.S. 577, 599 (1992) (asserting even *high* school graduation prayer may be, and was there, unconstitutional).

112. For further discussion of the possibility of writ of certiorari grant in coach-initiated prayer case, see *infra* notes 123–139 and accompanying text.

113. Rowan County, N.C. v. Lund, 138 S. Ct. 2564, 2564 (2018) (Thomas, J., dissenting from denial of certiorari, joined by Gorsuch, J.).

114. *See id.* (highlighting Court's fluctuating emphasis on endorsement through eyes of "'reasonable observer[s]'" at times and national "history and tradition" at others); *see also* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2100 (2019) (Gorsuch, J., concurring, joined by Thomas, J.) (noting another example of Court's "deeply inconsistent" Establishment Clause jurisprudence—"offended

prayer case as "unfaithful to [the Supreme Court's] precedent," Justice Thomas wrote the Court ought to have granted certiorari to clarify the apparent precedential ambiguity that led the Fourth Circuit to disallow non-federal legislative prayer by members of those bodies while the Sixth Circuit permits the same.[115] This belief in jurisprudential "disarray" by two members of the Court foreshadowed the Establishment Clause actions by a Court majority in the year that followed.[116]

C. Saddle Joints: Religion Clause Cases in October Term 2018 Riding the Trend

In the concluding five months of the Court's October Term 2018, both the Free Exercise and Establishment Clauses saw from the Court significant and sustained engagement, which this Comment addresses in turn below.[117] In January 2019, the Court first engaged the Free Exercise Clause in a case about the placing on paid administrative leave and recommendation to not rehire after contract expiration of a high school football coach, who prayed publicly following each game.[118] It then took on the Establishment Clause on both its certiorari and stay dockets.[119] February and March saw each of the stay docket's interactions with the Establishment Clause in turn, confronting the Court with challenges to the denial of the presence in the execution chamber of a spiritual advi-

---

observer standing," which enabled plaintiffs in *American Legion* to sue—dubbing it "the anomaly" "lower courts invented" and calling for its abolition).

115. *See Lund*, 138 S. Ct. at 2566–67 (Thomas, J., dissenting from denial of certiorari, joined by Gorsuch, J.) (citing Bormuth v. County of Jackson, 870 F.3d 494 (6th Cir. 2017)) (arguing for review to resolve Circuit split).

116. For further discussion of Court's foreshadowed subsequent reformulations of its Establishment Clause jurisprudence, see *infra* notes 140–148 and accompanying text.

117. *See, e.g.*, *Am. Legion*, 139 S. Ct. 2067 (narrowing Establishment Clause); Murphy v. Collier, 139 S. Ct. 1475 (2019) (reversing denial of execution stay on Establishment Clause grounds), *rev'g*, 919 F.3d 913 (5th Cir. 2019); Dunn v. Ray, 139 S. Ct. 661 (2019) (vacating execution stay on Establishment Clause grounds), *rev'g*, 915 F.3d 689 (11th Cir. 2019); Kennedy v. Bremerton Sch. Dist., 139 S. Ct. 634 (2019) (broadening Free Exercise Clause).

118. *See Kennedy*, 139 S. Ct. at 635 (Alito, J., concurring in denial of certiorari, joined by Thomas, Gorsuch, and Kavanaugh, JJ.) (asserting live Free Exercise claim despite no such claim in complaint).

119. *See generally Am. Legion*, 139 S. Ct. 2067 (reviewing Establishment Clause claim on certiorari docket); *Murphy*, 139 S. Ct. 1475 (reviewing Establishment Clause claim on stay docket); *Ray*, 139 S. Ct. 661 (reviewing Establishment Clause claim on stay docket).

sor of the soon-to-be executed person's own religion.[120] On its certiorari docket, the Court addressed whether a veterans' memorial on public land in the shape of a Latin cross violated the Establishment Clause.[121] This section argues the post-*Smith* re-broadening and post-*Lemon* narrowing trends described in the above sections continued in the Court's most recent completed term, which concluded in June 2019, where the Court not only did not provide any reason for observers to believe these trends would be stymied but also reified the certainty the trends would continue.[122]

1. *Coach-Initiated Prayer in* Kennedy v. Bremerton School District

In a case that evaded notice of many but is of central relevance to the arguments herein nonetheless, especially with regard to the relevance of the Court's Religion Clauses jurisprudence to sports, the Court denied the petition for writ of certiorari by a high school football assistant coach who challenged the athletic director's recommendation to not renew his employment contract on Free Speech grounds.[123] Bremerton School District did not rehire Coach Joseph Kennedy, a public high school football coach, after he ignored the district's instruction to cease his public, post-game, midfield prayers.[124] What were once silent, post-game prayers by

120. *See Murphy*, 139 S. Ct. 1475 (analyzing Buddhist inmate's claim upon denial of his cleric's presence in execution chamber); *Ray*, 139 S. Ct. 661 (assessing analogous claim of similarly situated Muslim).

121. *See Am. Legion*, 139 S. Ct. 2067 (reevaluating Court's Establishment Clause jurisprudence).

122. *See id.* (continuing post-*Lemon* narrowing of Establishment Clause); *Murphy*, 139 S. Ct. at 1476–77 (Kavanaugh, J., statement respecting grant of application of stay) (attempting to distinguish claims and timing of death penalty stay docket Establishment Clause claims); *Ray*, 139 S. Ct. 661 (exhibiting post-*Lemon* narrowing in death penalty stay context); *Kennedy*, 139 S. Ct. at 635 (Alito, J., concurring in denial of certiorari, joined by Thomas, Gorsuch, and Kavanaugh, JJ.) (telegraphing willingness to continue re-broadening Free Exercise Clause).

123. *See Kennedy*, 139 S. Ct. at 634 (denying discretionary review to Coach Kennedy after his Ninth Circuit loss on Free Speech claims without opinion speaking for Court majority). While a Court majority remained silent on reasoning for denial, an opinion speaking for four members of the Court—all that is needed to grant certiorari—admonished the District Court's "brief, informal," and unclear opinion delivered solely from the bench and the "even more imprecise" decision from the Ninth Circuit for being so deficient as to require the Court "to vacate [and remand] the decision below" had it come to the Court via its mandatory jurisdiction. *See id.* at 636 (Alito, J., concurring in denial of certiorari, joined by Thomas, Gorsuch, and Kavanaugh, JJ.).

124. *See* Kennedy v. Bremerton Sch. Dist., 869 F.3d 813, 816–20 (9th Cir. 2017) (detailing history of Coach Kennedy's weekly ritual). *See also* Reply Brief of Appellant at *2, Joseph A. Kennedy, Plaintiff-Appellant, v. Bremerton School District, Defendant-Appellee, 2017 WL 473818 (9th Cir. Jan. 31, 2017) (distinguishing Coach Kennedy's desired relief as "*a silent prayer* that lasts 15–30 seconds," "*not seek[ing] to pray with students* or while 'surrounded by' students"). Another reason

himself at midfield escalated to "deliver[ing] a message containing religious content" to "[s]tudents, coaches, and other attendees from both teams [who] were invited to participate."[125] The Bremerton School District Superintendent conveyed to Coach Kennedy via multiple letters over the course of six weeks that his actions could cause reasonable observers to perceive the district as endorsing religion.[126] Such an endorsement, the district feared, could be sufficient for an Establishment Clause challenge.[127]

After the first letter, Coach Kennedy altered his post-game ritual by excising any religious content from his speeches and waiting until the field started to clear to pray silently and alone at midfield.[128] Several weeks into this new routine, Coach Kennedy sought religious accommodation from the District via letter and informed the District he would restart his previous post-game prayer practice two days later at the next football game, an announcement he also made personally in local media appearances.[129] While

---

the District did not rehire Kennedy was because he did not reapply despite his one-year contract expiring. *See Kennedy*, 869 F.3d at 820 (explaining Kennedy never reapplied and, more broadly, assistant football coaches' routine one-year contract process).

125. *Kennedy*, 869 F.3d at 816 (describing evolution of Coach Kennedy's post-game religious exercise). *See also* Brief of Appellee at *5–6, *Kennedy*, 2016 WL 7474748 (chronicling earlier stages of Kennedy's prayer routine that occurred in team's locker-room).

126. *See Kennedy*, 869 F.3d at 817 (describing correspondence as recognizing absence of malice but describing prayers as, nevertheless, "problematic" and suggesting permissible alternatives). *See also* Reply Brief of Appellant at *3, *Kennedy*, 2017 WL 473818 (responding on behalf of Coach Kennedy to Bremerton School District's concerns regarding such "problematic" prayer, arguing for absence of "colorable claim" by describing how "no 'objective observer' would confuse Coach Kennedy's speech," such as "'ta[king] a knee at the 50-yard line' after the game 'to say a silent prayer that lasts 15-30 seconds,'" with state endorsement of prayer).

127. *See Kennedy*, 869 F.3d at 817–20 (detailing repeated iterations of District's concerns and instructions to Coach Kennedy in three letters over six weeks); *see also* Reply Brief of Appellant at *15–27, *Kennedy*, 2017 WL 473818 (presenting Coach Kennedy's argument that "only an *actual* violation" of Establishment Clause would permit Bremerton School District's course of action against him; arguing mere trepidation of District's attorneys to be insufficient to restrict his rights (citing Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring in judgment)).

128. *See Kennedy*, 869 F.3d at 817 (detailing Coach Kennedy's new post-game actions in response to District's letter). *See also* Reply Brief of Appellant at *19, *Kennedy*, 2017 WL 473818 (recounting Coach Kennedy's description of his new practice: "'I waited until the BHS players were walking toward the stands to sing the post-game fight song. Then I knelt at the 50-yeard line, closed my eyes, and prayed a brief, silent prayer.'").

129. *See Kennedy*, 869 F.3d at 818 (recounting Coach Kennedy's written response to District). *See also* Brief of Appellee at *11, *Kennedy*, 2016 WL 7474748 (describing Kennedy's lawyers' response as indicating his prayer taking place "immediately after" the final whistle as "the only acceptable outcome").

there is a dispute as to the manner in which a multitude joined Coach Kennedy at midfield when he resumed, band members' parents complained to the District the multitude "knocked over" their children, and Satanists informed the District they, too, would be exercising their religion on the field after the next game "if others were allowed to" as well.[130] As a result of Coach Kennedy's resumption and the reigning pandemonium it caused, the District then re-explained its policy to Coach Kennedy and, in a second letter to him, "reiterated that it 'can and will' accommodate 'religious exercise that would not be perceived as District endorsement, and which does not otherwise interfere with the performance of job duties.'"[131]

This offer of accommodation was not lip service: the District offered him "'a private location within the school building, athletic facility or press box . . . for brief religious exercise before and after games'" or "his prior practice of praying on the fifty-yard line after the stadium had emptied," and "invited Kennedy to offer his own suggestions" for accommodation methods.[132] After his lawyers conveyed to the District that Coach Kennedy found these measures inadequate, he again engaged in his post-game prayer ritual at the subsequent football game, which caused the District to place him on paid administrative leave for having violated its policies and instructions and, eventually, the athletic director to suggest during annual evaluations to not renew his one-year contract—an unavailable option regardless because Kennedy did not reapply for the opening.[133] In short, the school district placed Kennedy on paid administrative and the athletic director recommended to not rehire

130. *See Kennedy*, 869 F.3d at 818 (relating turmoil ensuing from Coach Kennedy's resumed religious exercise). *See also* Brief of Appellee at *12, *Kennedy*, 2016 WL 7474748 (showing how District took steps to secure public safety with police department after unrest; revealing Satanists donned their religious attire at next game).

131. *Kennedy*, 869 F.3d at 819 (reporting District's efforts to accommodate Coach Kennedy's religious exercise). *See also* Brief of Appellee at *9–10, *Kennedy*, 2016 WL 7474748 (showing District "underscore[ed] that Kennedy's coaching duties did not stop at the end of games, but instead included Kennedy's supervision of the players through the post-game ceremonies, post-game locker room activity, and 'until players are released to their parents or otherwise are allowed to leave.'").

132. *Kennedy*, 869 F.3d at 819 (reporting District's efforts to accommodate Coach Kennedy's religious exercise). *See also* Brief of Appellee at *11, *Kennedy*, 2016 WL 7474748 (reproducing letter to Coach Kennedy: "'Development of accommodation is an interactive process, and should you wish to continue to engage in private exercise while on the job, the District will be happy to discuss options for that to occur in a manner that will not violate the law.'").

133. *See Kennedy*, 869 F.3d at 819–20 (chronicling end of District's employment of Coach Kennedy). *See also* Brief of Appellee at *12–13, *Kennedy*, 2016 WL

him after contract expiration because he did not comply with its general policy nor its specific-to-him instructions, which were an effort to avoid running afoul of the Establishment Clause.[134] Coach Kennedy then challenged that decision on Free Speech grounds and pursuant to Title VII of the Civil Rights Act of 1964.[135]

While the Court quietly denied the petition for writ of certiorari, one Justice not-so-quietly wrote regarding this denial.[136] Justice Alito penned a concurrence to the denial of certiorari that explicitly informed the petitioner, without provocation, despite the denial of review of his Free Speech Clause claims that the coach "still has live claims under the Free Exercise Clause . . . ."[137] He was not alone in this belief.[138] Three other Justices signed on, bringing the total with this belief, when including the author, to four—the exact number required to grant certiorari should Coach Kennedy amend his complaint to include Free Exercise claims and it then percolate back up to the Supreme Court for review on those amended grounds, allowing the Court another opportunity to continue its post-*Smith* re-broadening of the Free Exercise Clause.[139]

7474748 (elucidating annual evaluations process: all six assistant football coaches only had one-year contract and all chose not to reapply).

134. *See Kennedy*, 869 F.3d at 819–20 (indicating why and how District "placed [Coach Kennedy] on paid administrative leave" and its Athletic Director recommended Coach Kennedy's one-year contract not be renewed). For further discussion of how the inter-clausal tension manifests in decisions like that of the administrators here, see *infra* notes 171–232 and accompanying text.

135. *See id.* at 820–21 (outlining grounds of suit as limited to Free Speech Clause and Title VII of Civil Rights Act of 1964 claims and relief sought as injunction, reinstatement, and permission to continue post-game prayer ritual). Coach Kennedy's First Amendment claim is one of Free Speech Retaliation pursuant to 42 U.S.C. § 1983. *See id.* at 821 n.5. Below, the Ninth Circuit three-judge panel denied a preliminary injunction on that claim because it held Coach "Kennedy spoke as a public employee, not as a private citizen," and was, thus, ineligible for the relief sought under Circuit precedent. *See id.* at 822 (citing Eng v. Cooley, 552 F.3d 1062, 1070–72 (9th Cir. 2009)).

136. *See* Kennedy v. Bremerton Sch. Dist., 139 S. Ct. 634, 635 (2019) (Alito, J., concurring in denial of certiorari, joined by Thomas, Gorsuch, and Kavanaugh, JJ.). Justice Alito acknowledged one of the primary reasons for denying certiorari to Coach Kennedy's Free Speech claims was the presence of "unresolved factual questions" such as the District Court's lack of "clear finding about what [Coach Kennedy] was likely to be able to prove" and the Circuit Court's "even more imprecise" opinion "on this critical point." *Id.* at 635–36 (Alito, J., concurring in denial of certiorari, joined by Thomas, Gorsuch, and Kavanaugh, JJ.).

137. *See id.* at 637 (suggesting Court's Free Speech jurisprudence "drastically cut[ting] back on the protection provided by the Free Exercise Clause" might have influenced Kennedy to not advance Free Exercise claims here). Justice Alito also indicated Kennedy's Title VII claims were still live; however, these are less relevant than those of Free Exercise to this Comment's scope. *See id.*

138. *See id.* at 635 (enumerating Justices signing on to concurring opinion).

139. *See id.* at 637 (passing for now on consideration of Free Exercise Clause claims because Court had "not been asked to revisit those decisions" limiting said

2. *Establishment Clause in American Legion v. American Humanist Association*

One of the Court's biggest blockbusters this term was an Establishment Clause case.[140] Maryland obtained the land circumscribed by some of the state's highly trafficked roads to (1) be better positioned to work towards lessening the danger of surrounding roads and (2) become stewards of the aging monument found thereon.[141] The monument is in the shape of a cross.[142] The cross itself is thirty-two feet tall and sits atop a pedestal that is at least an additional nine feet tall, which has thereon a plaque that commemorates forty-nine area men who lost their lives in World War I.[143] In holding the cross on public land did not violate the Establishment Clause, the Court rejected the almost-fifty-year-old *Lemon* test—at least insofar as the test's application to Establishment Clause challenges to long-standing memorials.[144] This rejection of the *Lemon*

clause). For further discussion of the Court's past, post-*Smith* re-broadening of the Free Exercise Clause, see *supra* notes 43–54 and accompanying text. The Court granted one petition for writ of certiorari that presents the opportunity to continue its post-*Smith* re-broadening of the Free Exercise Clause even before Coach Kennedy, or another party, might offer the Court the same chance. *See* Fulton v. City of Phila., 140 S. Ct. 1104 (2020), *granting cert. to*, 922 F.3d 140 (3d Cir. 2019) (challenging city's conditions on eligibility for foster care participation to which religious agency objected on religious grounds); Ricks v. Idaho Contractors Bd., 435 P.3d 1 (Idaho Ct. App. 2018), *petition for cert. filed*, (U.S. Jul. 10, 2019) (concerning challenge to state agency's denial of contractor license to applicant who refused to comply with request for Social Security Number (SSN) because he believed SSNs are "a form of the mark, and in substance (essence) the number of the 2-horned beast written of in the Holy Bible").

140. *See generally* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067 (2019) (considering Establishment Clause implications of long-established, Latin cross monument veterans' memorial on land Maryland purchased long after erection thereof).

141. *See id.* at 2078 (listing reasons Maryland purchased land on which memorial stands).

142. *See id.* (describing monuments dimensions, shape, and features in detail).

143. *See id.* (explaining nature and origins of memorial).

144. *See id.* at 2089–90 (finding no Establishment Clause violation because of cross' "added secular meaning" as war-dead memorial, "acquired historical importance," and nature as memorial to "particular individuals" instead of, for example, all fallen veterans of World War I); s*ee id.* at 2081–85 (considering four ways in which *Lemon* fails to be appropriate for "commemorative . . . symbols": (1) older monuments' purposes can be elusive; (2) there often exists more than one of those purposes, and they can easily diverge over time; (3) monuments' effect(s) can also evolve; and (4) removal may exhibit stronger inhibition of religion than advancement thereof its presence provides); *see id.* at 2087–89 (rejecting *Lemon* for more case-specific and history-laden approach it previously adopted in its legislative prayer cases *Marsh v. Chambers* and *Town of Greece, N.Y. v. Galloway*). For further discussion of legislative prayer cases, see *supra* notes 99, 113–114 and accompanying text.

test as a "grand unified theory" for Establishment Clause jurisprudence echoed a pre-*Lemon* understanding of an absence of a "single constitutional caliper against that can be used to measure the precise degree to which [Establishment Clause concerns] are present or absent."[145]

This anti-unification position garnered overlapping support from a variety of justices; two agreed it was "a misadventure" and had been "shelved," another said it was "no longer applie[d]," and yet another wrote it "could not resolve" the "great array of laws and practices [before] the Court."[146] All but two of the justices wrote or signed on to opinions that conceded *Lemon* was not applicable in every Establishment Clause case, so while at least four members of the *American Legion* Court seem prepared to scrap *Lemon* in contexts other than old memorials, there were at least seven who believe *Lemon* to be unfit for absolute duty.[147] This contraction of the Establishment Clause mirrors the dilation of the Free Exercise Clause as telegraphed by Justice Alito and three of his colleagues in the *Kennedy* statement regarding denial of the writ of certiorari only months before.[148]

3. *Establishment Clause in Death Penalty Stay Docket*

The Court further engaged with the Establishment Clause in two cases from its death penalty stay application docket that underscore the lethality of the Court's narrowing Establishment Clause jurisprudence and how that lethality discriminatorily cuts across

145. Tilton v. Richardson, 403 U.S. 672, 677 (1971) (rejecting one-size-fits-all Religion Clauses test).

146. *See Am. Legion*, 139 S. Ct. at 2087 (decrying efforts of Court's previous attempt at area-defining test); *id.* at 2092 (Kavanaugh, J., concurring) (discussing same); *id.* at 2101–02 (Gorsuch, J., concurring in the judgment, joined by Thomas, J.) (discussing same).

147. *See id.* at 2080 (announcing support of all but Ginsburg and Sotomayor, JJ. for *Lemon*'s fall from universal applicability in Establishment Clause cases); *see also,* Van Orden v. Perry, 545 U.S. 677, 687 (2005) (plurality opinion) (rejecting *Lemon* as "not useful" when confronted with static, religious displays and embracing, instead, approaches grounded in history and display's characteristics). For further discussion of this earlier rejection of *Lemon* for display cases, see *supra* notes 81–87 and accompanying text. While the Court did not discuss at length the apparent rejection of *Lemon* in school prayer cases, one concurrence noted the Court's school prayer jurisprudence had not relied on *Lemon* but, instead, had focused on the coercive effects of school prayer on impressionable students susceptible to the same. *See id.* at 2093 (Kavanaugh, J., concurring) (citing Lee v. Weisman, 505 U.S. 577 (1992)) (walking through Court's lack of reliance on *Lemon* for all "relevant categories of Establishment Clause cases," including school prayer).

148. For further discussion of statement regarding denial of writ of certiorari in *Kennedy*, see *supra* notes 136–139 and accompanying text.

lines of race and religion.[149] In the first of these two cases, that of Dominique Ray, the Court vacated the stay the Eleventh Circuit had placed on his execution for the sole expressed reason that Ray waited too long to file—eighty-three days after the execution day was set and ten days before the execution.[150] However, the dissent elucidates the delay was much shorter when considering Ray's warden did not inform Ray of the denial of the request for the presence of his spiritual advisor in the execution chamber until seventy-eight days after the date was set and fifteen days before the execution.[151] Additionally, the dissent adds, Ray then filed his claim only five days later.[152] In the second case, Patrick Murphy was also denied the presence of his spiritual advisor in the execution chamber.[153] He filed a stay application, which the District Court for the Southern District of Texas denied, and the Fifth Circuit affirmed.[154] The Court then reversed the Fifth Circuit's affirmance of denial of stay, but, unlike in Ray's case, the Court, here, refrained from providing a rationale.[155]

Despite the similar claims in the two applications for review of stay decisions by circuit courts, the Court vacated the stay the Eleventh Circuit had placed on the execution of Dominique Ray and, only seven weeks later, reversed the Fifth Circuit's denial of a stay on the execution of Patrick Murphy.[156] If the claims remained constant while the outcome was changed, another variable would be

149. *See* Murphy v. Collier, 139 S. Ct. 1475 (2019) (reversing denial of execution stay on Establishment Clause grounds), *rev'd*, 919 F.3d 913 (5th Cir. 2019); Dunn v. Ray, 139 S. Ct. 661 (2019) (vacating execution stay on Establishment Clause grounds), *rev'd*, 915 F.3d 689 (11th Cir. 2019).

150. *See Ray*, 139 S. Ct. at 661 (articulating only one reason for vacating Eleventh Circuit's stay: delay).

151. *See id.* at 662 (Kagan, J., dissenting) (dispelling with notion that cause of delay rested solely—or even primarily—on Ray's shoulders).

152. *See id.* (illustrating Ray's response to warden's denial was far from dawdling).

153. *See* Murphy v. Collier, 376 F. Supp. 3d 734 (S.D. Tex. 2019), *aff'd* 919 F.3d 913 (5th Cir. 2019) (detailing Murphy's Establishment Clause, Free Exercise Clause, and Religious Land Use and Institutionalized Persons Act (RLUIPA) claims), *rev'd* 139 S. Ct. 1475 (2019).

154. *See generally Murphy*, 139 S. Ct. 1475 (providing subsequent history).

155. *See id.* (requiring without rationale presence of Murphy's spiritual advisor or one of his religion but of state's choosing to be present in execution chamber), *rev'd*, 919 F.3d 913 (5th Cir. 2019).

156. *See id.* at 1475 (2019) (granting application for stay of execution after Fifth Circuit affirmed trial court's denial of stay); *Ray*, 139 S. Ct. 661, 661 (granting application to vacate stay of execution after Eleventh Circuit granted stay despite trial court's denial thereof).

implicated in the search for an outcome determinative factor; here, the facts provided that difference.[157]

While the stay for Murphy did not itself delve into these differences, Justice Kavanaugh, writing for himself and Chief Justice Roberts, wrote separately to explain why they voted for Murphy's stay and against Ray's less than two months earlier and to address Justice Alito's dissent, which both Justices Thomas and Gorsuch joined, from granting Murphy's stay.[158] The first difference to which Justice Kavanaugh points was that while Murphy raised an "equal-treatment" claim himself, the Eleventh Circuit raised *sua sponte* the same claim in Ray's case.[159] That is, even though the same claim was relied on in Ray's case, his stay application was denied because Ray did not himself raise the claim.[160] The second difference to which Justice Kavanaugh points was the difference in the relief sought underlying each stay application.[161] Even if Ray had advanced an "equal-treatment" claim himself, Justice Kavanaugh argued the remedy would not have been inclusion of a spiritual advisor of his religion but rather "removing of ministers of all religions from the execution room . . . ."[162] To receive the remedy sought, Ray would have needed to succeed under a different claim—the exact claim he advanced below and the advancement of which, Justice Kavanaugh also wrote, was the basis for the first dispositive distinction between these cases, precipitating the denial.[163] The third and final difference Justice Kavanaugh highlighted was timing.[164] Murphy's petition to Texas for the presence of a spiritual advisor of his religion one month prior to his execution date and the state's subsequent silence was distinguishable, Justice Kavanaugh wrote, from Ray's respective application, which came too

157. *See Murphy*, 139 S. Ct. 1475, 1476–77 (Kavanaugh, J., statement respecting grant of application of stay) (enumerating "several significant differences" between Ray and Murphy's claims).

158. *See id.* at 1476–85 (disagreeing over whether Murphy's case was different enough from Ray's case to draw outcome determinative distinctions).

159. *See id.* at 1476–77 (acknowledging grant of stay was based on "equal-treatment" claim but concluding Eleventh Circuit ought not have, of its own volition, based granting stay thereon).

160. *See id.* (noting Ray failed to put forward this type of claim in either district or circuit court).

161. *See id.* at 1477 (distinguishing relief from "equal-treatment" claim from what Alabama claims is regular relief to Ray's claim under RLUIPA).

162. *Id.* (citation omitted) (presenting as dispositive Ray's claim's remedy as removal of all spiritual advisors and Murphy's as inclusion of his).

163. *See id.* at 1476–77 (arguing only RLUIPA claim was *source* of one inconsistency between Ray's and Murphy's claims and *solution* of another).

164. *See id.* (highlighting implicitly growing concern for perceived use of stay applications by persons on death row as Hail Mary passes).

late.[165] Ray's and Murphy's cases illustrate the lethal effect of the Court so drastically narrowing the Establishment Clause and how that significant erosion of fundamental constitutional protection subsequently empowers Justices to rely on the hollow claim of procedural minutia, alleged time delays here, when that lethality discriminatorily cuts across lines of race and religion.[166]

III. CARTILAGINOUS JOINTS: AN ADAPTIVE ANALYSIS

The Court ought to resurrect its test that best struck the proper balance of the inter-clausal tension between the two Religion Clauses: *Lee v. Weisman*.[167] The Court could accomplish this end by abandoning its post-*Smith* re-broadening of the Free Exercise Clause and post-*Lemon* narrowing of the Establishment Clause and re-adopting its *Lee* formulation that "the principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause."[168] Unlike the tests explored in this Comment's background that have oscillated and bent close over the years, this test from *Lee* allows for less variation while not completely adopting immovability, allowing still for some "play in the joints" without sacrificing the Establishment Clause on the altar of Free Exercise.[169] This section discusses in turn the effects of the Court's Religion Clause trajectory and need for course correction on (1) coaches and teachers, (2) administrators, and (3) student-athletes before, finally, turning to the impact on these groups—both on religion as such and on its intersection with race—as portended by the recent death penalty stay docket cases specifically.[170]

---

165. *See id.* (placing blame for delay in Murphy's case on Texas and same in Ray's on him); *but cf.* Dunn v. Ray, 139 S. Ct. 661, 662 (2019) (Kagan, J., dissenting) (illumining warden's role in delay in Ray's case).

166. For further discussion of how this selective incorporation could affect student-athletes, coaches, and administrators along these same lines of race and religion, see *infra* notes 221–232 and accompanying text.

167. 505 U.S. 577 (1992).

168. *Id.* at 587 (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984)).

169. *See id.* (postulating Free Exercise claims cannot be allowed to override those of Establishment Clause "at a minimum"). For further discussion of how such overriding was allowed in Court's history of Free Exercise and Establishment Clauses before *Lee*, see *supra* notes 27–42, 58–70 and accompanying text.

170. For further discussion of effect on coaches and teaches, see *infra* notes 171–198 and accompanying text. For further discussion of effect on administrators, see *infra* notes 199–210 and accompanying text. For further discussion of effect on student-athletes, see *infra* notes 211–218 and accompanying text. For further discussion of predictions based on recent cases from death penalty stay docket, see *infra* notes 221–232 and accompanying text.

A. Ribs: Effect on the Coaches and Teachers, Protectors of Schools' Vital Organs

After a heart-wrenching overtime defeat in the 2019 Sweet Sixteen, University of Tennessee Men's Basketball Coach Rick Barnes spoke candidly to his team in the locker room, concluding his remarks by saying to his team, "Let's get it in. Come on. Let's get it in as a family. Come on."[171] He then got down on one knee, joined hands with his players in a circle of them doing the same, and initiated the Lord's Prayer in which his student-athletes joined.[172] This was not merely a spur-of-the-moment plea to the divine in a moment of great loss; instead, it was the culmination of a long-term emphasis by Coach Barnes on Christianity by way of, *inter alia*, "'power talks'. . .focus[ed] on faith."[173] The fruits of this focus have manifested in both player baptisms and Christianity-themed tattoos.[174] Although the Circuit in which Coach Barnes' university sits and the Sweet Sixteen game was played has not yet ruled definitively on coach-involved school prayer, the Third and Fifth Circuits have, and they would not bode well for Coach Barnes if courts treat him like the high and middle school coaches at the center of those cases.[175]

The Fifth Circuit case is closest in analogy to Coach Barnes' hypothetical case.[176] The Third Circuit case is closest in analogy to

171. Tennessee Basketball (@Vol_Hoops), TWITTER (Mar. 29, 2019, 12:39 AM), https://twitter.com/Vol_Hoops/status/1111487937827364864?s=20 [https://perma.cc/FZ8G-6QL8] (providing video of post-game locker room talk and prayer).

172. *See id.* (progressing through video to eventual prayer).

173. *See* WBIR Staff and Russell Biven, *Audience of One: Vols' Faith Lifts Basketball Team to Greater Heights*, 10NEWS, https://www.wbir.com/article/sports/college/vols/audience-of-one-vols-faith-lifts-basketball-team-to-greater-heights/51-87fb62af-d1af-4e85-be13-feb17ce51690 [https://perma.cc/6EA6-V22B] (last updated Mar. 18, 2019, 2:53 PM) (showing video of Lord's Prayer earlier in season).

174. *See id.* (showing pictures and chronicling stories of tattoos and baptisms).

175. *See* Borden v. Sch. Dist. of the Twp. of E. Brunswick, 523 F.3d 153, 174–79 (3d Cir. 2008) (holding constitutional school district's policy against high school football coach's *participation* in student-initiated prayer, recognizing district's "legitimate educational interest in avoiding Establishment Clause violations") (citing Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753 (1995)); Doe v. Duncanville Indep. Sch. Dist., 70 F.3d 402, 406–07 (5th Cir. 1995)) (finding violation of Establishment Clause when middle school basketball coach's *initiated and participated in* his team's prayers, violating *Lemon*'s prohibition on "excessive entanglement" and later bans on "endorsement").

176. *Compare* Doe v. Duncanville Indep. Sch. Dist., 70 F.3d 402 (5th Cir. 1995) (regarding middle school basketball coach leading team in Lord's prayer), *with* WBIR Staff & Biven, *supra* note 173 (concerning college basketball coach leading team in Lord's prayer). The biggest caveat to this claim is that the Court has viewed the adult status of, for example, legislators to be a significant factor when assessing the coercive power of legislative prayer. *See, e.g.*, Town of Greece, N.Y. v.

the Ninth Circuit case, *Kennedy*, discussed at length above.[177] At issue in the Fifth Circuit was a nearly twenty-year tradition of the middle school girls' basketball coach initiating and or participating in recitations of the Lord's prayer "in each basketball practice[,]. . . in the locker rooms before games began, after games in the center of the basketball court in front of spectators, and on the school bus travelling to and from basketball games."[178] The Third Circuit case concerned a high school football coach, who led his team in a similar pre-game prayer for twenty-three seasons.[179] Both the Third and Fifth Circuits held these actions, indeed, violated the First Amendment's Establishment Clause.[180] Moreover, neither Circuit validated the respective coach's Free Exercise claim.[181] Instead, the Fifth Circuit balanced the school district employees' free exercise rights against the commands of the Establishment Clause and

---

Galloway, 572 U.S. 565, 590 (2014) (attempting to distinguish from school-prayer-at-high-school-graduation case by arguing coercive factors present there are absent in legislatures); Marsh v. Chambers, 463 U.S. 783, 792 (1983) (reasoning adults are "presumably not readily susceptible to 'religious indoctrination' or peer pressure") (internal citation omitted). Whether the Court will reason similarly in sports-prayer cases is yet to be seen, but it has appeared to recognize some difference in college students; however, the case was limited to the context of federal funds used for construction expenses. *See* Tilton v. Richardson, 403 U.S. 672, 677 (1971) (showing funding was narrowed to exclude use of facilities for religious purposes). Nevertheless, the likely life-changing benefit a sports scholarship confers on a student-athlete must be factored into the coercion calculus when determining whether, for example, student-athletes' belief they could lose such a monumental benefit if not taking part in a religious exercise flows from a sufficiently coercive act by the university to trigger Establishment Clause protections. *C.f.* Santa Fe Ind. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (holding high school students were impermissibly coerced during school-sponsored prayer at football game even if, unlike in *Lee*, attendance was voluntary).

177. *Compare* Borden v. Sch. Dist. of the Twp. of E. Brunswick, 523 F.3d 153 (3d Cir. 2008) (centering on high school football coach leading team in prayer), *with* Kennedy v. Bremerton Sch. Dist., 869 F.3d 813 (9th Cir. 2017) (assessing high school coach leading team in prayer). For further discussion of *Kennedy*'s facts, see *supra* notes 123–139 and accompanying text.

178. *Duncanville Indep. Sch. Dist.*, 70 F.3d at 404 (describing coach's prayer routine and treatment of Petitioner, who endured, i*nter alia*, her history teacher calling "a 'little atheist'" for not participating in Lord's prayer).

179. *See Borden*, 523 F.3d at 159–60 (illustrating past practice of Coach Borden at pre-game meals and in locker room).

180. *See id.* at 174, 176–79 (finding Coach Borden's actions impermissible under Establishment Clause); *Duncanville Indep. Sch. Dist.*, 70 F.3d at 406–07 (ruling coach's prayers infringe on student-athletes' Establishment Clause rights).

181. *See Duncanville Indep. Sch. Dist.*, 70 F.3d at 406–07 (denying relief for Free Exercise claims of each coach because of "improper[ ] entangle[ment]" and "endorsement"); *see also Borden*, 523 F.3d at 174 n.17 (revealing Borden did not even originally raise Free Exercise claim). For a further discussion of *Borden* and *Duncanville Indep. Sch. Dist.*, see *supra* notes 109–111 and accompanying text.

found the former wanting.[182] Because permitting its employees to participate in student prayers would lead to both "endorsement" and "excessive entanglement," the Fifth Circuit held the employees' Free Exercise claims were outweighed by the Establishment Clause values that would otherwise be compromised.[183]

The Third Circuit quoted and cited a portion of the Fifth Circuit's opinion, including a quote from the Supreme Court in *Lee*, where the Court held:

> 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."[184]

This was the Court's synthesis of its Religion Clauses jurisprudence: the Establishment Clause shall not be sacrificed on the altar of the Free Exercise Clause.[185] This is consistent with the text of

---

182. *See Duncanville Indep. Sch. Dist.*, 70 F.3d at 406 (quoting Lee v. Weisman, 505 U.S. 577, 587 (1992)) (affirming district court's enjoining of employees from participating in student prayer).

183. *See id.* (synthesizing various Supreme Court Establishment Clause cases, relying especially on *Lemon*). Endorsement runs afoul of one of the rules handed down in Court's religious display cases. *See* Cty. Of Allegheny v. Am. Civil Liberties Union, 492 U.S. 573, 601–02 (1989). "Endorsement" could also be assessed as a synthesis of *Lemon*'s first and second prongs: (1) "a secular legislative purpose" and (2) a "principle or primary effect . . . that neither advances nor inhibits religion." *See* Lemon v. Kurtzman, 403 U.S. 602 at 612 (1971). Similarly, an absence of "'excessive government entanglement with religion'" is *Lemon*'s third prong. *See id.* at 613 (quoting Walz v. Tax Comm'n of City of N.Y., 397 U.S. 664, 674 (1970)).

184. *Lee*, 505 U.S. at 587 (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984)) (striking proper constitutional balance between Free Exercise and Establishment Clauses). It is important to note the *Lee* Court did not fashion this formulation of the Religion Clauses out of whole cloth; rather, it is part of a long line of precedent that affirms this relationship between the clauses. *See, e.g.*, Sch. Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203, 226 (1963) ("[T]he Free Exercise Clause . . . has never meant that a majority could use the machinery of the State to practice its beliefs.").

185. *See Lee*, 505 U.S. at 587 (asserting Free Exercise claims cannot run roughshod over Establishment Clause ones). For further discussion of the history of the Free Exercise and Establishment Clauses before *Lee*, see *supra* notes 27–42, 58–70 and accompanying text. The *Trinity Lutheran* Court described Missouri's categorical denial of playground re-surfacing materials to religious institutions as "nothing more than the state's policy preference for skating as far as a possible from religious establishment concerns." Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2024 (2017). While this Comment's normative argument to return to *Lee* is supported by more than avoiding establishment concerns only

the Religion Clauses, which forbid any "law respecting the establishment of religion" but then only proscribes those "prohibiting the free exercise thereof."[186] That is, because "respecting" is both broader and more capacious than "prohibiting", the Establishment Clause could be seen—at least textually—to be correspondingly broader than the Free Exercise Clause.[187]

Moreover, the Court has recognized for more than seventy-five years the history and structure of the Bill of Rights supports construing the First Amendment's protections as especially protected against majoritarian hijacking: "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."[188] Support for this understanding of the Religion Clauses' inter-clausal tension also flows from precedent because the Court has for more than half a century recognized the limits of the Free Exercise Clause: "While the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to anyone, it has never meant that a majority could use the machinery of the State to practice its beliefs," and a broader Establishment Clause would also bring with it a benefit to all while the Free Exercise Clause primarily benefits only those with some religion to exer-

---

for the sake of doing so, such a practice is, contrary to the Court's apparent disdain, laudable; there is inherent wisdom therein. *See id.* at 2040–41 (Sotomayor, J., dissenting, joined by Ginsburg, J.) ("The constitutional provisions of thirty-nine States—all but invalidated today—the weighty interests they protect, and the history they draw on deserve more than this judicial brush aside."). *Trinity Lutheran*'s dissenters warn of what this could portend, referencing concurrences that would invalidate similar provisions that limit state contributions for religious use or forbidding distinctions for "religious status" altogether. *See id.* at 2041 n.14 (Sotomayor, J., dissenting, joined by Ginsburg, J.). Seventy years earlier, the Court recognized the Establishment Clause adamantly forbade such state funding of religion. *See* Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1, 15–16 (1947) ("No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.").

186. U.S. CONST. amend. I (providing text of Constitution's Religion Clauses).

187. *See id.* (using different language to address Congressional limits on religion-related laws); *Lemon*, 403 U.S. at 612 ("A law may be 'respecting' the forbidden objective while falling short of its total realization."). This capacity is what prevents the Establishment Clause from becoming a mere nullity when the government acts at issue impermissibly favor religion but, nevertheless, fall short of officially establishing a state religion. *See id.* ("A given law might not establish a state religion but nevertheless be one 'respecting' that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment.").

188. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

cise.[189] Additionally, broadening the Establishment Clause would also temper the cyclical politicization of the Free Exercise Clause, which was championed by more liberal courts for the sake of religious minorities and then picked up by more conservative courts for, primarily, the sake of white Christians.[190] Under such a test—the one cited by both the Third and Fifth Circuits, Coaches Barnes' and Kennedy's Free Exercise claims would not fare well.[191] However, another test could be salvation for such claims.[192]

These are the kinds of claims that Justice Alito's statement concurring in the denial of certiorari of *Kennedy v. Bremerton Sch. Dist.* could supply with legal ammunition should a lawsuit arise.[193] Specifically, and hypothetically, counsel to Coaches Barnes and Kennedy could cite the "live claims under the Free Exercise Clause" language from Justice Alito's concurrence, joined by three other members of the Court, in Coach Kennedy's case with the confidence that, barring any so-called vehicle problems, there is a reasonable probability for Supreme Court review—a grant that only takes four votes, which Justice Alito's concurrence possessed.[194] While it may be somewhat less crystalline to predict exactly how each of the four Justices who espoused this belief would vote on the merits and whether such an opinion could garner a Court majority, it would appear Coach Barnes, with the benefit of Coach Kennedy's hindsight, would be able to make a claim to which a sufficient ma-

189. *Schempp*, 374 U.S. at 226 (rejecting Free Exercise Clause's use as tool to impose majority's beliefs on others).

190. *Compare* Sherbert v. Verner, 374 U.S. 398 (1963) (striking down state prohibition on unemployment benefits for unwillingness to work on Sabbath of petitioner, one Seventh Day Adventist), *with Trinity Lutheran*, 137 S. Ct. 2012 (wielding Establishment Clause to open state aid program to petitioner, one mainline Christian church).

191. *Compare Lee*, 505 U.S. at 587 (articulating test that weighs Establishment Clause as heavier than Free Exercise Clause), *with* WBIR Staff & Biven, *supra* note 173 (reporting facts similar to *Duncanville Sch. Dist.*, which Fifth Circuit used *Lee* to invalidate), *and* Kennedy v. Bremerton Sch. Dist., 869 F.3d 813 (9th Cir. 2017) (presenting facts similar to *Borden*, which Third Circuit used *Lee* to invalidate by following *Lee*'s emphasis on importance of students' Establishment Clause rights as protection against coach's Free Exercise Clause claims).

192. For further discussion of evolving nature of Court's Free Exercise jurisprudence, see *supra* notes 43–53, 123–139 and accompanying text.

193. *Compare* WBIR Staff & Biven, *supra* note 173 (concerning college basketball coach who frequently led his team in prayer on school premises), *with Kennedy*, 869 F.3d 813 (regarding high school football coach who frequently led his team in prayer on school premises).

194. *See* Kennedy v. Bremerton Sch. Dist., 139 S. Ct. 634, 637, *denying cert. to*, 869 F.3d 813 (9th Cir. 2017) (Alito, J., concurring in denial of certiorari, joined by Thomas, Gorsuch, and Kavanaugh, JJ.) (suggesting without provocation Coach Kennedy retained "live claims under the Free Exercise Clause").

jority of the Court would be amenable to secure review.[195] That the Court's Free Exercise Clause jurisprudence post-*Smith* exhibits a significant re-broadening trend only strengthens a hypothetical Barnes or additional Kennedy claim to any adverse employment action.[196] Of course, Coaches Barnes and Kennedy are not the only coaches who could potentially take advantage of Justice Alito's helpful hint and the Court's re-broadening Free Exercise jurisprudence.[197] Rather, all similarly situated coaches would have their legal positions similarly fortified if bringing similar litigation.[198]

B. Spine: Effect on Administrators, Schools' Backbones and Nerve Centers

Not only have the Court's re-broadening the Free Exercise Clause and signals of continuing that trend altered the calculus in cases like Coach Kennedy's, but the Court's narrowing of the Establishment Clause has done so as well.[199] At the intersection of Relig-

195. For further discussion of *Kennedy*, see *supra* notes 123–139 and accompanying text. While those four Justices have telegraphed the likelihood of their vote for review that would be sufficient for granting certiorari, four others have already announced their skepticism of "turning the First Amendment into a sword[ ] and using it against workaday economic and regulatory policy . . . in such an aggressive way" in the Free Speech Clause context, and there is no reason to believe such caution would not equally be applied at the merits stage by those Justices in the Free Exercise Clause context. *See* Janus v. Am. Fed'n of State, Cty., and Mun. Emps., 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting, joined by Ginsburg, Breyer, and Sotomayor, JJ.) (sounding alarm against weaponization of First Amendment against regulations).

196. *See, e.g.*, Masterpiece Cakeshop v. Col. Civil Rights Comm'n., 138 S. Ct. 1719 (2018) (rejecting animus found in state civil rights commission's hearing for baker who refused to bake specifically for same-sex wedding); Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017) (challenging state's policy of excluding religious institutions from public funding for playground resurfacing); City Of Boerne v. Flores, 521 U.S. 507 (1997) (seeking building permit for expansion of urban Catholic church after being denied); Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993) (arguing against city ordinance proscribing ritual animal slaughter). For further discussion of this post-*Smith* re-broadening trend, see *supra* notes 43–53 and accompanying text.

197. *See, e.g.*, Borden v. Sch. Dist. of the Twp. of E. Brunswick, 523 F.3d 153, 174–79 (3d Cir. 2008) (displaying similarly situated football coach); Doe v. Duncanville Indep. Sch. Dist., 70 F.3d 402, 406–07 (5th Cir. 1995) (showing similarly situated basketball coach).

198. *See Kennedy*, 139 S. Ct. at 637 (Alito, J., concurring in denial of certiorari, joined by Thomas, Gorsuch, and Kavanaugh, JJ.) (offering without provocation several potential relief opportunities for complaints reformulated to include claims other than Free Speech).

199. For further discussion of how Court has narrowed Establishment Clause post-*Lemon*, see *supra* notes 71–87, 123–139.

ion Clause cases are administrators.[200] There, they have to walk the fine line of allowing employees and students to freely exercise their religion while also ensuring such allowances are not so permissive so as to transform into an Establishment Clause claim due to reasonably perceived endorsement or excessive entanglement.[201] This tight rope act—one that must be walked while simultaneously carrying out the vital task of overseeing students' education—was articulated by the Bremerton School District administrators in *Kennedy*.[202] There, they provided as one rationale for their discipline of Coach Kennedy their fear his actions would cause a reasonable observer to believe the district was endorsing religion in contravention of the Establishment Clause.[203] Without doing so explicitly, the school district engaged in the type of balancing of interests envisioned by *Lee*, where the Court articulated a test that favored the Establishment Clause when Free Exercise claims were pitted against it.[204] If the district's counsel surveyed precedent for what test to apply, this would have been exactly what they found: *Lee* as applied by both the Third and Fifth Circuits.[205] However, this calculus becomes altogether different if the Court's narrowing of the Establishment

200. *See, e.g.*, Kennedy v. Bremerton Sch. Dist., 869 F.3d 813, 816–20 (9th Cir. 2017) (retelling how administrators handled incident from position between employees and students).

201. *See, e.g.*, *id.* at 817 (recounting Bremerton School District's balancing of constitutional obligations).

202. *See id.* (reproducing and summarizing correspondence between district and Coach Kennedy). If the Court readopted it's test from *Lee*, which is clearer and strikes the proper balance between Establishment and Free Exercise interests, administrators would be able to deal more confidently and swiftly with these matters, allowing them more time to devote to overseeing students' education. *See id.* at 817–19 (detailing District's concerns and time spent writing Coach Kennedy on multiple occasions as well as communications and organizing with local police for security after Kennedy's resumption of his post-game practice).

203. *See id.* at 817 (elucidating how district communicated to Coach Kennedy its obligation to prevent reasonably perceived endorsement).

204. *See* Lee v. Weisman, 505 U.S. 577, 587 (1992) (announcing test that prefers "fundamental limitations imposed by the Establishment Clause" over free exercise claims). In *Kennedy*, the implicit application of *Lee* meant the district's weighing as constitutionally heavier the Establishment Clause rights of the many potentially susceptible students over that of the singular coach, who could practice similar conduct in ways less likely to send the message to a reasonable high school student-athlete that the district endorsed Coach Kennedy's religion (that is, advanced it for the purpose thereof). *See Kennedy*, 869 F.3d at 816–20 (showing District's constitutional calculus).

205. *See* Borden v. Sch. Dist. of the Twp. of E. Brunswick, 523 F.3d 153 (3d Cir. 2008) (endorsing *Duncanville Indep. Sch. Dist.*'s embrace of *Lee*'s preference for Establishment Clause); Doe v. Duncanville Indep. Sch. Dist., 70 F.3d 402 (5th Cir. 1995) (embracing *Lee*'s preference for Establishment Clause).

Clause continues because the limitations imposed thereby would be correlatively narrowed.[206]

This is exactly what happened at the end of the Court's most recently completed term, which concluded in June 2019, when the Court continued its trend of narrowing the Establishment Clause by permitting a more-than-forty-feet-tall, cross-shaped World War I veterans memorial on state-owned land surrounded by a busy intersection.[207] By perpetuating the Court's post-*Lemon* trend of narrowing the Establishment Clause, the Court likely lessened the need for administrators like those in Bremerton School District to fear Establishment Clause claims upon allowing employees like Coach Kennedy to engage in his public prayer practice.[208] Put another way, if the Court lessens the possibility of Establishment Clause litigation, the equilibrium of administrators balancing between the Religion Clauses shifts toward the Free Exercise Clause.[209] This would usher in more lenient administrators and, as a result, more latitude for employees—including coaches.[210]

C. Growth Plates: Effect on Student-Athletes, Malleable But Integral Components

While a significant portion of the Court has tipped its hand at the future of cases of students objecting to the religious nature of their coach's conduct, it remains less clear how a reformulating of the relationship of the Religion Clauses to one another might affect students wishing to engage in religious activity.[211] Given (1) the increased latitude employees will likely gain if, or more likely when, the Court re-broadens the Free Exercise Clause even further and (2) the already significant latitude granted students relative to their coaches, it would follow students' Free Exercise rights will only in-

206. *See Lee*, 505 U.S. at 587 (defining as relevant to Establishment Clause's weight "fundamental limitations" therefrom).

207. *See* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067 (2019) (describing monument at issue). For further discussion of "Peace Cross" case, see *supra* notes 140–148 and accompanying text.

208. For further discussion of how Court has narrowed Establishment Clause post-*Lemon* but pre-*Am. Legion*, see *supra* notes 71–87.

209. *See Lee*, 505 U.S. at 587 (providing test that strengthens Free Exercise claims if Establishment Clause is weakened).

210. *Cf.* Kennedy v. Bremerton Sch. Dist., 869 F.3d 813, 816–20 (9th Cir. 2017) (showing limited administrator leniency and employee latitude when Establishment Clause concerns are higher).

211. *See, e.g.*, Kennedy v. Bremerton Sch. Dist., 139 S. Ct. 634, 637 (2019) (Alito, J., concurring in denial of certiorari, joined by Thomas, Gorsuch, and Kavanaugh, JJ.) (acknowledging potential for Coach to bring Free Exercise claim).

crease as well.[212] This sounds in line with the clarion call for the preservation of student rights in *Tinker*.[213] This time, perhaps ensuring students' rights are not checked at the stadium gate.[214] However, the Establishment Clause rights administrators weighed in the above section were those very same rights equally possessed by students if *Tinker* is to be followed.[215]

Faced with this conundrum, it would appear that all parties at schools are gaining Free Exercise latitude, albeit at the expense of Establishment Clause protections.[216] Students are not significantly different in either this gain or resulting loss.[217] Thus, students' rights and those of all parties at schools are following the greater trend across Religion Clause applications: a re-broadening Free Exercise Clause and narrowing Establishment Clause.[218] As formulated in *Lee*, a re-broadened Free Exercise Clause ought to be met with a correlatively broad Establishment Clause, not the narrowed one the Court has whittled down.[219] Only a broad Establishment Clause will be able to protect the rights of student-athletes seeking to be protected from undue religious influence from their coaches and, indeed, adequate protection against state action that would impermissibly inhibit their own religion as well.[220]

---

212. *See, e.g.*, *Kennedy*, 869 F.3d 813, 817 (describing District policy of already permitting students leeway "to engage in private, non-disruptive prayer").

213. *See* Tinker v. Des Moines Ind. Sch. Dist., 393 U.S. 503 (1969) (heralding bevy of constitutional rights preserved to children even when at school).

214. *See id.* at 506 (announcing famously that schoolchildren do not "shed their constitutional rights . . . at the schoolhouse gate").

215. *See id.* (reserving rights to teachers and students alike).

216. *Compare id.* (failing to distinguish between those rights preserved as between teachers and students), *with* Lee v. Weisman, 505 U.S. 577 (1982) (setting up zero sum game between Religion Clauses), *and Kennedy*, 139 S. Ct. at 637 (Alito, J., concurring in denial of certiorari, joined by Thomas, Gorsuch, and Kavanaugh, JJ.) (telegraphing continued re-broadening of Free Exercise Clause).

217. *See Tinker*, 393 U.S. at 506 (ruling neither teachers nor students were subject to having rights stripped at school).

218. For further discussion of these trends in Religion Clause jurisprudence, see *supra* notes 27–116 and accompanying text.

219. *See Lee*, 505 U.S. at 587 (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984)) (striking proper constitutional balance between Religion Clauses' interclausal tension).

220. *See* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (citing Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen, 392 U.S. 236, 243 (1968)) (laying out second prong that not only protects against advancement of religion but also, importantly and masterfully, against inhibition thereof). A partial solution to this conundrum may be found in the related work of a legal scholar who recently explored how members of minority religious groups have sought to take advantage of the Court's significant and sustained erosion of the Establishment Clause. *See* Jay Wexler, OUR NON-CHRISTIAN NATION (2019) (chronicling, *inter alia*, trip of author to Minnesota town that granted Satanists' petition to erect veterans' monument in town-established free speech zone on public land only to rescind by de-creating free speech

D. Sternal Angle: Applicability of Death Penalty Selectivity, Connecting Joints

Thus far, most of the distinctions herein have pitted the Religion Clauses against one another to highlight the disparity in emphasis between them.[221] However, there are another set of disparities perhaps more glaring and certainly more important.[222] The Court's death penalty stay docket is, here, revealing.[223] The same prejudices that have caused those who have been sentenced to death to receive from the Court disparate treatment on the basis of race and religion are unlikely to be absent when the Court decides other Religion Clause cases, which could be enforced in similarly disparate ways in a variety of contexts—including public school sports.[224]

If the Court's Religion Clauses jurisprudence as reflected in its death penalty stay docket is extended to other contexts, it should be expected that questions of Free Exercise in the realm of sports—like the one Coach Kennedy and those similarly situated can apparently raise—could be decided according to which religion one is seeking to exercise.[225] Similarly, questions about the Establishment Clause could come down to which religion the state is endorsing.[226] Students and teachers have previously been accorded a more expansive set of rights, or at least a more weighty measure of interests

---

zone after monument was commissioned and completed but before installation). Specifically, the scholar argued "non-Christians who want to participate in public life are right to push for access to the public square and should continue to demand their equal place there;" however, this does little—if not nothing—for those students not wishing to engage in public life and places an affirmative burden, here, on the parties with less power: students, especially non-Christian ones. *See id.* (arguing for civic inclusion of minority religions' practitioners).

221. For further discussion of the Religion Clauses' relationships to one another, see *supra* notes 184–187 and accompanying text.

222. For further discussion of potential disparities, see *supra* notes 149–165 and accompanying text.

223. For further discussion of the Court's death penalty stay docket, see *supra* notes 149–165 and accompanying text.

224. For further discussion of the disparate treatment on the basis of race and religion evinced by death penalty stay docket, see *supra* notes 149–165 and accompanying text.

225. *See* Murphy v. Collier, 139 S. Ct. 1475 (2019) (reversing denial of execution stay on Establishment Clause grounds for white Buddhist), *rev'd*, 919 F.3d 913 (5th Cir. 2019); Dunn v. Ray, 139 S. Ct. 661 (2019) (vacating execution stay on Establishment Clause grounds for Black Muslim), *rev'd*, 915 F.3d 689 (11th Cir. 2019).

226. *See id.* (illustrating religious disparities).

than those sentenced to death, so there is reason to believe the breadth of these disparities could be even greater here.[227]

Religion was not, however, the only dispositive disparity present in the Court's death penalty stay docket in the October 2018 Term; race, too, proved ostensibly dispositive.[228] Questions of Free Exercise, then, could turn on the race of the individual seeking to practice, and Establishment Clause cases could turn on what race the practitioners of the endorsed religion are as opposed to that of the challengers.[229] At least one member of the Court has recognized preferential treatment to some classes of litigants is present over others, specifically highlighting the Court's denial to consider Murphy's case, "where the risk of irreparable harm is the loss of life."[230] Later in the same case, one where the Court granted an emergency application to stay a district court's injunction on the Department of Homeland Security's "public charge rule," this same Justice explained how the Court's "concerns over quick decisions wither when prodded by the Government in far less compelling circumstances," noting this "disparity in treatment erodes the fair and balanced decision making process this Court must strive to protect."[231] If this pattern holds true for the Court's impending opportunity to reexamine *Smith* and subsequent application in the sports context, perhaps Christian coaches will be more successful in asserting Free Exercise claims or white athletes more successful in their Establishment Clause claims; Murphy's and Ray's cases foreshadow

227. *Compare* Tinker v. Des Moines Ind. Sch. Dist., 393 U.S. 503, 506 (1969) (including students and teachers in group who do not forgo rights by being in school), *with Ray*, 139 S. Ct. 661 (vacating stay of execution that was based on Establishment Clause claim of man refused presence of his spiritual advisor in execution chamber). This would not be the Court's first foray into preying on the vulnerable; rather, such a continued erosion of rights for society's most vulnerable would be par for the course for the post-Warren Supreme Court. *See* Adam Cohen, *Supreme Inequality: The Supreme Court's Fifty-Year Battle for a More Unjust America*, (2020) (arguing, since 1969, Supreme Court has lurched toward big money interests and away from liberty and equality for already susceptible populations).

228. *See Murphy*, 139 S. Ct. 1475 (reversing denial of execution stay on Establishment Clause grounds for white Buddhist); *Ray*, 139 S. Ct. 661 (vacating execution stay on Establishment Clause grounds for Black Muslim).

229. *Compare Murphy*, 139 S. Ct. 1475 (imposing stay on execution of white man), *with Ray*, 139 S. Ct. 661 (vacating Eleventh Circuit's stay on execution of similarly situated Black man).

230. *See* Wolf v. Cook Cty., Ill., 140 S. Ct. 681, 684 (2020) (Sotomayor, J., dissenting in denial of certiorari) (citing *Murphy*, 139 S. Ct. at 1481 (Alito, J., dissenting from grant of stay)); *Ray*, 139 S. Ct. 661) (contrasting Court's permissive stance on Government's stay applications with its much less permissive one, generally, and even more intolerant one for capital defendants).

231. *Id.* (Sotomayor, J., dissenting in denial of certiorari) (analyzing Court's response to Government's application for emergency review over "20-year status quo in one State" here with Court's response to execution stay applications).

this potential disparate treatment on the basis of religion and race.[232]

IV. FIBROUS JOINTS: AN UNBENDING CONCLUSION

Four members of the Supreme Court have telegraphed their belief that the Court is ready to both narrow the Establishment Clause and broaden the Free Exercise Clause.[233] If this happens, student-athletes, coaches, and administrators alike will enjoy greater Free Exercise latitude—a benefit only to those who are religious—and lessened Establishment Clause protections—a detriment to all those who are not of the state's endorsed religion.[234] For Coach Kennedy, this would mean his public, post-game, midfield prayers may be reinstated due to increased protection for some by the expanded Free Exercise Clause.[235] For Bremerton School District, this would mean looser regulations due to diminished fear of Establishment Clause suits.[236] However, when coaches are practicing a religion other than the most prominent or politically acceptable one in a community or the coach is not white, will the Court be as sympathetic?[237] When *Ray*'s and *Murphy*'s cases are juxtaposed, it would appear not.[238]

232. For a further discussion of *Ray* and *Murphy*, see *supra* notes 149–165 and accompanying text. These two cases also foreshadow the grave consequences that can flow therefrom. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 641 (1943) ("Those who begin coercive elimination of dissent soon find themselves exterminating dissenters.").

233. *See* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067 (2019) (narrowing Establishment Clause and signaling willingness of at least four to go further); Kennedy v. Bremerton Sch. Dist., 139 S. Ct. 634, 637 (2019) (Alito, J., concurring in denial of certiorari, joined by Thomas, Gorsuch, and Kavanaugh, JJ.) (illustrating readiness to expand Free Exercise Clause even further).

234. For further discussion of the effect of these trends on student-athletes, coaches, and administrators, see *supra* notes 171–218 and accompanying text.

235. For further discussion of Coach Kennedy's case, see *supra* notes 123–139 and accompanying text.

236. For further discussion of effect on Bremerton School District and other administrators, see *supra* notes 199–210.

237. For further discussion of potential disparities, see *supra* notes 149–165 and accompanying text. Recall, this majoritarian tyranny was exactly that against which the *Barnette* Court warned was the antithesis of the Religion Clauses: "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *Barnette*, 319 U.S. at 638.

238. For further discussion of *Ray* and *Murphy*, see *supra* notes 149–165 and accompanying text. The Court has warned against the "compulsory unification" towards which these cases help illustrate it now trends; it should, here, heed its own, grave warning: "Compulsory unification of opinion achieves only the unanimity of the graveyard." *Barnette*, 319 U.S. at 641 (explaining why national unity justification for compulsion in Court's decision of Minersville School District v. Gobitis,

How far is the Court willing to broaden the Free Exercise Clause—just wide enough to let Christians in and no more?[239] How far is the Court willing to narrow the Establishment Clause—just too narrow for a forty-foot tall Latin cross and no more?[240] For Coach Kennedy, the student-athletes he coached, Bremerton School District, and all student-athletes, coaches, and public-school administrators throughout the country of any or no religion at all and of any race to be equally and adequately protected by the Religion Clauses, Free Exercise must apply to more than Christian coaches, Establishment must apply to Christian symbols, and student-athletes—including those coached by Coach Kennedy—must not be forced to "shed their constitutional rights . . . at the [stadium] gate."[241]

*Samuel England**

---

310 U.S. 586 (1940) is constitutionally impermissible). It also derived a "lesson" from "such attempts to compel coherence" in such a matter: "ultimate futility." *See id.* (pointing to maligned efforts of Roman Empire's anti-Christian actions, the Inquisition, and Russian state's exiles to Siberia as evidence of compulsion's "ultimate futility").

239. *See, e.g.*, Kennedy v. Bremerton Sch. Dist., 139 S. Ct. 634, 637 (2019) (Alito, J., concurring in denial of certiorari, joined by Thomas, Gorsuch, and Kavanaugh, JJ.) (signaling willingness to allow for continuation of Christian prayers). This Free-Exercise-for-me-but-not-for-thee conception of the Religion Clauses stands in contravention to how the Court had traditionally viewed the Free Exercise Clause: "While the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to anyone, it has never meant that a majority could use the machinery of the State to practice its beliefs." *See* Sch. Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203, 226 (1963).

240. *See, e.g.*, Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067 (2019) (permitting monument in shape of Christian symbol).

241. *See* Tinker v. Des Moines Ind. Sch. Dist., 393 U.S. 503, 506, 512–13 (1969) (making analogous claim about "schoolhouse gate"; extending students' rights beyond classroom to include "on the playing field"). For further discussion of normative claims, see *supra* notes 184–187 and accompanying text.

* J.D. Candidate, 2020, Villanova University Charles Widger School of Law; B.A., 2017, University of Tennessee. This Comment is dedicated to my great-grandparents, Allyene and Roy, without whom none of this would have been possible as well as to the rest of my family whose love knows no limiting principles. I am also grateful to the staff of the *Jeffrey S. Moorad Sports Law Journal* for their feedback throughout the editing and publication process.