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KENNEDY V. BREMERTON SCHOOL DISTRICT:
A TOUCHDOWN AND A VICTORY FOR ESTABLISHMENT
CLAUSE JURISPRUDENCE

I. PRE-GAME INTRODUCTIONS

Prayer has traditionally been a part of American life, including sports.\(^1\) American football specifically has been known to have a robust history and tradition involving religious practices.\(^2\) This continues today.\(^3\) However, in the 1960s, legal challenges began to mount against religious practices in schools and other public places.\(^4\) Over the next few decades, the Supreme Court decided many cases that limited these practices, while trying to strike a balance between the Free Speech, Free Exercise, and Establishment Clauses of the

\(^1\) See Alex R. Utrup, A Coach’s Fight to Pray: A Public High School Coach’s Case Involving the First Amendment, 31 Marq. Sports L. Rev. 325, 328–330 (2021) (discussing history of First Amendment and public religious practice in America, including that prayer in schools in United States was normal prior to 1960s and that school sports often involve prayers by player and coaches); see also John J. Miller, Khalil Lee, \& Christina L. L. Martin, An Analysis of Interscholastic Athletic Directors’ Religious Values and Practices on Pregame Prayer in Southeastern United States: A Case Study, 23 J. Legal Aspects Sport 91, 91 (2013) (stating school sports in United States have been strongly associated with Christian practices for many years).

\(^2\) See Miller et al., supra note 1, at 92 (providing data showing pre-game prayer is practiced publicly at American football games more than any other sport). The study cited by the authors found that forty percent of respondents claimed football games began with prayer and found that more than fifty percent of football coaches participated in prayer with their players. See id. at 92–94 (reporting survey and study results regarding prayer in certain types of sports).


\(^4\) See Utrup, supra note 1, at 328 (explaining legal events occurred in 1960s in regard to prayer in public schools, specifically discussing Engel v. Vitale, 370 U.S. 421 (1962)). In Engel, a New York school district required a specific prayer to be said aloud in the classroom on every school day. See id. (reciting specifics of school prayer that was basis of Engel). Parents of ten students brought a legal challenge against the practice as unconstitutional, and the Supreme Court held the practice inconsistent with the Establishment Clause. See id. (discussing factual details of Engel and holding). After Engel, the Court decided two more school prayer cases, Sch. Dis. of Abington Twp. v. Schempp and Wallace v. Jaffree, each time striking down religious exercises or prayers occurring in public schools. See id. at 329 (describing school prayer cases where Supreme Court decided public school prayer was unconstitutional).
First Amendment. Despite these decisions, confusion continued to exist around religious expression and First Amendment rights. Multiple circuit splits developed over time, specifically in Establishment Clause cases, that required the Supreme Court to intervene often. Even after resolving these splits, courts and schools made conflicting decisions in similar scenarios. The Court’s recent decision in *Kennedy v. Bremerton Sch. Dist.* addressed some of the uncertainty that was created by prior opinions. Specifically, it abandoned the *Lemon* test in Establishment Clause cases and allowed for religious expression during public sporting events by individuals acting in a private capacity.

This Casenote articulates the Supreme Court’s recent holding in *Kennedy v. Bremerton Sch. Dist.* It first lays out the background of legal precedent, statutes, and history that played a role in *Kennedy*. Then, it analyzes and discusses the arguments and potential legal impact of the *Kennedy* decision. Finally, this Casenote examines the potential future effects of the holding in *Kennedy*.

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5. See id. at 329–31 (examining Supreme Court Cases from 1960s-2000s dealing with First Amendment issues involving public prayer). The author specifically discusses in detail *Wallace v. Jeffree, Sch. Dist. Of Abbington, Twp v. Schempp*, and *Santa Fe Indp. Sch. Dist. v. Doe*. See id. (explaining background of cases on prayer in public schools). In the analysis, the author explains that the *Wallace* Court struck down a law allowing teachers to hold a minute of silence during school for prayer or meditation. See id. at 328 (providing specific facts of *Wallace* and Court’s decision).


7. See Karthik Ravishankar, *The Establishment Clause’s Hydra: The Lemon Test in the Circuit Courts*, 41 UNIV. DAYTON L. REV. 262, 266–94 (2016) (discussing application of *Lemon* test in Establishment Clause cases about legislative prayer, school prayer, limited public forums, school funding, religious displays, and Ten Commandments where circuit splits eventually developed, in some cases, multiple times).

8. See id. at 275–77 (reporting school prayer Establishment Clause circuit splits, resolved by *Lee v. Weisman* decision and later, by *Santa Fe* decision, followed by continued confusion about test which applied to similar cases among lower courts).


10. See id. at 2416 (deciding case of public school football coach who prayed on-field after games).

11. See id. (holding public school football coach prayers on-field after games are protected by First Amendment when other coaches are free to engage in secular, private speech).

12. For further discussion of the Court’s holding in *Kennedy v. Bremerton*, see infra notes 69–75 and accompanying text.

13. For further discussion of the historical background of free speech and prayer in schools, see infra notes 76–149 and accompanying text.

14. For further discussion of the *Kennedy v. Bremerton* opinion, see infra notes 150–235 and accompanying text.

15. For further discussion of the potential impact of the *Kennedy v. Bremerton* decision, see infra notes 236–259 and accompanying text.
II. Coach Kennedy’s Midfield Prayers

A. Taking a Knee: The Chain of Events that Led to Coach Kennedy’s Suspension

In *Kennedy v. Bremerton Sch. Dist.*, the Supreme Court examined whether the Free Exercise and Free Speech Clauses of the First Amendment of the United States Constitution protected the on-field, post-game prayers of a public high school football coach.¹⁶ Joseph Kennedy became a football coach at Bremerton High School (“BHS”) in 2008.¹⁷ His role included acting as an assistant coach for the varsity team and as the head coach for junior varsity.¹⁸ Kennedy’s employment contract expired after each football season and documented that he was “to be a coach, mentor, and role model for the student athletes.”¹⁹ His job duties included completing supervisory responsibilities, adhering to school policies, communicating effectively, maintaining positive media relations, and conducting himself properly in public.²⁰

During his tenure as BHS football coach, Kennedy led pre-game locker room prayers and participated in post-game locker room

¹⁶. *See Kennedy*, 142 S. Ct. at 2415–27 (holding Free Exercise Clause and Free Speech Clause of First Amendment did protect Coach Kennedy’s religious expression of kneeling on field after games to give thanks and that Bremerton School District’s worries of Establishment Clause violation would not be enough to overcome Coach Kennedy’s First Amendment rights).


¹⁹. *See Kennedy*, 869 F.3d at 815–16 (noting details of Coach Kennedy’s football employment contract with Bremerton School District, which included formal job descriptions and additional responsibilities). Kennedy’s contract also included clauses where he agreed to “exhibit sportsmanlike conduct at all times” and which required him to agree that he was always being watched by others. *See id.* at 816 (expressing further details of Kennedy’s employment agreement with Bremerton School District).

²⁰. *See id.* at 816 (documenting Kennedy’s responsibilities as Bremerton School District employee were equivalent to that of any head coach and commanded Kennedy to strive “to create good athletes” and “good human beings,” to work with parents, and to obey all Rules of Conduct).
prayers with the coaches and players. Both of these practices were school traditions that existed prior to Kennedy’s arrival at BHS. Beginning in his first season, Kennedy also took a knee at the fifty-yard line to pray after games were over and both teams had shaken hands. According to Kennedy, his religious beliefs “required him to give thanks through prayer at the end of the game for the player’s accomplishments.” They also required that he do so on the same field where the game was played. These prayers usually lasted about thirty seconds, and were completed whilst Kennedy donned a BHS logo.

After a few games, some of the players voluntarily joined Kennedy in his prayers. As the season progressed, more people joined in prayer at midfield after games. This included most of the BHS football team and, at times, players from the opposing team. Eventually, Kennedy incorporated a short, motivational speech with

21. See id. (describing coach’s practices as they related to religion and his duties as football coach). Coach Kennedy reportedly led locker-room prayer prior to most, but not all games, and his religious beliefs did not require him to lead any of these prayers. See id. (providing further facts and details about Kennedy’s prayer).

22. See id. (reporting previously mentioned practices were followed as school tradition started before Kennedy began to work at Bremerton High School); see also Carter, supra note 18 (explaining Kennedy’s agreement that Bremerton traditional locker room prayer practice involved captive audience, but that he would stop).


24. See Kennedy v. Bremerton Sch. Dist., 443 F. Supp. 3d 1223, 1228 (W.D. Wash. 2020) (noting Kennedy’s post-game prayers at midfield were rooted in his Christian faith and required him to thank God for opportunity to be part of their lives). The court further explained that Kennedy had committed to these prayers after watching the 2006 film *Facing the Giants*. See id. (providing further detail into Kennedy’s prayer practice).

25. See Kennedy, 869 F.3d at 816 (adding further reason why Kennedy’s religious practice after games had to occur in manner it did).

26. See id. (noting additional pertinent details about manner and circumstances surrounding Kennedy’s post-game, midfield, prayers, including Kennedy’s BHS shirt or jacket attire).

27. See id. (explaining that after few games in Kennedy’s first season as coach, football players from his team began to join him). Prior to joining Kennedy in the fifty-yard line prayers, these players asked him if they could do so. See id. (noting players’ responses to Kennedy’s prayer practice). Kennedy replied that they could do what they wished. See id. (restating discussion between Kennedy and his players).


29. See Kennedy, 869 F.3d at 816 (noting Kennedy’s post-game prayer practice sometimes included players and coaches from other team); see also Seymour & Henry, supra note 28 (detailing game where opposing team, Klahowya, joined prayer and Klahowya player voluntarily lifted helmet for Kennedy to use in his
his prayer, which included religious references, all while holding up a helmet from each team.  

In 2015, an employee from another school district mentioned Kennedy’s prayer practice to a Bremerton School District (“BSD” or the “School District”) administrator, which led the School District to initiate an investigation.  

Subsequently, on September 17, 2015, BSD sent Kennedy a letter about his conduct.  

This letter explained that BSD recognized the well-intentioned nature of his prayers and the lack of encouragement of participation from others.  

However, the School District also noted that his practices were problematic under the Establishment Clause.  

Specifically, BSD requested that Kennedy make the content of his talks purely secular, and that he pray in a manner that was physically separate from the students and that did not interfere with his job responsibilities.  

After receiving the School District’s letter, Kennedy gave secular motivational speeches after games and stopped leading locker room prayers.  

He continued to pray post-game at the fifty-yard line, but did so once everyone had left the field.  

The coach complied with prayer).  In an interview after this game, Kennedy said that “he could not bear to turn the student down.”  

30. See Kennedy, 869 F.3d at 816 (reporting Kennedy, at certain games, gave motivational speeches while engaging in his after-game prayer practice).  

31. See id. at 816–17 (documenting Bremerton School District inquiry into whether Kennedy was following school policy).  The court noted that Kennedy cooperated with the school during this time and that the school realized a lack of instruction for the coaches on the School District’s policy existed.  

32. See id. at 817 (detailing Kennedy was sent letter from BSD superintendent on this date to explain School District’s policy); see also Carter, supra note 18 (reporting BSD Superintendent Aaron Leavell wrote letter to Kennedy on September 17, 2015, explaining need to cease post-game fifty-yard line prayer practice).  

33. See Kennedy, 869 F.3d at 817 (explaining contents of letter Kennedy received from School District).  The court also reported that BSD noted Kennedy as cooperative and candid throughout the process.  

34. See id. (providing details on BSD communications with Kennedy).  

35. See id. (describing in detail additional statements provided in letter Kennedy received from School District); see also Carter, supra note 18 (outlining further explanation from Superintendent Leavell that Kennedy’s practices were “exposing the [D]istrict to significant risk of liability”).  

36. See Kennedy, 869 F.3d at 817 (documenting changes Kennedy needed to make in his prayer conduct and underlying reasoning for these changes).  

The superintendent explained that the talks needed to be secular to avoid alienating individuals and also discussed the need to avoid perception that BSD was endorsing any specific religious activity or beliefs.  

37. See id. (delineating BSD’s specific requests of Kennedy).  

38. See id. (noting changes Kennedy made to his religious practices before and after football games of which he acted as coach, including making no remarks about religion or faith after receiving initial letter).  

39. See id. (describing game on September 18, 2015, where Kennedy prayed at fifty-yard line after everyone had left stadium, which staved off BSD’s fears of crowd swarming field to pray with him).
the School District’s original letter in this manner for a few weeks. However, on October 14, 2015, his attorney sent a letter to the school, requesting a religious accommodation to continue to practice his post-game prayer at the fifty-yard line, as he had previously done. The letter also stated that he would restart this practice at the next game.

On October 23, 2015, the School District replied to Kennedy’s letter, thanking him for his attempts to comply with their requirements, but explaining that he was still violating the school policy. At this time, a religious accommodation, allowing him to pray after games in a private space, was provided. Kennedy continued to pray at midfield after games on October 23 and 26. On October 28, 2015, the School District sent another letter to Kennedy, placing him on leave for continuing to violate the policy. While on leave, Kennedy could not participate in BHS football, but could attend games as a member of the public.

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38. See id. at 818 (explaining Kennedy temporarily stopped praying while students were around and he complied for several weeks); see also Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2417 (writing about Kennedy’s reason for abandoning his prayer practice, noting he felt pressured to do so and felt he had “broken his commitment to God”).

39. See Kennedy, 869 F.3d at 818 (detailing contents of letter sent by Kennedy’s lawyer to District).

40. See id. (noting letter sent by Kennedy’s lawyer also included declaration he would begin his prayer once again, despite their requests); see also Hanna, supra note 17 (documenting Kennedy and his lawyer’s statements that they had attempted to meet with school administration regarding letter and were refused). BSD only allowed an hour and a half phone call between lawyers which subsequently resulted in the next letter from BSD. See id. (noting BSD negotiating procedure).

41. See Kennedy, 869 F.3d at 818–19 (reiterating contents of Bremerton School District’s reply letter to Kennedy).

42. See id. at 819 (explaining religious accommodation BSD offered to Kennedy). Instead of agreeing to provide Kennedy with the accommodation he requested, the School District offered a private, indoor location near the field that could be available for a brief period after games for Kennedy to pray in. See id. (reporting specifics of BSD’s accommodation offering).

43. See id. (noting Kennedy prayed at fifty-yard line after two games in view of public and his team). Kennedy’s lawyers had previously responded to the School District’s second letter through the media, stating that the only acceptable accommodation was the one they had requested. See id. (noting method of communication between parties to situation).


45. See Kennedy, 869 F.3d at 820 (noting repercussions Kennedy experienced for being placed on administrative leave). While on leave, Kennedy attended a football game as a member of the public and prayed in the bleachers. See id. (reporting Kennedy’s post-leave attendance); see also School District Takes Action Against Praying Football Coach, supra note 44 (writing Kennedy continued to be paid while on leave,
The BHS football players did not pray at midfield after Kennedy was placed on leave.46 Once the 2015 season ended, the School District began its usual practice reviewing applications for coaches for the next season.47 While Kennedy had previously participated in this review, and had received positive assessments, he elected not to participate this time.48 The athletic director also suggested that Kennedy not be rehired due to his actions the previous season.49


Kennedy brought an action against Bremerton School District in the Western District of Washington (the “District Court”) in 2016, claiming that BSD violated his rights under the First Amendment and Title VII of the Civil Rights Act of 1964.50 He then moved for a preliminary injunction against Bremerton School District.51 If granted, the injunction would have required the School District to stop discriminating against Kennedy based on his religion, to reinstate him as a football coach, and to allow him to kneel at midfield for post-game prayers.52 The District Court, however, denied this motion, and determined that Kennedy spoke as a public employee...
when he prayed after games. The court also ruled that the School District’s conduct was justified, as it was necessary to avoid a violation of the Establishment Clause.

Kennedy appealed this decision to the Ninth Circuit, which affirmed the lower court’s ruling. The Ninth Circuit agreed that Kennedy spoke as a public employee when he prayed on the field. It reasoned that this fact made it unlikely for Kennedy to succeed on the merits of his First Amendment claim, which was necessary to support his preliminary injunction.

Subsequently, he petitioned the Ninth Circuit for rehearing en banc, and this request was denied. Following this denial, Kennedy petitioned the Supreme Court for a writ of certiorari. The Supreme Court denied this petition. It explained that “unresolved factual questions” prevented the Court from deciding the free speech issue. In a concurrence, Justice Alito noted that the Court’s denial did not equate to agreement with the Ninth Circuit’s decision or opinion.

53. See id. (noting procedural history of Kennedy’s case and original holding of Western District of Washington).
54. See id. (explaining further District Court’s holding in its denial of preliminary injunction).
55. See id. at 815 (documenting Kennedy’s appeal from District Court, filed on October 3, 2016 and recording Ninth Circuit’s holding on appeal from Western District of Washington).
56. See id. at 822 (analyzing Coach Kennedy’s post-game prayer in front of students and parents under Pickering-Garcetti framework to determine whether he spoke as public or private employee).
57. See id. at 831–32 (holding Kennedy could not succeed on merit of First Amendment retaliation claims because of public employee speech status).
58. See Kennedy v. Bremerton Sch. Dist., 880 F.3d 1097, 1097 (9th Cir. 2018) (documenting vote was taken among Ninth Circuit judges, resulting in majority vote not to grant request for rehearing en banc).
60. See id. (denying Kennedy’s petition for writ of certiorari).
61. See id. at 635 (Alito, J., concurring) (explaining unresolved factual questions regarding free speech issue in case would make case impossible to resolve in current state, as reason for Court’s denial of certiorari). Justice Alito further explained that both the District Court and Ninth Circuit should have made a finding about what Coach Kennedy was likely able to show regarding the reason(s) for his loss of employment. See id. (quoting Justice Alito’s concurrence). Specifically, the Court needed to determine whether he was discharged for neglect of his duties, or whether he was even on duty at the time of his prayer practice. See id. at 635–36 (concurring in judgment to explain reasons for denial).
62. See id. at 635 (arguing Court’s denial was not because it agreed with Ninth Circuit reasoning and providing argument to support notion Kennedy spoke as private citizen). Justice Alito further explained that the Ninth Circuit’s opinion was imprecise on the critical point of why Coach Kennedy lost his job. See id. at 636 (explaining Ninth Circuit’s lack of determining specific reason Kennedy lost his job by listing all of his prayer activities over multiple year period). Additionally, the Justice argued that the Ninth Circuit’s understanding of free speech rights was troubling. See id. at 636 (explaining argument against elements of Ninth Circuit decision).
The case returned to the District Court following the Supreme Court’s denial of certiorari. Both Kennedy and Bremerton School District moved for summary judgment, with the court granting the School District’s motion. The court held that public schools can stop their coaches from praying at the fifty yard line of the football field directly after a game. Kennedy appealed this decision to the Ninth Circuit, which affirmed the Western District of Washington’s holding. The Ninth Circuit’s reasoning was similar to that of the lower court. He then petitioned the court again for rehearing en banc and his petition was denied.

C. The Supreme Court Grants Certiorari

The Supreme Court granted certiorari in January 2022. In its final decision released that June, the Court reversed the decision of the Ninth Circuit and remanded the case for further proceedings consistent with its holding. The Court held that the Free Exercise and Free Speech Clauses of the First Amendment protected Kennedy’s religious expression of on-field, post-game, prayers as a public high school football coach. Specifically, the Court determined that Bremerton School District’s policy targeted Kennedy’s sincere religious practice and was not neutral or generally applicable, thus violating the Free Exercise Clause. It also held that the School District had violated the Free Speech Clause, and thus

63. See Kennedy v. Bremerton Sch. Dist., 443 F. Supp. 3d 1223, 1227 (W.D. Wash. 2020) (reporting both parties had made motions for summary judgment following Supreme Court’s denial of certiorari).

64. See id. at 1227–28 (documenting actions taken and arguments made by each party following Supreme Court’s denial of certiorari).

65. See id. at 1245 (noting court’s conclusion and holding of case).

66. See Kennedy v. Bremerton Sch. Dist., 991 F.3d 1004, 1010 (9th Cir. 2021) (documenting coach had appealed from prior decision and holding public schools can stop coaches from praying at fifty-yard line of football field directly after game).

67. See id. at 1015–22 (explaining coach was speaking as public employee when he was praying at midfield after games and school district had adequate justification for treating Kennedy differently than other members of public).

68. See Kennedy v. Bremerton Sch. Dist., 4 F.4th 910, 911 (9th Cir. 2021) (reporting this petition for rehearing en banc failed to receive majority of vote, which is necessary to grant petition).


71. See id. at 2415–16 (holding Free Exercise and Free Speech Clauses of First Amendment protected Kennedy’s religious expression).

72. See id. at 2422 (deciding Bremerton School District’s policy targeted Kennedy’s sincere religious practice and was not neutral or generally applicable, requirements for Free Exercise claims).
violated Kennedy’s rights, because his prayers were private speech.\footnote{73} In regard to the Establishment Clause, the Court noted that it does not “require the government to single out private religious speech for special disfavor.”\footnote{74} It further determined that courts will not evaluate Establishment Clause cases by the Lemon test, rather courts will assess these cases through the lens of historical practices and understandings.\footnote{75}

III. Background

A. The History of Prayer in Sports

Prayer and religion have historically been a part of the American culture.\footnote{76} Sports in the U.S. are no exception to this history.\footnote{77} Pre-game and post-game prayers have traditionally been a part of sporting events nationwide.\footnote{78} Teams, players, coaches, and fans often engage in some form of religious practice during competitions, at both private and public school events, and at high school, college, and professional levels.\footnote{79} While these practices occur at events across different types of sports, American football has a particularly strong

\footnotesize{73. See id. at 2424 (holding School District violated Free Speech Clause because Kennedy’s silent, post-game, individual prayers were private speech).

74. See id. at 2416 (proclaiming Establishment Clause meaning and determining School District did not have adequate justification to curtain Kennedy’s expression).

75. See id. at 2428 (holding test set out in Lemon had long since been abandoned and new standard for reviewing Establishment Clause cases is to evaluate lens of historical practices and understandings).

76. See Gil Fried & Lisa Bradley, Applying the First Amendment to Prayer in a Public University Locker Room: An Athlete’s and Coach’s Perspective, 4 Marq. Sports L. J. 301, 321 (1994) (explaining most athletes are familiar with traditional pre-game prayers, specifically in locker room); see also Utrup, supra note 1, at 328 (explaining history of First Amendment and history of prayer being accepted practice in U.S. public schools prior to 1960).

77. See Fried & Bradley, supra note 76, at 301 (noting most athletes participate in pre-game prayers, often due to habit or ritual).

78. See id. at 302 (arguing pre-game prayers occur regularly at universities and public high schools in United States); see also Nicole Yang, supra note 3 (discussing pre-game and post-game prayer traditions of National Football League teams).

79. See Miller et al., supra note 1 at 91 (discussing prevalence of religion and prayer in sports). Studies reported that fifty percent of Southern high school athletic directors participated in prayer, while twenty-five percent participated in the Midwest and twenty-three percent participated in the West. See id. at 92 (examining differences in sports prayer across different U.S. regions); see also Fried & Bradley, supra note 76, at 302-08 (mentioning practice of prayer in sports in elementary, middle, and high schools, as well as colleges and professionally); see also Green, supra note 6 (discussing public and private school sports in relation to prayer-activity and noting pre-game prayers at private school events have consistently been upheld by courts).}
history of including prayer and religion within its traditions. The “hail Mary” pass and the act of taping one’s wrist and drawing a cross for religious reference on it, are just two of these commonly known football traditions. Even within the National Football League, the post-game tradition of kneeling in a circle to pray and thank God continues to this day.

Although the inclusion of prayer and religion in sports seems largely engrained in our society, many disputes have arisen in recent years as to the constitutionality of these practices. Prayer at public school sporting events is a particularly contentious topic. Prior to the 1960s, prayer in public school was a relatively normal occurrence, even when led by teachers or administrators. However, the landmark Supreme Court case Engel v. Vitale challenged these practices. In Engel, and then later in School District of Abington Township v. Schempp, the Court determined that the state may not promote prayer in public schools under the Establishment Clause. The decisions in Engel and Schempp were followed by a line of cases that gave

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80. See Miller et al., supra note 1, at 92 (finding football was sport most likely to involve pre-game prayer, with basketball coming in second place). Studies reportedly found that forty percent of respondents indicated that football had pre-game prayers and five percent indicated that basketball games did. See id. (reporting percentage of respondents in survey who responded for each sport as having prayer prior to competitions).

81. See id. at 91 (examining religious expressions commonly known to occur in football); see also Here’s the history of the NFL’s ‘Hail Mary’ pass on its 41st Anniversary, ABC7 (Dec. 28, 2016), https://abc7ny.com/hail-mary-football-pass-doug-flutie/1138071/ [https://perma.cc/EEL5-WFWD] (defining “Hail Mary” pass as end of game, last second attempt of losing team to win football game).

82. See Yang, supra note 3 (documenting interview of football players from Patriot’s team, who explained groups have been meeting at midfield after Patriot’s games to pray for as long as he can remember).

83. See Green, supra note 6 (noting prayer and religion related-activities involving sports at high schools have led to “dozens of disputes” each year across United States, leading to court cases in multiple states and tension between two conflicting viewpoints regarding constitutionality of prayer in public schools).

84. See id. (noting four major legal disputes arising, from December 2015 to February 2016, involving prayer public high school sport).

85. See Utrup, supra note 1, at 328 (explaining history of prayer in schools, including prior to Engel, prayer was commonly led by teachers in public schools and this practice was not challenged for many years). For instance, in Engel, the prayer practice challenged by parents was a state-developed prayer read by teachers to students in class each day. See id. (reciting specific details of Engel case).


87. See id. at 423 (documenting parent challenge against school prayer was opposed to their religious beliefs).


89. See Engel, 370 U.S. at 422–24 (holding recitation of daily prayer in public school, recommended by New York State Board of Regents, was inconsistent with Establishment Clause); see also Schempp, 374 U.S. at 223 (ruling requirement of reading Holy Bible verses during school day at public schools violates Establishment Clause).
much leeway to public school policies that attempted to avoid First Amendment violations.\textsuperscript{90} The original school prayer cases were extended in the decades following the 1960s.\textsuperscript{91} Wallace v. Jaffree\textsuperscript{92} found an Alabama law that required a moment of silence in public schools unconstitutional, while Stone v. Graham\textsuperscript{93} struck down a Kentucky law that instructed schools to post a copy of the Ten Commandments on classroom walls.\textsuperscript{94} Later, Lee v. Weisman\textsuperscript{95} decided that public school graduations could not host religious prayers, and Santa Fe Independent School District v. Doe\textsuperscript{96} held that student led and initiated prayer at public high school football games violated the Establishment Clause.\textsuperscript{97}

Despite these decisions, confusion regarding what was acceptable expression in schools and school sports continued.\textsuperscript{98} Many schools even continued their practices knowing that they conflicted with the Court’s holdings.\textsuperscript{99} In the early 2000s, the United States Department of Education produced a policy providing “guidance on constitutionally protected prayer in public elementary and

\textsuperscript{90} See Utrup, supra note 1, at 326 (noting courts have previously given public schools leeway with policies to avoid Establishment Clause infringement even when rights of coaches were being infringed, policies which continued through 2021, and included courts allowing coaches’ free speech and free exercise rights to be constrained by schools if coaches were on duty).


\textsuperscript{94} See Wallace, 472 U.S. at 41–42, 60 (holding Alabama law authorizing one minute silence for meditation or prayer in public schools inconsistent with Constitution); see also Stone, 449 U.S. at 40 (ruling Kentucky law requiring Ten Commandment postings on walls of every public school classroom to be unconstitutional).


\textsuperscript{97} See Lee, 505 U.S. at 586 (holding allowance of clergy members to offer graduation invocation prayers at public schools was inconsistent with First Amendment); see also Santa Fe, 530 U.S. at 294–301 (holding student prayer given over public address system before public school varsity football games violated Establishment Clause).

\textsuperscript{98} See Green, supra note 6 (mentioning confusion existed regarding what level of prayer was allowed at public school sporting events and that this confusion gave rise to Department of Education producing guiding material).

\textsuperscript{99} See id. (reporting some school sports events have continued to include prayer); see also Miller et al., supra note 1, at 93 (finding many public schools, especially in Southern United States, continued to have some level of prayer in their sporting events).
These guidelines did not quiet national debate regarding prayer in sports. In 2000, the Court decided *Santa Fe*, a case centered on prayer at public varsity high school football games. This case was followed by several other sports prayer cases within the circuit courts. The Supreme Court later decided *Garcetti v. Ceballos* and *Town of Greece v. Galloway*, which dealt with public speech of government employees, public prayer, and religious expression.

**B. First Amendment Precedent**

The First Amendment of the United States Constitution includes the Free Exercise, Free Speech, and Establishment Clauses. The Free Exercise Clause states that “Congress shall make no law . . . prohibiting the free exercise” of religion. The Free Speech Clause provides that “Congress shall make no law . . . abridging the freedom of speech.” Finally, the Establishment Clause declares that “Congress shall make no law respecting an establishment of religion.”

Under the Free Exercise Clause, a plaintiff must prove that their free exercise of religion has been burdened in some way in order to establish a violation. One way to prove that the government has violated this right is to show one’s sincerely held religious beliefs have been burdened under a policy that is not neutral or generally

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100. See Green, supra note 6 (discussing Department of Education’s response to uncertainty among public schools about what level and type of prayer was allowed at events).
101. See Santa Fe, 530 U.S. at 294 (deciding case where prayer was given over announcement system at school football games).
102. See id. (describing practice of giving prayers over intercom system at varsity football games was challenged in court).
103. See Utrup, supra note 1, at 331–33 (listing and explaining multiple cases in circuit courts, including Borden v. Sch. Dist., Doe v. Duncanville Indp. Sch. Dist. and Jonson v. Poway Unified Sch. Dist.).
106. See Garcetti, 547 U.S. at 421 (holding public employee statements made while performing official duties were not protected First Amendment speech); see also Town of Greece, 572 U.S. at 570 (holding prayer used to open town board meetings did not violate Constitution).
108. See id. (quoting Free Exercise Clause).
109. See id. (quoting Free Speech Clause).
110. See id. (quoting Establishment Clause).
applicable. If a plaintiff can prove this, the government must overcome strict scrutiny by showing that it had a compelling state interest in the policy and that the policy was narrowly tailored to meet this interest. A free exercise violation can also be shown through proof of “official expressions of hostility” towards religion in addition to policies that burden religious exercise.

When it comes to the Free Speech Clause there are multiple potential analyses depending on the specifics of the case. The test utilized in the analysis of free speech claims as they relate to government employees is the Pickering-Garcetti test. In the first part of this test, the court analyzes the nature of the employee’s speech, including whether the individual is speaking in a government capacity or as a private citizen. The second part of the test is a balancing act that looks at and compares the interests of the employee in the speech and the interests of the government. If an employee’s speech is made “pursuant to [one’s] official duties,” then it is not protected speech under the First Amendment. However, if the speech is made by one if their private capacity, then it will be entitled to protection.

Under the Establishment Clause, the test that was often employed to determine whether a law or policy properly upheld the wall of separation between church and state was the Lemon test. This three-step inquiry involved asking (1) does the law have a

112. See id. (explaining and applying decisions holding free exercise rights do not dispel obligations to follow neutral and generally applicable laws).

113. See Church of Lukumi Babalu v. City of Hialeah, 508 U.S. 520, 546 (1993) (discussing standard in free exercise cases requiring government to overcome strict scrutiny standard to uphold law is not neutral or generally applicable).


115. See Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2423 (2022) (explaining free speech protections for teachers and students exist but may not be without bound when speech at issue is of public-school teacher).

116. See id. (describing Court’s decisions in Pickering and Garcetti cases suggest two step analysis for cases dealing with free speech rights and government employees).

117. See id. (noting step one of Pickering-Garcetti free speech test requires analysis of whether public employee is producing speech in manner consistent with their official duties).

118. See id. (acknowledging step two of Pickering-Garcetti test balances competing interests with said speech, considering government’s interest in efficient public services).


120. Contra id. (noting type of speech not protected by First Amendment).

121. See Gabrielle Girgis, A Little-Noted Puzzle in Religion Law, Post-Bremerton, 2022 Harv. J.L. & PUB. POL’Y PER CURIAM 1, 2 (2022) (noting Lemon test was used for Establishment Clause violations but Kennedy put end to this practice).
secular legislative purpose, (2) is it the law’s primary effect to neither advance nor inhibit religion, and (3) does the law avoid causing excessive government entanglement with religion. If the answer to each question was yes, then there was no Establishment Clause violation.

In practice, this test led to varying results amongst the lower courts. Multiple circuit splits developed across different categories of Establishment Clause cases due to alternative applications of the Lemon test. The first split in school prayer cases developed between the First and Eleventh Circuits and the Sixth Circuit. The First and Eleventh Circuits applied Lemon to hold that prayer given by state actors at public graduation ceremonies violated the Establishment Clause, while the Sixth Circuit chose not to apply Lemon and held these prayers constitutional.

In Lee v. Weisman, the Supreme Court followed the First Circuit’s decision and held these prayers unconstitutional, but failed to apply the Lemon test.

In Weisman, the Court applied a different test, the Coercion test, to state-sponsored graduation prayers under the Establishment Clause and found as the First Circuit
Weisman decision, another split occurred in regards to student-initiated graduation prayers. The Third, Fifth, Sixth, and Ninth Circuits all held student-voted graduation prayers unconstitutional under the Lemon test, while the Third and Fifth Circuits held graduation prayers given by the students permissible. The Seventh Circuit also held graduation prayers constitutional under Lemon, but only in university settings. The Supreme Court “resolved” this split in its decision in Santa Fe, striking down student initiated prayer. However, confusion continued to exist over when and how to apply the Lemon test. Similar splits also occurred in Ten Commandment and legislative prayer cases.

Over time, the Lemon test was increasingly criticized and ignored by the Supreme Court. For instance, in a concurring opinion in Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist., Justice Scalia criticized the Lemon test for producing inconsistent results under the Establishment Clause. Later in Town of Greece, the Court analyzed legislative prayer through a historical lens, rather than through Lemon. Most recently, in American Legion v. American Humanist did, that this practice was unconstitutional. See id. (explaining Court’s decision in Weisman).

129. See id. (arguing Lee v. Weisman case led to confusion on whether Lemon test applied to prayer at school ceremonies, leading to new circuit split on student-initiated school prayer).
130. See id. (describing school prayer, Establishment Clause jurisprudence circuit splits, including split occurring after Lee v. Weisman decision between Third, Fifth, Sixth, Seventh, and Ninth Circuits on constitutionality of student prayer at public graduations).
131. See id. at 277 (explaining unclear test used by Seventh Circuit in ruling that limited Lee v. Weisman decision to prayer at primary and secondary school graduations, allowing non-sectarian prayer at university graduations).
133. See Ravishankar, supra note 7, at 277 (noting Santa Fe decision solved specific circuit split but did not “alleviate the confusion over which test to apply”).
134. See id. at 273–83 (describing history of additional categories of Establishment Clause cases and circuit splits developing over time in such categories, including Ten Commandment and legislative prayer cases).
135. See Girgis, supra note 121, at 1 (documenting that relevance of Lemon test had been reduced over years to point of practical abandonment in Supreme Court precedent).
137. See id. at 399 (Scalia, J., concurring) (contending scholars who criticized Lemon test for “crooked lines and wavering shapes its intermittent use has produced” were correct).
138. See Town of Greece v. Galloway, 572 U.S. 565, 569–70 (2014) (reversing previous decision and holding prayer by local, mostly Christian, clergy at town board meeting constitutional under Establishment Clause). The Court ignored the Lemon test in its analysis and instead described historical legislative practices in the United States in making this decision. See id. at 575–77 (referencing Congressional prayer as example of acceptable historical practice).
the Court held a World War One cross memorial located on public land as constitutional under the Establishment Clause focusing on “historical practices and understandings.” Choosing not to apply Lemon, multiple Justices wrote separately to instead call for this test to be overruled. Despite the Supreme Court’s shift away from the Lemon test, many lower courts continued to follow the test in analyzing Establishment Clause violations.

Prior to the Court’s decision in Kennedy, a circuit split specific to the application of the Lemon test in cases dealing with religious expression of school employees also existed. On one hand, the Eighth Circuit upheld a personal, framed display of psalms in a school administrators office, by ignoring the Lemon test and noting that it does not apply to all situations. On the other hand, the Ninth Circuit applied the Lemon test in holding a school employee’s private prayer unconstitutional.

In religious freedom cases, one or all of these clauses may be implicated. Oftentimes, when dealing with public schools, the Establishment Clause will be at play. When free exercise and speech claims are also made, a tension between the clauses can lead

140. See id. at 2074 (overruling Fourth Circuit to hold World War One cross memorial on public land constitutional under Establishment Clause). The majority opinion argued against using the Lemon test analysis due to issues it created in situations with memorials, monuments, and symbols, instead focusing largely on the history of the memorial and of the United States. See id. at 2074–82 (focusing analysis on length of time memorial existed and meaning of memorial).
142. See Girgis, supra note 121, at 1 (writing Court’s lack of explicitly overruling Lemon permitted lower courts to continue to use it in cases such as Shurtleff v. Bos.).
143. See Warnock v. Archer, 380 F.3d 1076, 1080–82 (8th Cir. 2004) (upholding personal religious display in school office of school employee as constitutional under Establishment Clause); see also Kennedy v. Bremerton Sch. Dist., 991 F.3d 1004, 1010 (9th Cir. 2021) (holding public schools can stop their employee coaches from praying at fifty-yard line of football field directly after game under Lemon test analysis).
144. See Warnock, 380 F.3d at 1080 (recounting Supreme Court Establishment Clause precedent and noting Lemon test has not been applied to all similar cases).
145. See Kennedy, 142 S. Ct. at 2427 (reporting Ninth Circuit followed District Court decision in applying Lemon test analysis to uphold BSD’s actions against Coach Kennedy).
147. See Engel, 370 U.S. at 424 (finding Establishment Clause violation in public school prayer case).
to a complex and confusing analysis.\textsuperscript{148} Discrepancies in the application of the three clauses have led to confusion in the doctrine of prayer in public schools over the last few decades.\textsuperscript{149}

IV. Post-Game Analysis

A. The Court’s Game Plan: The Majority Analyzes the Free Speech, Free Exercise, and Establishment Clauses

In \textit{Kennedy}, the Supreme Court analyzed the Free Speech, Free Exercise and Establishment Clauses of the First Amendment, alongside related Court precedents, to determine whether Bremerton School District violated Kennedy’s constitutional rights.\textsuperscript{150} First, the Court determined that Kennedy met his burden under the Free Exercise Clause.\textsuperscript{151} It reasoned that Kennedy showed that the government, in accordance with a policy that was not neutral or generally applicable, burdened his sincere religious practice.\textsuperscript{152} Once this was proven, the Court explained that the government carried the burden of satisfying strict scrutiny, or the Court would find a First Amendment violation.\textsuperscript{153} In Kennedy’s case, the Court made clear that his sincerely motivated religious exercise was undisputed.\textsuperscript{154}

The Court further found that the School District’s policy was not neutral or generally applicable, since it had admitted that

\begin{itemize}
  \item \textsuperscript{148} \textit{See} \textit{Kennedy}, 142 S. Ct. 2407, 2426 (explaining confusion has occurred in past cases when all religious clauses are at play and arguing this is not proper reading of said clauses).
  \item \textsuperscript{149} \textit{See id.} (describing relationship between First Amendment clauses provides for more harmony in cases dealing with multiple claims or clauses).
  \item \textsuperscript{150} \textit{See id.} at 2416–33 (2022) (holding Bremerton School District did violate Mr. Kennedy’s First Amendment rights).
  \item \textsuperscript{151} \textit{See id.} at 2421–22 (discussing standard of review under First Amendment, and providing in-depth explanation of importance of Free Exercise and Free Speech Clauses working together to doubly protect religious speech).
  \item \textsuperscript{152} \textit{See id.} (explaining ways plaintiff can prove government violated Free Exercise Clause, as determined in prior case law). The Court further explained that the Free Exercise Clause not only allows inward expression of faith but also the performance of physical acts related to this faith. \textit{See id.} at 2421 (describing full protections Free Exercise Clause provides in religious practice).
  \item \textsuperscript{153} \textit{See id.} at 2422 (reporting next step in process after plaintiff proves government violated Free Exercise Clause). In order for the government to pass strict scrutiny, they must prove that there was a compelling state interest and that the government’s policy was narrowly tailored. \textit{See id.} (explaining application of strict scrutiny test for Free Exercise Clause violations).
  \item \textsuperscript{154} \textit{See id.} (noting it was unquestioned Mr. Kennedy sought to engage in sincere religious practice, given Mr. Kennedy noted repeatedly his faith required him to give thanks after games). Mr. Kennedy specifically was quoted saying that his prayer required him to give “thanks through prayer” directly “on the playing field” after the games he coached. \textit{See id.} (explaining facts related to Mr. Kennedy’s prayer).
\end{itemize}
restrictions placed on Mr. Kennedy were at least in part due to religion. Specifically, the School District explained in a letter that it could not allow an employee to engage in religious conduct while on duty. This, the Court found, indicated that the School District intended to prohibit a religious practice, thus falling into the category of a non-neutral policy. In addition, the Court found that the School District’s policies failed to pass the general applicability test. The School District allowed other coaches to take personal calls or speak to friends after games, but did not allow Mr. Kennedy to pray during the same period. Therefore, any post-game policy that required supervision of players was not equally applied to secular and religious activities of coaches.

Next, the Court applied the Pickering-Garcetti framework to Kennedy’s free speech claim. Under this two-part test, the Court first found that Mr. Kennedy’s speech was private, not public. The Court here engaged in a comparison of the facts in Garcetti and Lane to those in Mr. Kennedy’s case. Through this analysis, it determined that Kennedy was not “engaged in speech ordinarily within the scope of his duties as coach” because, during the time he prayed, other coaches were allowed to partake in personal, secular

155. See id. (explaining School District admitted it disciplined Kennedy at least in part due to his religious expression, resulting in discrimination type known as discrimination on face of policy).

156. See id. at 2423 (quoting words from School District’s September 17, 2015 letter to Kennedy, which prohibited overt actions which may appear to others as endorsing student prayer).

157. See id. (noting prohibiting religious exercise was objective of School District, as School District specifically acknowledged this to be case by admitting its policies were not neutral towards religion).

158. See id. (describing general applicability test as applied to Mr. Kennedy and why he was placed on administrative leave).

159. See id. (outlining various practices other coaches engaged in while forgoing supervisory duties School District claimed Mr. Kennedy failed to do while working).

160. See id. (concluding School District, if it did have policy, did not properly apply it evenly across staff, as coaches were allowed to engage in their own private speech during so-called supervisory period, but Kennedy could not pray during same period).

161. See id. at 2423–24 (detailing Pickering and Garcetti test Court has created applying both cases to Free Speech violation claims).

162. See id. at 2424 (explaining Pickering-Garcetti test has two prongs and first prong here turns on whether Mr. Kennedy’s speech was public or private).

163. See id. (discussing facts and Court’s conclusions in Garcetti and Lane cases). Specifically, the Court noted the holdings of each case to compare to Mr. Kennedy’s situation. See id. (summarizing Court’s opinion in Garcetti and Lane cases). In Garcetti, a prosecutor’s internal memorandum to a supervisor was made as a part of his job duties, whereas in Lane, a public employer’s testimony about a government-employment related matter was private speech. See id. (providing side-by-side comparison of decisions in Garcetti and Lane).
speech. The Court also noted that the fact that Kennedy’s speech took place on the field, which can be considered “within the office environment,” was not a determinative factor. Additionally, the Court found that Kennedy was not speaking pursuant to government policy at the time he was praying. There was no “government-created message” that Kennedy was speaking to. Nor was he, at the time of prayer, “engaged in speech . . . the District paid him to produce as a coach.” As a result of these factors, the Court held that the substance and circumstances of Kennedy’s speech allowed for the conclusion that he did not pray while acting in the scope of his coaching job.

Thereafter, the Court rejected the Ninth Circuit’s argument that Kennedy worked as a role model and remained on duty after games, thus making his speech a part of his coaching role. Notably, it argued that this creates “excessively broad job description[s],” erroneously turning all speech of coaches at the workplace into government speech. The Court also mentioned that this argument ignores the fact that the School District conceded that the coach’s job description did allow for private secular activities after the game, explaining that his speech cannot be converted into government speech merely because he chose to spend his time praying.

The Court then moved to the second prong of the Pickering-Garcetti test, determining that the government’s interests do not outweigh Mr. Kennedy’s private speech rights on a matter of public concern. In fact, the Court explained that the School District cannot sustain its burden under strict scrutiny, or any lesser

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164. See id. at 2424–25 (reasoning Kennedy was not instructing players, discussing strategy, or performing other speech School District paid him to produce).

165. See id. at 2425 (proclaiming all that mattered here was whether prayers were offered in scope of Kennedy’s coaching duties, which they were not). Alternatively, circumstances and timing of Kennedy’s prayers were deemed important to analyzing whether they were private speech. See id. (analyzing prayer practice under Supreme Court precedent).

166. See id. (discussing further reasoning why Kennedy’s speech was private and not within his public, coaching job capacity).

167. See id. at 2424 (noting reasons Kennedy’s prayers did not “owe their existence” to government).

168. See id. (quoting Court’s additional reasoning for determining Kennedy’s speech to be private).

169. See id. at 2425 (determining, based on prior reasoning, Kennedy’s prayer was in private, not public, capacity).

170. See id. (mentioning Ninth Circuit and School District are correct to note coaches act as role models).

171. See id. (citing Garcetti to explain Ninth Circuit’s argument would prohibit Muslim teacher from wearing headscarf).

172. See id. (explaining further why School District’s argument fails).

173. See id. at 2425–26 (noting second part of Pickering-Garcetti test requires government to prove its interests outweigh those of its employees when dealing with private speech on matter of public concern).
Both sides in this case agreed that Kennedy’s speech dealt with matters of public concern. However, the School District argued that it had an interest in avoiding an Establishment Clause violation, which overpowered any rights that Kennedy had. The School District based this argument on an understanding that Establishment Clause violations occur when reasonable observers can conclude that the government endorsed religion. This understanding, which anchored on the Lemon analysis, resulted in the need to stop Mr. Kennedy’s speech in order to prevent observers from seeing his speech as an endorsement.

The Court refused to accept this argument for a number of reasons. First, it explained that the three clauses of the First Amendment – the Free Speech, Free Exercise, and Establishment Clauses – all read within the same sentence. This, it reasoned, indicated that they are not at odds, and instead, serve complementary purposes. Next, it provided an analysis of Lemon and its progeny, determining that the Lemon approach had been abandoned by the Court years ago. The Court pointed to prior case law noting the many shortcomings of Lemon, and then provided a different test for the Establishment Clause, which analyzes cases in “reference to historical practices and understandings.” This test, the Court explained, directs the focus of the analysis to original meaning and history so as to determine what level of conduct is allowed under the Establishment Clause.

Finally, the Court rejected the School District’s secondary arguments as to why the Establishment Clause trumps Kennedy’s free

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174. See id. at 2426 (reporting School District requested intermediate scrutiny or something less harsh, as opposed to strict scrutiny, but could not pass muster for either).
175. See id. at 2424 (accounting both sides points of agreement).
176. See id. at 2426 (documenting School District’s argument for its policy to be considered constitutional).
177. See id. (explaining School District’s reasoning and understanding of First Amendment and its meaning).
178. See id. at 2427 (analyzing School District’s reasoning and results it produces).
179. See id. (explaining why School District’s argument and Establishment Clause understanding was incorrect).
180. See id. at 2426 (describing First Amendment structure as one sentence to be read and applied together, as compared to how School District and other courts read it separately).
181. See id. (expressing natural and historical reading of First Amendment).
182. See id. at 2427 (providing multiple cases criticizing Lemon and offering additional tests).
183. See id. at 2427–28 (citing Town of Greece, Abington, American Legion, and more precedent to explain historical practice test already exists).
184. See id. at 2427–28 (explaining details of historical analysis of Establishment Clause cases).
exercise and speech rights. Specifically, the School District attempted to argue that it had to suppress Kennedy’s speech to avoid “coercing students to pray.” However, the Court explained that this claim was not supported by the evidence, which displayed that Mr. Kennedy did not intend for anyone to join him in prayer. Furthermore, there was no evidence that suggested anyone felt coerced to pray. Here, the Court explained that taking offense to viewing another’s religious practice is not coercion. Instead, it made clear that viewing religious practices is a natural result of the society we live in and is necessary to learn to tolerate other cultures. The School District also attempted to argue that any religious act by a coach is coercive towards students. In declining to follow this argument, the Court explained that it would require schools to fire employees who engage in any visible religious conduct in front of students. This rule, the Court noted, would thus contradict the constitutional tradition of “learning how to tolerate diverse expressive activities.” The Court distinguished the case at hand from previous precedent to add support to the fact that Kennedy’s practice did not involve coercion. Concluding its analysis, the Court touched on the importance of respecting religious expression and reiterated that the Constitution does not mandate or tolerate the type of discrimination to which Mr. Kennedy was subjected.

185. See id. at 2428 (detailing School District’s final arguments on coercion, which Court suspected included knowing other arguments were faulty and would fail).
186. See id. at 2428–29 (noting School District argued everyone agrees coercion would be violation of Establishment Clause).
187. See id. at 2429 (recounting specific facts of Kennedy’s case, as documented by District Court in 2017).
188. See id. (providing detailed account of all evidence in case, showing Kennedy did not attempt to coerce anyone, nor did anyone report being coerced).
189. See id. at 2430 (citing Town of Greece, 572 U.S. at 589) (explaining some may find religious expression and practices offensive, but this does not equate to coercion).
190. See id. (discussing reasons for religious freedom in constitutional republic and, more broadly, in functioning society).
191. See id. at 2431 (communicating School District’s final argument).
192. See id. (reporting real-life application of School District’s argument on broader scale).
193. See id. (noting rule existing under School District’s argument would give preference to secular activity in direct contrast to First Amendment).
194. See id. (detailing Zorach, Lee, and Santa Fe cases, each dealing with public school religious First Amendment issues).
195. See id. at 2432–33 (reiterating Court’s holding and its constitutional basis).
In a brief concurring opinion, Justice Thomas noted that the *Kennedy* decision does not address two outstanding Free Exercise questions. The first issue that was not resolved was whether the rights of public employees differ from the right of private citizens, specifically under the Free Exercise Clause. The second issue was that it failed to identify the level of scrutiny that should be employed when determining whether a government employer is justified in restricting the religious expression of its employees. He concluded that the burden a government employer should overcome may be different when different First Amendment guarantees are invoked. Justice Alito, who also wrote a brief concurrence, commented that the type of expression exhibited in *Kennedy* is different from that of other public-employee free speech cases. He also reiterated Justice Thomas’s earlier point that this decision does not determine which scrutiny standard should be applied to similar cases under the Free Speech Clause.

In a dissenting opinion joined by Justices Breyer and Kagan, Justice Sotomayor asserted that the majority incorrectly ignored precedent and misconstrued the meaning of the First Amendment. Her dissent argued that the majority made two mistakes in its understanding of the interactions between the First Amendment clauses. The first was describing the Free Exercise and Free Speech Clauses as “working in tandem” to protect religious expression, while simultaneously ignoring the Establishment Clause.

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196. See id. at 2433 (explaining why he chose to write separate, concurring opinion, despite full support of majority decision).
197. See id. (discussing prior Court precedent regarding Free Speech and Free Exercise clauses).
198. See id. (describing another gap in majority opinion that thus becomes gap in Free Exercise doctrine).
199. See id. (suggesting potential answer to unanswered majority question on what standard may be addressed in different situations).
200. See id. (differentiating case at hand with prior case law to support majority decision).
201. See id. at 2434 (highlighting element of case that was not addressed in majority opinion).
202. See id. at 2446 (discussing problems with majority opinion that led to what dissent believes to be incorrect decision). Specifically, the dissent argued that the majority did more than “misread[] the record” in rejecting “longstanding concerns surrounding government endorsement of religion.” See id. at 2434 (asserting Lemon test as valid precedent to be followed to establish separation of church and state).
203. See id. at 2446 (writing about key reasons why majority was incorrect, which dissent argues were based on “erroneous understanding[s] of the Religion Clauses”).
204. See id. (reasoning majority’s argument provides for high protections of expression thus reducing value of establishment clause to nothing).
was holding that the lower courts erred by “introducing a false tension between the Free Exercise and Establishment Clauses.” Her opinion also noted that Kennedy completely overruled Lemon, which was still good precedent, and then replaced it with a “history and tradition test” that offers schools no guidance and provides no true rule to go on.

C. An Overdue Upset: Why the Court was Justified to Abandon Lemon

This Casenote suggests that while the Supreme Court’s decision in Kennedy overturned more than fifty years of precedent by abandoning the Lemon test, this decision was justified because it cleared up confusion that existed amongst the circuit courts, and because of its consistency with recent Supreme Court history. In 1971, the Court decided Lemon v. Kurtzman, creating a three-step test to determine if Establishment Clause violations have occurred. Over time, this test changed, and often was criticized and ignored by Justices and judges. Some argued that the test produced inconsistent results, while others noted that it caused the Court to split into irreconcilable

205. See id. at 2447 (explaining each clause is separate for reason and tension between these clauses does exist to properly protect rights).

206. See id. at 2449–50 (discussing text of Lemon and additional case law and how majority opinion contradicts completely).

207. See id. at 2427–28 (abandoning Lemon test for Establishment Clause cases, and discussing chaos and differing results resulting from Lemon test); see also Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (creating Establishment Clause test); see also Ravishankar, supra note 7, 262–95 (evaluating history of Supreme Court and Circuit Court decisions applying Lemon test, including multiple different applications of Lemon test and lack thereof in certain cases); see also Taub & Toney, supra note 141, at 13 (noting Establishment Clause jurisprudence in Kennedy case directly followed Supreme Court’s decision in American Legion and Town of Greece in earlier years).

208. See Lemon, 403 U.S. at 612–14 (refining Establishment Clause test set out in Walz v. Tax Comm’n to hold state-provided financial aid to religious schools as unconstitutional). In altering the test used to evaluate Establishment Clause violations, the Court developed a three-prong analysis. See id. (explaining three elements used to determine whether government aid to religious schools violates Establishment Clause). Under this test, government action was constitutional under the Establishment Clause if it (1) had a secular purpose, (2) did not inhibit or promote religion, and (3) avoided excessive government entanglement with religion. See id. (holding government law challenged in Establishment Clause case had to satisfy three elements to be considered constitutional).

209. See Kennedy, 142 S. Ct. at 2427–28 (providing history of Lemon and endorsement test in Establishment Clause violation cases). The Lemon opinion created a test that over time became the endorsement test. See id. at 2427 (discussing iterations of Lemon test, including eventual inclusion of whether reasonable observer would see government action as religious endorsement). Justice Gorsuch noted Supreme Court decisions over the past twenty years have often criticized or completely ignored these tests. See id. at 2428 (discussing Establishment Clause precedent).
plurality opinions. Furthermore, depending on the specific topic at issue, the results of applying the *Lemon* test led to varying circuit splits. Such circuit splits arose in many contexts, including Ten Commandment cases, legislative prayer cases, and school graduation prayer cases. These splits often were the result of differing analyses of the *Lemon* test. However, circuit splits also occurred when certain courts applied the *Lemon* Test and others applied alternative tests to similar cases.

By abandoning the *Lemon* test, the Court’s decision in *Kennedy* prevents further circuit splits in Establishment Clause cases directly attributable to the *Lemon* test. The confusion that the Court discussed, regarding how and where to apply the *Lemon* test, is eliminated when the test is no longer used. Although abandonment will not eliminate confusion altogether, it allows for a new standard

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211. See Ravishankar, supra note 7, at 266–94 (discussing *Lemon* test application and case results over time in Establishment Clause cases about legislative prayer, school prayer, limited public forums, school funding, religious displays and Ten Commandment cases); see also Klukowsi, supra note 125 (explaining Second Circuit analysis in *Town of Greece v. Galloway*, which held praying in Jesus’ name was unconstitutional under *Lemon* test and thus created circuit split).

212. See Ravishankar, supra note 7, at 266–94 (analyzing Establishment Clause decisions using *Lemon* test often led to alternative outcomes, leading to circuit splits later resolved by Supreme Court). One category of cases where application of the *Lemon* test led to a circuit split was the Ten Commandment cases. See id. at 279 (discussing differences in lower court application of *Lemon* and in case outcomes from 1971-2005 in cases dealing with Ten Commandments). Under the Establishment Clause, the Third Circuit found that a display of the Ten Commandments in front of a country courthouse did not violate the Constitution, while the Sixth, Tenth, and Eleventh Circuits disagreed. See id. (reporting court holdings in cases dealing with public display of Ten Commandments). Another category of Establishment Clause cases that once had a circuit split was the legislative prayer cases. See id. at 274 (noting *Lemon* led to circuit splits on whether legislative prayer was constitutional). Finally, prior to the *Santa Fe* decision, a split existed between the Third and Sixth Circuits and Fifth and Ninth Circuits in school graduation prayer cases. See id. at 273–79 (detailing circuit splits in specific Establishment Clause categories).

213. See id. at 279 (noting different circuits applied *Lemon* test in similar cases and ended up with different results).

214. See id. (opining Third Circuit applied only endorsement test and not *Lemon* test in certain Ten Commandment cases, while other circuits applied *Lemon* test).

215. See *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2427 (2022) (declaring Supreme Court had abandoned *Lemon* and endorsement test long ago); see also Ravishankar, supra note 7, at 266–94 (discussing multiple circuit splits resulting from application of *Lemon* test).

216. See *Kennedy*, 142 S. Ct. at 2427–28 (discussing chaos and differing results due to *Lemon* test usage which led to criticism and ultimate abandonment by Court).
that has the potential to reduce uncertainty and disagreement.  

Increased consistency in the Establishment Clause doctrine may improve predictability for legislators across the nation.

Prior to completely abandoning the Lemon test in Kennedy, the Court had taken steps to stop its use in Establishment Clause cases.  

Over the years, certain Supreme Court cases completely failed to mention the Lemon test. Recently, in Town of Greece, the Court analyzed historical practices in evaluating prayer at meetings, instead of applying the Lemon test. Then, in American Legion, the Court upheld a cross memorial on public land using an analysis based on historical practices and understandings. In declining to apply the Lemon test in American Legion, five Justices, each in separate opinions, called for overruling Lemon. The Kennedy decision followed this pattern of ignoring and overstepping the Lemon test by declaring it abandoned.

Even though it all but overrules Lemon in doing so, the line of cases leading up to Kennedy justifies the Court’s decision.

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217. See Toney & Taub, supra note 141, at 2 (explaining Kennedy decision Establishment Clause jurisprudence as significant in part because it rejected Lemon test’s subjective, unpredictable, and contradictory outcomes).

218. See Kennedy, 142 S. Ct. at 2427–28 (noting Lemon test created “minefield for legislators” as one reason to abandon it).

219. See id. (abandoning Lemon test and replacing it with test based on history and tradition); see also Taub & Toney, supra note 141, at 13 (arguing Kennedy decision’s change in Establishment Clause jurisprudence through Lemon test abandonment followed American Legion and Town of Greece decisions from few years earlier).

220. See Ravishankar, supra note 7, at 262–63 (noting forty-year time span of Establishment Clause cases where Supreme Court sometimes failed to mention Lemon test at all).

221. See Town of Greece v. Galloway, 572 U.S. 565, 569 (2014) (reversing Second Circuit’s decision by holding prayer by local, mostly Christian, clergy at town board meeting constitutional under Establishment Clause). The Court looked to legislative historical practices in the United States in making this decision and did not apply the Lemon test. See id. at 575–77 (analyzing prayer practices in American history).

222. See Am. Legion v. Am. Humanist Ass’n, 139 S. Ct. 2067, 2074 (overruling Fourth Circuit to hold World War One cross memorial on public land constitutional under Establishment Clause). The Court’s analysis here focused largely on the history of the memorial and of the United States and discussed specific issues that the Lemon test analysis created in situations with memorials, monuments, and symbols. See id. at 2082 (arguing significance of memorial and passage of time since its creation were key factors in constitutionality).

223. See id. at 2074–89 (discussing multiple reasons why Lemon test should not be applied in cases with religiously expressive monuments, symbols, and practices). In addition to the majority opinion, the concurring and dissenting opinions also discuss the need to ignore and, in some cases, to overrule the Lemon test. See id. (articulating history and outcomes related to Lemon test).

224. See Kennedy, 142 S. Ct. at 2427–28 (noting Court’s abandonment of Lemon test in Establishment Clause cases many years ago, and instead, utilizing analysis based on American history to decide Kennedy’s case).

225. See id. (recognizing Lemon as abandoned but not specifically using word overruled).
Although the Court’s decision to abandon the *Lemon* test was justified, its focus on the rationale for this decision prevented it from elaborating on the Establishment Clause test that replaced the *Lemon* test. In its analysis, the Court explains that Establishment Clause cases are now to be interpreted by “reference to historical practices and understandings.” Specifically, to determine whether something is acceptable under the Establishment Clause, the government and the courts are instructed to look to history and to the Founding Fathers’ understanding. However, there are no multi-pronged analyses or specific factors listed that would assist courts in applying this test. Furthermore, the Court does not spend much time elaborating on why this new test was chosen. The lack of analysis and explanation with regard to the new historical understandings test could lead to similar confusion as was created under the *Lemon* test, which in turn may lead to further circuit splits.

The Court’s focus on the drawbacks of the *Lemon* test also distracted it from deciding what scrutiny standard to apply to similar free speech cases. While the Court did hold that Coach Kennedy was involved in private speech when he prayed alone after games, and that retaliation for this speech by the School District could not be justified under any standard, it did not explain which standard would apply in similar situations. By not determining the standard the government must meet when restricting religious expression of employees, the Court left an important question unanswered. This may lead to continued confusion in the lower courts going forward.

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226. *See id.* at 2450 (Sotomayor, J., dissenting) (noting majority “reserves any meaningful explanation of its history-and-tradition test for another day”).

227. *See id.* at 2428 (explaining replacement test for *Lemon* and endorsement tests in evaluating Establishment Clause violations).

228. *See id.* at 2428 (explaining replacement test by discussing need to reflect understanding of Founding Fathers and focusing on original meaning and understanding).

229. *See id.* (discussing new Establishment Clause test without reference to specific factors); *see also id.* at 2450 (Sotomayor, J., dissenting) (writing majority did not explain new test and instead relied on prior case law).

230. *See id.* at 2428 (describing new Establishment Clause test and discussing *Lemon* test drawbacks).

231. *See id.* at 2450 (Sotomayor, J., dissenting) (noting effects of new focus on history and tradition may have profound effects).

232. *See id.* at 2433 (Thomas, J., concurring) (mentioning two issues relating to Coach Kennedy’s claims which Court did not resolve, including level of scrutiny government employer must satisfy to justify restriction of religious expression).

233. *See id.* at 2433–34 (Alito, J., concurring) (reiterating Court holding and finding Court did not address specific standard to apply when employee speaks privately while at work but temporarily not on duty).

234. *See id.* at 2433–34 (Alito, J., concurring) (writing own concurring opinion specifically to address lack of addressing scrutiny decision by Court opinion).
when dealing with Free Speech cases, and ultimately may require another decision by the Court to resolve.235

V. POST-GAME EFFECTS: HOW THE COURT’S DECISION IN KENNEDY WILL LEAD TO FUTURE WINS FOR COACH KENNEDY AND RELIGION ACROSS THE UNITED STATES

A. The Touchdown: Mr. Kennedy is Once Again a Football Coach

After the Supreme Court’s ruling in Kennedy, the case went back to the Ninth Circuit, which vacated the District Court’s grant of summary judgment to Bremerton and remanded the case.236 A joint stipulation filed at the end of October 2022 stated that the Coach was to be reinstated as an assistant coach by March 15, 2023.237 The stipulation further proclaimed that BSD would not impede on Mr. Kennedy’s post-game prayer or retaliate against him in the future for praying on the field.238 Finally, the document also granted Kennedy the right to receive reasonable attorney’s fees from BSD.239 Kennedy was officially reinstated as assistant coach by BSD on March 8, 2023.240 And, after years of being unable to coach due to his religious beliefs, Kennedy was once again on the field, coaching and praying on September 1.241

235. See id. at 2450 (Sotomayor, J., dissenting) (arguing majority decision “sets the stage for future legal changes” and provides answers on how courts will address same challenges).

236. See Kennedy v. Bremerton Sch. Dist., 43 F.4th 1020, 1021 (9th Cir. 2022) (reporting decision of Supreme Court to reverse Ninth Circuit’s holding and subsequent action that must be taken by lower court).


238. See id. (noting School District’s proclamation that they will not prohibit Kennedy’s post-game practices in manner is consistent with Supreme Court’s opinion and will not take disciplinary action against him for these acts again).

239. See id. (providing further details of joint stipulation where School District agrees to pay Kennedy’s attorney’s fees and other related fees from litigation).


241. See id. (explaining Kennedy’s fight for his right to pray after games began in 2015 and continued for eight years); see also id. (interviewing Kennedy after his first game back at Bremerton High School, which occurred on September 1, 2023).
The Court’s decision in *Kennedy* provided a specific path for Coach Kennedy to get his job back after being placed on leave for praying at the fifty-yard line of the football field after games. However, the implications of this decision will have a much larger effect on individuals and public institutions across the United States. With the *Lemon* test gone from Establishment Clause analyses and a new historical test in its place, the strong American tradition of public prayer and religious freedom will likely be taken into account in many future cases. This will benefit individual litigants in cases where there is an Establishment Clause issue. For example, public school employees and government employees alike will be afforded a more favorable form of review that looks to past-allowed and traditionally accepted practices to inform future decisions. Personal outward practices, particularly visible elements of religion, then, will not themselves be constitutional violations, resulting in a broader range of acceptable religious behaviors of individuals.

In addition to the abandonment of the *Lemon* test, the majority’s viewpoint of coercion will also likely strengthen the First Amendment rights of public employees. *Kennedy* makes it clear that simply feeling uncomfortable in the presence of a religious practice does not qualify as coercion, even when high school students are involved.

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242. For further discussion of Coach Kennedy’s case and his future employment, see supra notes 142–195, 207–241 and accompanying text.

243. See Girgis, supra note 121, at 6–7 (contending reversal of *Lemon* will have larger implications than many realize).

244. See *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2427–28 (2022) (overruling *Lemon* and holding that Establishment Clause cases will now be resolved using test based on historical understanding).

245. See Lupu & Tuttle, supra note 91 (stating Court’s changing of Establishment Clause jurisprudence will protect individual rights).


247. See *Kennedy*, 142 S. Ct. at 2416–31 (holding Coach Kennedy could practice his religious prayers on football field after game in view of others and providing multiple examples of other religious practices protected under this case).

248. For further discussion of the *Kennedy* majority discussion on coercion, see supra notes 189–194 and accompanying text.

249. For further discussion of the *Kennedy* majority discussion on coercion, see supra notes 189–194 and accompanying text.
constitutional issue for school districts. This will result in more freedom for public employees to practice personal, outward displays of religion on and off the job.

These changes in Establishment Clause review will make it more difficult for school districts to prevail in litigation because individual religious practices in view of another person will not automatically create a coercion or Establishment Clause issue. This means that schools will be encouraged to put new policies into place that better protect the rights of their employees. The combination of these policies and a more difficult burden on the institution will allow for more freedom in individual religious rights.

Furthermore, even mere knowledge about Coach Kennedy’s case will increase the religious freedom felt by individuals in the United States. Public and private employees alike with an understanding of this case may feel more confident to openly display elements of their religious beliefs and practices. They also might better understand their ability to request reasonable religious accommodations at work. Moreover, these individuals will be more emboldened to take the risk of requesting accommodations, and even to pursue litigation in the case of a denial, because of a perception of greater protection under the First Amendment. Therefore, the Kennedy decision and its many holdings will bring about change in the policies of public institutions and in the practices of individuals across the United States, increasing individual religious freedom for all.

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250. For further discussion of the Kennedy majority discussion on coercion, see supra notes 189–194 and accompanying text.
251. For further discussion of the Kennedy majority discussion on coercion, see supra notes 189–194 and accompanying text.
252. See Lupu & Tuttle, supra note 91 (explaining that, post-Kennedy, school districts will have difficult time winning in Establishment Clause litigation).
253. See Miller Nash LLP et al., supra note 246 (predicting that, post-Kennedy, extensive changes will be needed in employer approaches to public employees).
254. See Lupu & Tuttle, supra note 91 (claiming schools will have to surpass higher burden in Establishment Clause cases).
255. See Miller Nash LLP et al., supra note 246 (asserting that, post-Kennedy, employees of private organizations will gain understanding of said case, leading to discussions and more requests for religious accommodations).
256. See id. (noting both public and private employees will be affected by Kennedy ruling).
257. See id. (predicting private employees will make requests for religious accommodations based on Kennedy).
258. See id. (noting Kennedy holding and its perception thereof will lead to potential increased litigation of religious accommodation cases).
259. See id. (arguing Kennedy strengthens religious freedom rights of individuals and providing changes in policies employers should make).

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