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PRAYING AT THE 50-YARD LINE: HOW WILL *KENNEDY V. BREMERTON* IMPACT PUBLIC SCHOOLS?

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I. INTRODUCTION

The First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[2] Thomas Jefferson famously described the First Amendment's Establishment Clause, which prohibits the endorsement of a particular religion by state actors, as erecting "a wall of separation between church and state."[3] Jefferson also identified the constitutional freedom of

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[1] The authors wish to thank J. Todd Faulkner for his valuable suggestions and comments on this article.
[2] U.S. Const. amend. I.
[3] The Supreme Court has weighed in on the meaning of the Establishment Clause in more detail in a key case from the 1940s in which the Court applied the Establishment Clause to state law for the first time: "The establishment of religion clause means at least this: Neither a state nor the Federal Government may set up a church. Neither can pass laws that aid one religion, aid all religions, or prefer one religion over another. Neither can force a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion . . . Neither a state nor the Federal Government can, openly or

religion as "the most inalienable and sacred of human rights."[4] It is between these two foundational pillars that public schools find themselves seeking to strike a delicate balance between protecting against religious incursion in schools while also respecting the right of individual students and educators to exercise their religion freely. Thus, while public school employees and students may wear religious clothing and pray individually before meals during the school day, the Supreme Court has ruled since the 1960s that employees and students cannot lead others in prayer during school hours and events when circumstances imply the school's endorsement of religion.[5]

For many years, the Supreme Court decisions in this area attempted to identify guideposts on how to manage this balance given the unique characteristics of the elementary and secondary school environment, with more weight given to the Establishment Clause. In the summer of 2022, however, in *Kennedy v. Bremerton School District*,[6] the Supreme Court dramatically expanded protections for religious expression in public schools, ruling in favor of a high school football coach who was disciplined by his school district for praying after games in the center of the field. With this ruling, the Court tipped the balance decisively away from Establishment Clause protections and towards protections for the free exercise of religion. In short, the Court's decision in *Kennedy* reflects the majority's conservative turn on religious issues in the public sphere, reversing decades of precedent separating church and state in schools.[7]

The Court's decision upholding the coach's right to pray at the 50-yard line after football games with students and members of the public raises new questions about how public schools should approach issues pertaining to employee prayer during school hours and events. The case may have far-reaching consequences involving First Amendment issues in the realm of public education, potentially restricting the ability of public schools to regulate the speech and religious expression of their employees.

Part II of this Article will provide an overview of the Supreme Court's key decisions on prayer in public schools since the 1960s. These cases set up the framework for the Court's discussion of the First Amendment's Free Exercise and Establishment clauses in *Kennedy*, particularly with respect to the issues of coercion, endorsement, employee free exercise rights, and the public versus private nature of school prayer. Part III will discuss the history and details of the *Kennedy* case, summarizing the facts, lower court proceedings, and the Supreme Court's decision. Finally, Part IV will discuss the implications of the *Kennedy* decision for public schools and provide key takeaways and best practices for schools in light of *Kennedy*.

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secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'" Everson v. Board of Ed. of Ewing Tp., 330 U.S. 1, 15–16 (1947).

[4] Thomas Jefferson, *Minutes of University of Virginia Board of Visitors* (March 29, 1819), https://founders.archives.gov/documents/Jefferson/03-14-02-0167.

[5] *See infra* notes 9–42.

[6] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022).

[7] The Court also ruled during the same term as *Kennedy* that a state violated the Free Exercise Clause when it banned the use of public funds for students who attend private religious schools. Carson v. Makin, 142 S. Ct. 1987 (2022).

II. PRE-KENNEDY SUPREME COURT DECISIONS ON PRAYER IN PUBLIC SCHOOLS

A. Establishment Clause Issues

The *Kennedy* case both follows and challenges a long line of Supreme Court decisions addressing the issue of prayer in public schools under the First Amendment. During the 1940s, the Supreme Court incorporated the First Amendment's Establishment Clause and Free Exercise Clause into the Fourteenth Amendment, applying them to the states.[8] Subsequently, the Court began to address numerous First Amendment issues regarding prayer and other forms of religious practice that were widespread in public schools. In the landmark case *Engel v. Vitale* (1962),[9] the Court ruled that state and school-sponsored prayer violated the Establishment Clause, reasoning that students should not be coerced into religion or subject to religious proselytizing while at school. While later cases would nuance *Engel*'s holding and rationale, the Court's decisions from *Engel* up until *Kennedy* maintained a clear separation between church and state regarding prayer in public schools.

In *Engel*, the Court held that school officials could not require an official state prayer to be recited in public schools at the start of each school day, even when the prayer was denominationally neutral and students were permitted to stay silent or be excused during prayer.[10] The Court's holding was highly specific to the facts. In 1958, a New York City school board voted to enact a measure that required teachers to begin each school day with a prayer composed by the State Board of Regents. The prayer consisted of 22 words: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country."[11] Despite the ostensibly nonsectarian language, a group of parents went before the school board to express their opposition to the teacher-led prayer. Parent Lawrence Roth declared, "We believe religious training is the prerogative of the parent, and not the duty of the government."[12] The school board insisted that the prayer had nothing to do with religion and was in fact tied to patriotic feeling, and thus any attempt to cancel the prayer was a "premeditated act to undermine the American heritage."[13]

In January 1959, the families of ten students represented by the ACLU filed a lawsuit against the school district in New York state court, challenging the constitutionality of both the state law authorizing the school district to direct the use of the Regents' prayer in public schools and the district's regulation ordering the recitation of the prayer in schools. The New York Court of Appeals sustained the lower court's order upholding the power of the state to direct the use of the Regents' prayer in public schools as long as

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[8] Cantwell v. State of Conn., 310 U.S. 296 (1940); Everson v. Bd. of Educ., 330 U.S. 1 (1947).
[9] Engel v. Vitale, 370 U.S. 421, 430 (1962).
[10] *Id.* at 424.
[11] *Id.* at 422.
[12] JUSTIN DRIVER, THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND 364 (2018).
[13] *Id.* at 365.

schools did not compel students to join in the prayer.[14] The U.S. Supreme Court reversed the state court decisions, holding that the school district's daily practice of reciting the Regents' Prayer violated the Establishment Clause. The Court reasoned that even when a school allows students to be silent or choose not to participate in nondenominational prayer, students still feel coercive pressure to conform "when the power, prestige and financial support of the government is placed behind a particular…officially approved religion."[15]

Later Supreme Court decisions would go beyond *Engel*'s holding to encompass more traditional religious expressions of prayer and reinforce concerns pertaining to the coercion of students. A year after *Engel*, the Supreme Court decided a similar case in *Abingdon School District v. Schempp* (1963),[16] in which the Court invalidated state laws that required teachers to recite the Lord's Prayer and Bible verses at the start of each school day. Notably, the Court distinguished the application of the Establishment and Free Exercise clauses in this case, stating that invalidating teacher-led prayers under the Establishment Clause was necessary in order to enable the free exercise rights of students who wished to participate in prayer: "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 [the State's] beliefs."[17]

In another key case on school prayer, the Supreme Court opined that the unconstitutional coercion of students was possible even in school contexts where attendance was not technically required. In *Lee v. Weisman* (1992),[18] the Supreme Court ruled that school-sponsored prayer at graduation violated the First Amendment. The case involved a Rhode Island school district's practice of inviting members of the clergy to provide the invocation at graduation. In 1986, the Weisman family contacted the school district to lodge a complaint that a Baptist minister's prayer at their daughter's middle school graduation was unconstitutional. Three years later, while preparing for their younger daughter's graduation, Daniel Weisman contacted school officials to ensure that this practice would not happen again. The principal assured the Weismans that they didn't have to worry since "we've got a rabbi this year."[19] However, the Weismans, who were Jewish, did not want any form of prayer at graduation. Vivian Weisman stated, "We see prayer in public schools…as being very divisive. It really cuts out the minorities for whom the public school system has been a gateway for full inclusion in our society…. No one should feel like they are outside of things at their own graduation."[20] The Weismans sought injunctive relief in federal court to block the rabbi's prayer from taking place, but the court denied the request. At the graduation ceremony, the rabbi recited a formulaic prayer adapted from a pamphlet called "Guidelines for Civic Occasions," which recommended nonsectarian themes for public prayer that would presumably pass constitutional muster.[21]

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[14] Engel v. Vitale, 10 N.Y.2d 174, 182 (N.Y. 1961).
[15] Engel, 370 U.S. at 431.
[16] School Dist. of Abington Tp., Pa. v. Schempp, 374 U.S. 203, 226–27 (1963).
[17] *Id.* at 226.
[18] Lee v. Weisman, 505 U.S. 577, 599 (1992).
[19] DRIVER, *supra* note 12, at 382.
[20] *Id.* at 383.
[21] *Weisman*, 505 U.S. at 588.

The Supreme Court disagreed. Justice Anthony Kennedy, writing for the majority, held that the rabbi's prayer at graduation violated the Establishment Clause because the principal's decision to bring in a religious leader to perform a prayer at graduation made the choice "attributable to the State."[22] In line with its earlier decisions, the Court expressed concern with the coercive effect school-sponsored prayer would have on impressionable young students:

> Our decisions in *Engel* [and *Schempp*] recognize…[that] prayer exercises in public schools carry a particular risk of indirect coercion. The concern may not be limited to the context of schools, but it is most pronounced there.... What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy.[23]

In his dissent, Justice Antonin Scalia distinguished *Weisman* from *Engel* and *Schempp*, pointing out that unlike the other prayers at issue, this graduation prayer took place only once a year outside the classroom at an event that did not require student attendance.[24] However, the Court reasoned that "to say a teenage student has a real choice not to attend her . . . graduation is formalistic in the extreme."[25] The First Amendment "forbids the State to exact religious conformity from a student as the price of attending her own . . . graduation. This is the calculus the Constitution demands."[26]

Along with prayer led by school officials and religious leaders, the Supreme Court would rule that student-led prayers may violate the Establishment Clause in certain circumstances as well. In *Santa Fe Independent School District v. Doe* (2000), the Supreme Court held that student-led prayer over the school's PA system before football games constituted public speech that violated the Constitution.[27] In this case, a high school in a predominantly white Protestant town in Texas allowed students to select a classmate to lead a prayer over the school stadium loudspeaker before kickoff at each home game during the football season.[28] A Catholic and a Mormon family filed a lawsuit against the school district, arguing that the student-led prayer was unconstitutional.[29] Key to the case was the centrality of football to the community and the students' lives. The federal district court judge in the case remarked that high school football "is the apex of their social function . . . The entire community turns out for these [games]. And it really is a big part of these kids' lives."[30] "I think . . . football is probably a heck of a lot more

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[22] *Id.* at 587.
[23] *Id.* at 592. In their concurring opinions, two justices noted that they did not see coercion as a prerequisite to finding an Establishment Clause violation. *Id.* at 604 (Blackmun, J., concurring); *Id.* at 609 (Souter, J., concurring).
[24] *Id.* at 644 (Scalia, J., dissenting).
[25] *Id.* at 595.
[26] *Id.* at 596.
[27] Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 301 (2000).
[28] *Id.* at 297–98.
[29] *Id.* at 294.
[30] DRIVER, *supra* note 12, at 389.

important [to locals] than graduation."[31] The trial court ordered the school district to enact a more restrictive policy that allowed only nonsectarian, non-proselytizing prayer, but the appellate court found that even the modified policy of the district court violated the Establishment Clause.[32]

The case went to the Supreme Court, where the majority, led by Justice John Paul Stevens, determined that the degree of the school's involvement in the student-led prayer effectively transformed the prayer into publicly endorsed speech.[33] The Court wrote: "The delivery of such a message—over the school's public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public prayer—is not properly characterized as 'private' speech."[34] Even if attendance at games was not required—as it was for many students, including players, cheerleaders, and school band musicians—the pregame prayer would reasonably be construed as school-sponsored and coercive in violation of the Establishment Clause.

B. Free Exercise Issues

In several of the prayer cases, the Supreme Court commented on the tensions between the Establishment and Free Exercise clauses, noting—as in the *Schempp* decision—that these provisions were inextricably intertwined. In a concurring opinion in *Wallace v. Jaffree* (1985), in which the Court struck down the Alabama legislature's requirement of "one minute of silence" in public schools each morning, Justice Sandra Day O'Connor wrote:

> Government pursues free exercise values when it lifts a government-imposed burden on the free exercise of religion…When the manifest objective of a statute is to facilitate the free exercise of religion by lifting a government-imposed burden…the religious purpose of such a statute is legitimated by the free exercise clause.[35]

Lower courts have addressed issues related to employee prayer and the Free Exercise Clause more directly. In the public school context, courts have held that schools have broad latitude to regulate the religious practice of employees during working hours, especially when students are present.[36] The courts have consistently ruled against employees who display overt religious activity during the course of their work. The issue arises when school employees are seen as acting on behalf of their school during the course of their official duties. In *Roberts v. Madigan* (1990), for instance, the Tenth Circuit Court of Appeals upheld the authority of a school district to order an elementary school teacher to take down a religious poster from a classroom wall, remove religious

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[31] *Id.*
[32] Santa Fe, 530 U.S. at 294.
[33] *Id.* at 310.
[34] *Id.*
[35] Wallace v. Jaffree, 472 U.S. 38, 83 (1985) (O'Connor, J., concurring).
[36] *See, e.g.*, Bishop v. Aronov, 926 F.2d (11th Cir. 1991); Roberts v. Madigan, 921 F.2d 1047 (10th Cir. 1990).

books from the classroom, and refrain from silently reading the Bible during instructional time.[37] The court stated that the school needed the authority to prevent potential violations of the Establishment Clause and to protect students from religious coercion.

The issue becomes murkier, however, when it is unclear whether a school employee is carrying out religious activity during the course of their official duties or on their own time. For example, in *Wigg v. Sioux Falls School District* (2004), a teacher sued the school district for prohibiting her from serving as an instructor in an evangelical Christian group for children that met after school hours at various public schools in the district.[38] The school district maintained a policy that allowed groups, including outside religious groups, to use its facilities, provided that they were non-profit organizations with liability insurance. However, the district also maintained a policy that prohibited all district personnel from participating in religious activities on school grounds or at school-sponsored activities.[39] The federal district court ruled that the teacher should be able to participate in the religious group, but that the school district could prohibit her from participating at the school where she worked.[40] The appellate court went further in its ruling to protect the teacher's rights, holding that the district could not exclude her from participating in the group at her own school after hours.[41] The court reasoned that once the school day ended, the teacher became a private citizen, and no reasonable observer would perceive her after-school involvement in the religious group as a state endorsement of religion by the school district.[42]

In sum, therefore, the Supreme Court has consistently held since *Engel* in 1962 that schools should not engage in or promote the practice of prayer during school hours and school-sponsored activities. The holdings in these cases were notably narrow, focusing on the specific facts at hand and on issues pertaining to the Establishment Clause, school endorsement of prayer, and the coercion of students. Furthermore, the Supreme Court and lower courts have struck an uneasy balance between the Establishment Clause and the Free Exercise Clause with respect to public schools, prohibiting schools from either endorsing religion or overregulating the private practice of religion outside of regular school hours. This balancing approach between the First Amendment provisions constituted the landscape of school prayer jurisprudence for several decades, all the way up until the Supreme Court's decision in *Kennedy*.

[37] Roberts v. Madigan, 921 F.2d at 1059.
[38] Wigg v. Sioux Falls School Dist. 49-5, 274 F.Supp.2d 1084, 1089 (D. S.D. 2003).
[39] *Id.* at 1088.
[40] *Id.* at 1104.
[41] Wigg v. Sioux Falls School Dist. 49-5, 382 F.3d 807, 815–16 (8th Cir. 2004).
[42] *Id.* at 815.

III. *KENNEDY V. BREMERTON*: AN EXPANSION OF EMPLOYEE FREE EXERCISE RIGHTS?

A. Factual Background and Litigation History

The *Kennedy* case involved a former Bremerton High School football coach, Joseph Kennedy, who asserted that his sincerely held Christian beliefs required him to kneel at the 50-yard line and offer a prayer of thanks immediately after every high school football game.[43] Initially, Kennedy prayed alone on the field, but over the course of more than seven years, Kennedy routinely invited students, coaches, and members of the public to join him in prayer. Kennedy also led the football team in prayer in the locker room before and after games and gave religious-themed motivational speeches.[44]

The district was first notified that Kennedy was regularly engaging in prayer when an employee from another school commented positively on the practice to the Bremerton principal. Motivated by Establishment Clause concerns, the Bremerton School District notified Kennedy in September 2015 that he was free to engage in private prayer only if it was non-demonstrative and did not interfere with his job duties.[45] The district stated that in order to resolve the tension between the Establishment Clause and a school employee's right to freely exercise their religion, the employee's free exercise rights "must yield so far as necessary to avoid school endorsement of religious activities."[46] While Kennedy initially complied with the district's directives, in October 2015, he sent a letter through his counsel to school officials informing them that because of his "sincerely-held religious beliefs," he felt "compelled" to offer a "post-game personal prayer" of thanks at midfield.[47] Kennedy later spoke to local media and made widely publicized appearances vowing to resume praying on the field.

After a raucous homecoming game that involved members of the public jumping the fence to get onto the field and pray with the coach, the school district sent Kennedy another letter explaining that his conduct violated district policy. The district offered to provide Kennedy with a private location on campus to pray and invited him to offer his own suggestions for a compromise.[48] Instead of responding to the district, Kennedy and his attorneys informed the media that the only acceptable outcome was for the school district to permit him to pray on the 50-yard line after games. After Kennedy continued to perform post-game prayers, the school district placed Kennedy on paid administrative leave because he continued to engage in "public and demonstrative religious conduct while still on duty as an assistant coach."[49]

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[43] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2416 (2022).
[44] *Id.*
[45] *Id.*
[46] *Id.* at 2417.
[47] *Id.*
[48] *Id.* at 2418.
[49] *Id.* at 2418–19.

Kennedy sued the school district in federal court, claiming that his rights were violated under the First Amendment's Free Speech and Free Exercise clauses. Kennedy asked the trial court to order the school district to reinstate him and allow him to pray as he wished. The trial court denied his request,[50] and a panel of Ninth Circuit Court of Appeals judges affirmed.[51] Kennedy appealed to the Supreme Court, who declined to hear the case in 2019. However, in a concurring opinion signed by three other conservative justices, Justice Samuel Alito criticized the lower court opinions and suggested that the school district may have violated the coach's First Amendment free speech rights.[52] Though Alito concurred in denying review due to "unresolved factual questions," his sharply worded rebuke foreshadowed his willingness to revisit the issue of public school employees and their right to free expression, including religious speech.[53] When the case was remanded to the lower courts for further fact-finding, the district court held that the school district was justified in restricting Kennedy's prayer activities to avoid violating the Establishment Clause.[54] Upon review, the Ninth Circuit Court of Appeals panel once again ruled against Kennedy[55] and the full Ninth Circuit denied rehearing *en banc*,[56] leading to Kennedy's second appeal to the Supreme Court.

In September 2021, Kennedy filed another petition for writ of certiorari with the Supreme Court, arguing that the Ninth Circuit wrongly converted "everything public-school teachers do or say during school hours or after-hours functions into government speech that the school may prohibit."[57] Kennedy insisted that his "brief, quiet prayer" was simply private speech, and the school district would not have violated the Establishment Clause by allowing him to engage in such prayer on the field after games.[58] Kennedy urged the Supreme Court to affirm that the First Amendment "does not demand that schools purge from the public sphere all that in any way partakes of the religious."[59]

The school district responded in turn that Kennedy had mispresented the facts in his petition. The case was not about the hypothetical question of whether an employee has the right to a "brief, quiet prayer by himself while at school."[60] Instead, the district argued:

> This case is about a school district's authority to protect students when its employee does not work with it to find a reasonable accommodation…The

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[50] *Id.* at 2419.
[51] Kennedy v. Bremerton Sch. Dist., 869 F.3d 813, 831 (9th Cir. 2017).
[52] Kennedy v. Bremerton Sch. Dist., 139 S. Ct. 634, 635 (2019) (Alito, J., concurring).
[53] *Id.*
[54] Kennedy v. Bremerton Sch. Dist., 443 F.Supp.3d 1223 (W.D. Wash. 2020).
[55] Kennedy v. Bremerton Sch. Dist., 991 F.3d 1004 (9th Cir. 2021).
[56] Kennedy v. Bremerton Sch. Dist., 4 F.4th 910 (9th Cir. 2021).
[57] Petition for Writ of Certiorari, Kennedy v. Bremerton Sch. Dist., (Sept. 14, 2021), https://www.supremecourt.gov/DocketPDF/21/21-418/192354/20210914133417114_FINAL%20Kennedy%20Cert%20Petition.pdf.
[58] *Id.* at 2.
[59] *Id.* at 33.
[60] Brief for the Respondent, Kennedy v. Bremerton Sch. Dist., (2021), https://www.supremecourt.gov/DocketPDF/21/21-418/204295/20211207122626202_21-418%20BIO%20final.pdf.

> district thus faced a stark choice: Either let its employee dictate how school events would be run—even if that threatened the safety and religious freedom of the students—or take the steps necessary to curb the practice.[61]
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> The school district told the Supreme Court that a ruling for Kennedy would "overturn decades of settled law under both the Free Speech and Establishment clauses."[62]

B. Oral Arguments Before the Supreme Court

When the case came before the Supreme Court the second time, the Court granted certiorari on January 14, 2022. During oral arguments on April 25, 2022, the attorneys and justices focused on the issue of whether the coach's prayer was a private act that may be protected by the Free Exercise and Free Speech clauses, or whether the coach prayed while he was on duty as a public employee of the school district, and thus was subject to the district's ability to regulate his speech to avoid violating the Establishment Clause.[63]

Kennedy's attorney argued that Kennedy's prayer was private speech that was protected by the Free Exercise and Free Speech clauses, and that the lower courts erred in finding that Kennedy's prayer was public speech. Kennedy's attorney stressed that the school district's action against Kennedy was solely out of religious endorsement concerns, which ignored the Court's precedent affirming that a school does not endorse private religious speech just because it fails to censure it.[64] If the government censures speech solely because it is religious, Kennedy's attorney argued, strict scrutiny—the highest standard of review a court can use to determine whether a government act violated the Constitution—should apply, rather than any more lenient standard.[65]

Bremerton School District's attorney argued that Kennedy was on duty as a public employee while engaging in prayer. While the school district would permit their employees to have quiet prayers by themselves even if students could see them, the school district's attorney emphasized that in this case, the coach insisted on audible prayers at the 50-yard line with students, legislators, and other members of the public, even announcing publicly in the press that these prayers were "how he helps these kids be better people."[66] Thus, the school district had every right to regulate Kennedy's prayer.

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[61] *Id.* at 2.
[62] *Id.* at 17.
[63] Transcript of Oral Argument, Kennedy v. Bremerton Sch. Dist., (2022), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/21-418_j4ek.pdf.
[64] *Id.* at 3.
[65] *Id.* at 6.
[66] *Id.* at 57.

C. The Supreme Court Decision

1. The Majority Opinion

On June 27, 2022, the Supreme Court issued its ruling in *Kennedy*.[67] In a 6-3 decision penned by Justice Neil Gorsuch, the conservative majority held that the school district violated Kennedy's First Amendment free exercise and free speech rights by disciplining the coach for "engaging in a . . . personal religious observance."[68] Rejecting the school district's argument that the Establishment Clause required it to prohibit Kennedy's prayer, Gorsuch wrote: "Respect for religious expressions is indispensable to life in a free and diverse Republic . . . Here, a government entity sought to punish an individual for engaging in a brief, quiet, personal religious observance doubly protected by the Free Exercise and Free Speech clauses of the First Amendment."[69]

a. Establishment Clause and Coercion Issues

The Court took issue with the school district's argument that the district's interest in avoiding an Establishment Clause violation outweighed the coach's free speech and free exercise rights. During oral arguments, the conservative justices repeatedly criticized the school district's reliance on the Establishment Clause, as well as the district's attempt during oral argument to raise the issue of the coercive effect of the coach's conduct on students.[70] Here, the Court formally abandoned the *Lemon* test that the Court first laid out in the case *Lemon v. Kurtzman* (1971),[71] in which the Court developed the following three-part test to analyze whether a government action would violate the Establishment Clause: 1) whether the government action has a bona fide secular or civic purpose; 2) whether the primary effect of the government action is neutral, i.e., neither advancing nor inhibiting religion; and 3) whether the law avoids excessive governmental entanglement with religion. If the answer to any one of these questions is "no," then the government action is deemed unconstitutional.[72] In *Kennedy*, the Court replaced the *Lemon* test with an originalist test that would interpret the Establishment Clause by "reference to historical practices and understandings" so as to "accord with history and faithfully reflect the understanding of the Founding Fathers."[73]

Furthermore, the Court rejected the school district's argument that the district was justified in regulating Kennedy's prayer so that it would not have been guilty of coercing students to pray. The Court stated that the school district's own letters to Kennedy never raised the issue of coercion, despite the fact that a few parents told the district that their sons had "participated in team prayers only because they did not wish to separate

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[67] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022).
[68] *Id.* at 2433.
[69] *Id.* at 2432–33.
[70] *Id.* at 2426–27.
[71] Lemon v. Kurtzman, 403 U.S. 602 (1971).
[72] *Id.* at 612–13.
[73] *Kennedy*, 142 S. Ct. at 2428 (quoting Town of Greece v. Galloway, 572 U.S. 565, 576–77 (2014)).

themselves from the team."[74] The Court distinguished this case from *Lee*, in which a clergy member publicly recited prayers as part of an official school graduation ceremony,[75] and *Santa Fe*, in which the school broadcast student prayers over the public address system before each game.[76] Here, the Court remarked, "the prayers for which Mr. Kennedy was disciplined were not publicly broadcast or recited to a captive audience. Students were not required or expected to participate."[77]

In sum, the Court stated that the district was wrongly attempting to draw a false conflict between "an individual's rights under the Free Exercise and Free Speech clauses and its own Establishment Clause duties."[78] However, "there is no conflict between the constitutional commands before us. There is only the 'mere shadow' of a conflict, a false choice premised on a misconstruction of the Establishment Clause."[79] The Court remarked that a government effort to prohibit any visible religious expression would undermine a long constitutional tradition in which tolerance of diverse religious expression is a fundamental part of "learning how to live in a pluralistic society."[80] Notably, the Court interpreted the First Amendment to provide doubled protections for religious speech in both the Free Exercise and the Free Speech clauses. The Court wrote:

> Where the Free Exercise Clause protects religious exercises, whether communicative or not, the Free Speech Clause provides overlapping protection for expressive religious activities. That the First Amendment doubly protects religious speech is no accident. It is a natural outgrowth of the framers' distrust of government attempts to regulate religion and suppress dissent.[81]

This explicit weighing of both the Free Speech and Free Exercise clauses in favor of religious expression against the government's obligation to avoid endorsement under the Establishment Clause appears to contradict decades of Supreme Court jurisprudence that analyzed government action in regulating religion by balancing its duties under the Free Exercise and Establishment Clauses alone.

b. Free Exercise Issues

Regarding Kennedy's free exercise claim, the Court determined that Kennedy met his burden of demonstrating that the school district violated his right to free exercise by burdening his sincerely motivated religious practice with a policy that was not neutral or generally applicable.[82] When a plaintiff demonstrates that his rights were infringed under

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[74] *Id.* at 2430.
[75] Lee v. Weisman, 505 U.S. 577, 580 (1992).
[76] Santa Fe Independent Sch. Dist. v. Doe, 530 U.S. 290, 294 (2000).
[77] *Kennedy*, 142 S. Ct. at 2432.
[78] *Id.* at 2432.
[79] *Id.* at 2432 (quoting School Dist. of Abington Tp., Pa. v. Schempp, 374 U.S. 203, 308 (1963) (Goldberg, J., concurring)).
[80] *Id.* at 2431 (quoting *Lee*, 505 U.S. at 590).
[81] *Id.* at 2421 (citations omitted).
[82] *Id.* at 2421–23 (citing Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U.S. 872, 879–81 (1990).

the Free Speech and Free Exercise clauses, strict scrutiny is triggered, and the government must demonstrate that its action was justified by a compelling state interest and was narrowly tailored in pursuit of that interest.[83] In this case, the Court found that Kennedy's prayer was sincerely motivated, and that the district failed to act pursuant to a neutral and generally applicable rule, since the district's policy towards Kennedy was specifically directed at his religious practice while permitting secular post-game conduct by employees (such as taking personal phone calls).[84] Thus, the Court determined that the school district violated the coach's free exercise rights.

c. Free Speech Issues

The Court also determined that Kennedy demonstrated that the school district violated his right to free speech. The Court stated that the government needs to find a balance between avoiding infringing on the freedom of speech of its employees, on the one hand, and being able to regulate the speech of employees when they are speaking on the government's behalf, on the other. The Court employed a two-step *Pickering-Garcetti* analysis, taken from its previous decisions in *Pickering v. Township High School*[85] and *Garcetti v. Ceballos*[86], to determine whether the school district violated Kennedy's free speech rights. First, did Kennedy offer his prayers in his capacity as a private citizen addressing a matter of public concern, or did his prayers constitute speech occurring "ordinarily within the scope" of his duties as coach, and thus amount to government speech attributable to the district?[87] If the latter, then the employee is generally not shielded from the employer's control and discipline. If the former, the Court would then apply a nuanced balancing test, in which the government may seek to prove that its interests as employer outweigh the employee's interest in speaking privately on a matter of public concern.[88]

Under this two-part test, the Court determined that Kennedy's prayer in fact constituted private speech, given both the content (the prayer itself) and the timing and circumstances (post-game period when coaches and students were free to briefly attend to personal matters).[89] The Court stated that Kennedy's prayer was private speech because it was made outside of his coaching duties, he was not instructing or coaching players at the time, and all coaches appeared to be off the clock during this post-game period.[90] With the Court determining that Kennedy was speaking as a private citizen on a matter of public concern, the burden shifted to the school district to show that it had a compelling reason to restrict Kennedy's speech.[91] The Court found that the school district did not establish a compelling reason, given that the district never endorsed Kennedy's speech, and the Establishment Clause is not automatically violated whenever a school

[83] *Id.* at 2422 (citing Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 546 (1993)).
[84] *Id.* at 2423.
[85] Pickering v. Board of Ed. of Township High Sch. Dist. 205, Will Cty., 391 U.S. 563 (1968).
[86] Garcetti v. Ceballos, 547 U.S. 410 (2006).
[87] *Kennedy*, 142 S. Ct. at 2424 (quoting Lane v. Franks, 573 U.S. 228, 240 (2014)).
[88] *Id.* at 2423.
[89] *Id.* at 2424–25.
[90] *Id.* at 2425.
[91] *Id.* at 2426.

fails to censor religious speech.[92] Moreover, per the record, there was no evidence of coercion of students to join the prayer.[93] Based on this analysis, the Court concluded that the school district had violated Kennedy's freedom of speech when it prohibited him from praying midfield after games.[94]

2. The Dissenting Opinion

In a blistering dissent joined by Justices Stephen Breyer and Elena Kagan, Justice Sonia Sotomayor rebuked Gorsuch's characterization of the coach's prayer as "brief, quiet, [and] personal" and thus meriting First Amendment protections.[95] Instead, Justice Sotomayor wrote:

> This case is about whether a public school must permit a school official to kneel, bow his head, and say a prayer at the center of a school event. The Constitution does not authorize, let alone require, public schools to embrace this conduct. Since *Engel v. Vitale*, this Court consistently has recognized that school officials leading prayer is constitutionally impermissible. Official-led prayer strikes at the core of our constitutional protections for the religious liberty of students and their parents, as embodied in both the Establishment Clause and the Free Exercise Clause of the First Amendment.[96]

Elsewhere, Justice Sotomayor reframed the issue of the case as "not about the limits on an individual's ability to engage in private prayer at work," but "about whether a school district is required to allow one of its employees to incorporate a public, communicative display of the employee's personal religious beliefs into a school event, where that display is recognizable as part of a longstanding practice of the employee ministering religion to students as the public watched."[97]

Asserting that the majority misrepresented not only the issue but the very facts of the case, Justice Sotomayor summarized the record in detail including: photos of Kennedy praying while surrounded by his players and members of the public to show that the coach had led student athletes in "highly visible and demonstrative prayer" at the 50-yard line for years; evidence that this incited "severe disruption" to school events; concerned letters from parents about students who felt forced to take part in the prayers; and a media storm prompted in part by the coach's outreach to local news outlets.[98] Justice Sotomayor also emphasized the fact that the district did not ban the coach from praying but had in fact informed Kennedy that "all District staff are free to engage in religious activity, including prayer, so long as it does not interfere with job responsibilities."[99]

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[92] *Id.* at 2426, 2428.
[93] *Id.* at 2429.
[94] *Id.* at 2432.
[95] *Id.* (Sotomayor, J., dissenting).
[96] *Id.* at 2434 (citations omitted).
[97] *Id.* at 2241.
[98] *Id.* at 2436.
[99] *Id.* at 2434.

More broadly, the dissenting justices took issue with the majority paying "almost exclusive attention" to the Free Exercise Clause's protection of the coach's religious expression at the expense of the Establishment Clause's prohibition of state endorsement of religion.[100] Justice Sotomayor highlighted the Court's historical vigilance in monitoring public schools' compliance with the Establishment Clause due to the central role public schools play in society and the state's exertion of "great authority and coercive power" over children in schools, particularly through their teachers and coaches who serve as role models.[101] Justice Sotomayor determined that the district's directive prohibiting Kennedy's speech was narrowly tailored to avoid an Establishment Clause violation, and that the district's Establishment Clause concerns were valid and satisfied strict scrutiny. Justice Sotomayor warned that this decision—along with Justice Gorsuch's replacement of the *Lemon* test with a vague test based on "history and tradition"—would upend decades of Court holdings that school officials leading prayer is constitutionally impermissible.[102] In concluding, Justice Sotomayor stated that the *Kennedy* decision "elevates one individual's interest in personal religious exercise, in the same exact time and place of that individual's choosing, over society's interest in protecting the separation between church and state, eroding the protections for religious liberty for all."[103]

IV. POTENTIAL IMPLICATIONS OF *KENNEDY* FOR PUBLIC SCHOOL DISTRICTS

There is no doubt that religion and, more specifically, religion in schools "possesses perhaps an unrivaled ability to stir passions . . ."[104] It is also true that, for a time, Supreme Court decisions balancing student and employee rights under the Establishment Clause and the Free Exercise Clause provided for a settling of the law in this area and a corresponding relative calm within public school districts regarding the role of religion in public classrooms, school buildings and school activities.[105] That moment of calm may have passed. Across the country, a wave of discontent regarding teaching, curriculum and books in school libraries has arisen.[106] School districts are seeing many of these conflicts

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[100] *Id.*
[101] *Id.* at 2442.
[102] *Id.* at 2449.
[103] *Id.* at 2453.
[104] DRIVER, *supra* note 12 at 380.
[105] Professor Driver makes a compelling case that allowing space for religious prayer through moments of silence, along with the trifecta of—(1) the passage of the Federal Equal Access Act, (2) the acceptance by states and corresponding increase in the rate of homeschooling, and (3) the legalization of school vouchers—have resulted in a lowering of the collective temperature on fights over religion in school. *Id.* at 395-422.
[106] *See, e.g.,* Laura Meckler and Hannah Natanson, *New Critical Race Theory Laws Have Teachers Scared, Confused and Self-Censoring,* WASHINGTON POST (Feb. 14, 2022), https://www.washingtonpost.com/education/2022/02/14/critical-race-theory-teachers-fear-laws/; Melissa Block, *Teachers Fear the Chilling Effect of Florida's So-Called 'Don't Say Gay' Law*, NPR (Mar. 30, 2022), https://www.npr.org/2022/03/30/1089462508/teachers-fear-the-chilling-effect-of-floridas-so-called-dont-say-gay-law.

motivated by parents' faith-based beliefs.[107] With the *Kennedy* decision, the Supreme Court has waded into this moment of unrest and has largely upended the previously struck balance.[108]

The *Kennedy* decision compels public school districts to review their policies and procedures governing the religious expression of their employees while on the job, and potentially that of students as well. The decision made clear that a "neutral and generally applicable" policy must be applied when restricting the conduct of public employees and may not single out religious expression for discipline.[109] However, school districts and public employers still need to balance free speech and free exercise with Establishment Clause concerns, though Justice Gorsuch's opinion did not elaborate on an explicit test for determining whether a public institution violates the Establishment Clause based on a "historical" analysis. The question is, beyond ensuring that policies and procedures reflect current law, how should school districts should navigate this uncertain terrain and resolve issues regarding religious expression as they arise at the local level.

As an initial matter, it is clear that each case will need to involve a fact-specific, case-by-case inquiry using some of the guideposts laid out in the decision. This is certainly made more complicated by the fact that the majority and the dissent do not agree on the facts of the *Kennedy* case itself.[110] Ultimately, what is clear is that although the previous balance tipped towards the Establishment Clause, offering less deference to an educator's religious expression than they enjoy outside the school building and on non-working time, the Court's decision in *Kennedy* has elevated the right to free exercise and, concomitantly, religious free speech, thereby making it difficult for schools to limit private religious expression on the job, particularly when staff are not actively engaged in carrying out their duties.

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[107] *See, e.g.,* Samuel Smith, *Student Gets Religious Accommodation to High School's Sex Ed Requirement*, THE CHRISTIAN POST (Feb. 4, 2021), https://www.christianpost.com/news/student-gets-religious-accommodation-to-school-sex-ed-program.html.

[108] Some have argued that the Supreme Court's decision in *Carson v. Makin* will have a far greater impact in the long term, channeling public funds to private religious schools that teach lessons antithetical to secular, mainstream curriculum. *See, e.g.,* Adam Laats, *The Supreme Court Has Ushered in a New Era of Religion at School*, THE ATLANTIC (July 15, 2022), https://www.theatlantic.com/ideas/archive/2022/07/supreme-court-religion-schools-prayer-kennedy-carson/661365/.

[109] *Kennedy*, 142 S. Ct. at 2423.

[110] *Compare id.* at 2415 (stating that Mr. Kennedy "offered his prayers quietly while his students were otherwise occupied") *with id.* at 2436 (Sotomayor, J., dissenting) ("Kennedy led a prayer out loud, holding up a player's helmet as the players kneeled around him").

While the Court's decision in *Kennedy* has not specifically authorized educators to introduce prayer during class time, it leaves open more ground for "private prayer" in other ways and in other spaces.

Let us say a school district allows teachers to decorate their desks in the classroom with personal items. Teachers have included on their desk pictures and mementos, and one or two teachers have included inspirational quotes from educator John Dewey and civil rights leader Mahatma Gandhi. A teacher then decides to place a picture and quote of Jesus Christ on her desk. Can the school district ask her to remove this from her desk? When we add that this is a second-grade classroom and students regularly come to the desk to speak with the teacher, does that change the inquiry? And if the school district wants her to remove the picture of Jesus Christ, in order to do so are they compelled to require the teachers to remove the quotes from Mr. Dewey and Mr. Gandhi?

To raise another example, what if a teacher offers optional test preparation for students, on her own time, after school and not at the direction of the district, and requires that students pray at the beginning of the tutorial?[111] Perhaps because this is so closely aligned to her duties as a teacher, the school district can more easily restrict the prayer, but there is certainly room within the reasoning of the *Kennedy* decision for a contrary outcome. Likely the best answer is to prohibit this type of quasi-work activity from the start to avoid the possible conflict and make any such support to students offered through the school.
What both of these examples implicate—perhaps even more than the concern about public endorsement of religion—is the coercive impact that such religious display may have on school-aged children. In a concurrence in a case concerning the Equal Access Act that predated his majority opinion in *Lee*, Justice Kennedy reminded the Court that any inquiry related to coercion "must be undertaken with sensitivity to the special circumstances that exist in a secondary school where the line between voluntary and coerced participation may be difficult to draw."[112] Indeed, Justice Sotomayor in her dissenting opinion in *Kennedy* notes that, prior to the current decision, the Supreme Court had been "particularly vigilant in its monitoring of compliance with the Establishment Clause in elementary and secondary schools" given the role of public schools in our society and the higher risk of coercion given the mandatory nature of school attendance of young children who are more susceptible to subtle coercive pressure, particularly from respected adults in the school building.[113] Thus, the prior guiding principle was that the vulnerable and captive nature of the elementary and secondary school population necessitated a particular and enhanced attention to the potential coercive impact of religious expression in schools.

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[111] LAATS, *supra* note 108.
[112] Bd. of Educ. of Westside Community Schools v. Mergens By and Through Mergens, 496 U.S. 226, 258 (1990) (Kennedy, J., concurring in part and concurring in the judgment).
[113] *Kennedy*, 142 S. Ct. at 2442 (Sotomayor, J., dissenting) (citing Edwards v. Aguillard, 482 U.S. 578, 583–84 (1987)). In the context of free exercise claims, the Seventh Circuit has also noted that teachers at the elementary and secondary level are not given expansive academic freedom in the classroom because the attendance of the students who are subject to that speech is compulsory. Mayer v. Monroe Coty. Comm. Sch. Corp., 474 F.3d 477, 479–80 (7th Cir. 2007).

In his majority opinion in *Kennedy*, however, Justice Gorsuch dismissed these coercion concerns on the grounds that there was no direct evidence of coercion in the record and that the district had not advanced this theory. While legal decisions should certainly not be made based on mere speculation,[114] the unique nature of compulsory education of young children, as Justice Sotomayor points out, begs the question as to how a school district "proves" a coercive impact on students. It may be difficult if not impossible to gauge the impact that an educator's "private" religious speech within a school has on the young children under her supervision. Prior to this decision, school districts erred on the side of protecting students against such coercion, assuming that certain religious activity on the part of staff would invariably present the risk of such coercion. The *Kennedy* decision largely removes the legal right of districts to make such determinations without specific evidence of a widespread coercive impact.

The majority opinion also urges that "learning how to tolerate speech or prayer of all kinds is 'part of learning how to live in a pluralistic society,' a trait of character essential to 'a tolerant citizenry.'"[115] Justice Gorsuch asserts that secondary students are mature enough not to be coerced to participate in religious practice, and that taking offense at such religious expression does not equate coercion.[116] Indeed, one can hardly argue that tolerance and acceptance of difference are critical to teach to young people. One may question, perhaps, whether allowing religious activity of educators within the school setting will teach students that lesson. When an educator who practices the majority faith of the community engages in religious activity in school, will a student who practices a minority faith receive solely a lesson on tolerance, or perhaps more likely, will that student feel both a sense of alienation and the pressure to join in?

Finally, taking a perhaps more troubling example, can a public school require an educator to use the chosen name and pronouns of a transgender student if doing so violates their own religious beliefs?[117] Perhaps the answer remains unaffected by the *Kennedy* decision insofar as if this happens in the classroom, the teacher is carrying out her official duties, and the school district can impose its rules (and corresponding discipline for violations of such rules) on the teacher. However, the Supreme Court's elevation of free exercise rights in *Kennedy* raises many questions and the specter of further entanglement and encroachment of religion within public schools. Particularly in communities where religion plays a dominant role, the legal rails that prevented religion in these school systems may have been weakened or removed entirely.

Before *Kennedy*, there existed a balance, however uneasy, of religious rights within public school districts across this country based on the Free Exercise and Establishment Clauses. The *Kennedy* decision, however, has introduced a new playing field. School districts are

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[114] As with many of the facts in this case, whether there was a coercive impact of Coach Kennedy's speech was hotly contested between the majority and dissenting opinions.
[115] *Kennedy*, 142 S. Ct. at 2429 (citing Lee v. Weisman, 505 U.S. 577, 590 (1992)).
[116] *Id.*
[117] Matt Barnum, *What Will the Supreme Court Decision on Prayer Mean for Schools?*, CHALKBEAT (June 27, 2022), https://www.chalkbeat.org/2022/6/27/23185586/supreme-court-schools-prayer-football-coach.

cautioned to review and revise any policies, procedures and practices that are not neutrally applied to religious expression, limit any "free time" when staff can engage in religious expression, and continue to protect all staff and students of all faiths from discrimination, harassment and bullying. If a matter does arise where a school district believes an employee's religious expression may not be protected, school districts need to document the facts of the situation, obtain expert guidance on whether there is a coercive influence on students of the religious expression at issue, and then analyze the situation according to the Court's guidance with the assistance of legal counsel.