NOTES & COMMENTS

HAIL MARY: HOW THE PRAYERS OF TWO PUBLIC HIGH SCHOOL FOOTBALL COACHES LED TO DIFFERENT COURT DECISIONS AND THE WEAKENING OF AN ESTABLISHMENT CLAUSE DEFENSE FOR SCHOOL DISTRICTS

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* J.D., Elon University School of Law, December 2023. I want to thank my wife, Jennifer, for her support, and my daughters, Hayden and Kelsie, for their motivation during law school. I would also like to express my appreciation to Professor Chrystal Clodomir for serving as the faculty advisor for this note. The views articulated in this note are solely my own.

"*The breach of neutrality that is today a trickling stream may all too soon become a raging torrent . . . .*" [1]

I. INTRODUCTION

Football, perhaps more than other sports, has a close relationship with the Christian faith. This close relationship may be best represented by the "Word of Life" mural on the side of the Hesburgh Library on the campus of the University of Notre Dame. While the mural's creation had nothing to do with football, "Touchdown Jesus," as it is more commonly known, is located just beyond the north endzone of the football stadium and stands 134 feet high and 68 feet wide.[2] The mosaic depicts Jesus with arms raised as if to signal the Fighting Irish football team had just scored a touchdown.[3] While the mural on campus would surely give rise to an Establishment Clause issue at a public university, Notre Dame, as a private institution, has little concern over the commingling of football—or any other aspect of its educational programs—with the school's Catholic tradition.

Throughout football, however, religious invocations are common. There are prayers for victory before games, gestures to the heavens following a scoring play, and references to God in media interviews at the conclusion of games.[4] During his football career, quarterback Tim Tebow was known for writing Bible verses on the black patches under his eyes and kneeling in prayer on the field before and after

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[1] Sch. Dist. v. Schempp, 374 U.S. 203, 224 (1963).

[2] Julie Hail Flory, "*Touchdown Jesus*" *Turns 40*, NOTRE DAME NEWS (May 5, 2004), https://news.nd.edu/news/touchdown-jesus-turns-40.

[3] Cindy Boren, *Touchdown Jesus Turns 50 at Notre Dame*, WASH. POST (Sept. 21, 2013, 2:30 PM), https://www.washingtonpost.com/news/early-lead/wp/2013/09/21/touchdown-jesus-turns-50/.

[4] Mark Edmundson, *Football and Religion: The Odd Relationship Between God and the Gridiron*, TIME (Nov. 6, 2014, 11:28 AM), https://time.com/3561559/football-and-prayer/.

games.[5] After beginning his public displays of faith during his high school football playing days, he continued such demonstrations while playing in college at the University of Florida and in the National Football League for the Denver Broncos and New York Jets.[6] In addition to prayers of celebration and gratitude, there are prayers to be free from injury as well as prayers after an injury occurs. Both teammates and opponents commonly gather around a fallen player in solidarity to lift up prayers for the injured player's wellbeing.[7] When Buffalo Bills defensive back Damar Hamlin suffered cardiac arrest and collapsed on the field in a January 2, 2022, game against the Cincinnati Bengals, an incredible outpouring of public prayer followed.[8]

Some football coaches at public universities have made the Christian faith an intricate part of their programs' identities. Dabo Swinney, the head football coach at Clemson University, frequently invokes his Christian faith.[9] When speaking to players and recruits, Swinney often gives testimony about how faith has played a role in his own life.[10] He once invited a local preacher to baptize players after practices.[11] Nick Saban, the head football coach at the University of Alabama, includes Mass and a recitation of the Lord's Prayer in the Crimson Tide's pregame rituals.[12] With high school football coaches and players emulating their collegiate and professional counterparts, it

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[5] Greg Bishop, *In Tebow Debate, a Clash of Faith and Football*, N.Y. TIMES (Nov. 7, 2011), https://www.nytimes.com/2011/11/08/sports/football/in-tebow-debate-a-clash-of-faith-and-football.html.

[6] Josh Peter, *Tim Tebow Not Happy About 'Tebowing' Being Brought into National Anthem Protests Debate*, USA TODAY (June 8, 2018, 11:47 PM), https://www.usatoday.com/story/sports/2018/06/08/tim-tebow-kneeling-national-anthem/686533002/.

[7] Edmundson, *supra* note 4.

[8] Ruth Graham, *Prayers for Damar Hamlin Show Bond Between Football and Faith*, N.Y. TIMES (Jan. 7, 2023), https://www.nytimes.com/2023/01/05/us/damar-hamlin-prayers-football-religion.html; Rob Maaddi, *Damar Hamlin Put Prayer in Football Back in the Spotlight*, ASSOCIATED PRESS (Feb. 9, 2023, 9:00 AM), https://apnews.com/article/damar-hamlin-prayer-football-super-bowl-76d687691c649b702a584a5957d1f4f3.

[9] Gabriel Baumgaertner, *Baptisms at Practice: How College Football Became a Christian Empire*, GUARDIAN (Sept. 18, 2019, 4:00 PM), https://www.theguardian.com/sport/2019/sep/18/dabo-swinney-christianity-clemson-football-recruiting.

[10] Tim Rohan, *Faith, Football and the Fervent Religious Culture at Dabo Swinney's Clemson*, SPORTS ILLUSTRATED (Sept. 4, 2019), https://www.si.com/college/2019/09/04/clemson-dabo-swinney-religion-culture.

[11] Baumgaertner, *supra* note 9.

[12] Greg Garrison, *Alabama Rivals Notre Dame in Mixing Faith and Football*, ADVANCE LOC. (Jan. 3, 2013, 12:15 PM), https://www.al.com/living/2013/01/alabama_rivals_notre_dame_in_m.html.

is no surprise that many of the same traditions are replicated under the lights on Friday nights.

Richard Garnett, a Notre Dame law professor, has distinguished the effect of prayer on college students versus younger students in K-12 educational settings. Professor Garnett stated that because college students are adults, there is little risk of coercion because they can differentiate state-sponsored prayer from a coach's personal prayer.[13] However, at the K-12 grade levels, "the Supreme Court has long upheld that it's unconstitutional to proselytize in public schools."[14] Garnett said that at this level of education, "kids are impressionable, they might feel like they're being coerced, and the government is supposed to be neutral [on religion]."[15]

This neutrality requirement, and whether a high school football coach's prayers amounted to coercion or the endorsement of religion, were at issue in two similar cases. In 2008, the Third Circuit Court of Appeals concluded in *Borden v. School District of the Township of East Brunswick* that a reasonable observer was likely to view the coach's pregame prayer rituals as endorsing religion in violation of the Establishment Clause.[16] By denying a writ of certiorari, the United States Supreme Court let the Third Circuit ruling stand. In 2022, however, the Supreme Court held in *Kennedy v. Bremerton School District* that the football coach's public prayer demonstrations at the 50-yard line after football games did not violate the Establishment Clause, and instead the school district deprived the coach of his constitutional rights under the Free Exercise Clause.[17]

In an effort to understand the constitutional limits of a coach's prayer, this note will first review the pertinent Establishment Clause case law, including the most common tests the Supreme Court has developed to address such issues as well as the difference between school prayer and legislative prayer. The note will then tackle the opinions of the Third Circuit in *Borden* and the Supreme Court in *Kennedy* to uncover the reasons the prayers of the two high school football coaches led to different decisions by the courts. Finally,

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[13] Rohan, *supra* note 10.

[14] *Id.*

[15] *Id.* (alteration in original).

[16] 523 F.3d 153, 160 (3d Cir. 2008), *cert. denied*, 555 U.S. 1212 (2009).

[17] 142 S. Ct. 2407, 2433 (2022).

consideration is given to the implications of the Supreme Court's *Kennedy* decision on future cases concerning the Establishment Clause.

II. ESTABLISHMENT CLAUSE JURISPRUDENCE

The First Amendment provides, in pertinent part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[18] As president, Thomas Jefferson interpreted the religion clauses to "build[] a wall of separation between Church [and] State" in an 1802 letter to the Danbury Baptist Association.[19] While Jefferson did not coin the expression,[20] his assertion of the phrase would come to have a defining influence on the relationship between religion and the government. In fact, the Supreme Court has quoted Jefferson and the "wall of separation" metaphor in numerous opinions.[21] However, as the Court would later recognize, "total separation [between church and state] is not possible in an absolute sense. . . . [T]he line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."[22] While the interplay between government action and individual liberty may render the wall solid, permeable, or somewhere in between, the Establishment and Free Exercise Clauses are meant to provide broad protection of religious freedom,[23] although sometimes tension arises between the two clauses.[24]

A. Incorporation of the Establishment Clause

As much as Justice Thomas would prefer otherwise,[25] the Establishment Clause has been incorporated against the states via the

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[18] U.S. CONST. amend. I.

[19] DANIEL L. DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE 1–2 (2002).

[20] *Id.* at 71.

[21] *See, e.g.*, Reynolds v. United States, 98 U.S. 145, 164 (1878); Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947); Illinois ex rel. McCollum v. Bd. of Educ., 333 U.S. 203, 211 (1948).

[22] Lemon v. Kurtzman, 403 U.S. 602, 614 (1971).

[23] *Everson*, 330 U.S. at 14–15.

[24] *See id.* at 16.

[25] *See* Zelman v. Simmons-Harris, 536 U.S. 639, 678 (2002) (Thomas, J., concurring) ("[I]n the context of the Establishment Clause, it may well be that state action should be evaluated on different terms than similar action by the Federal Government."); Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 45 (2004) (Thomas, J., concurring) ("I would acknowledge that the Establishment Clause is a federalism provision, which, for this reason, resists incorporation.").

Fourteenth Amendment.[26] The first case where the Supreme Court incorporated the Establishment Clause against the states was the 1947 case of *Everson v. Board of Education of the Township of Ewing*.[27] In *Everson*, the Ewing Board of Education, pursuant to a New Jersey statute, enacted a general program where public money would reimburse parents for their children's bus fares on public transportation to attend public and private schools, including Catholic schools.[28] The petitioner alleged, *inter alia*, this scheme violated the Establishment Clause.[29] The Court said that while the Establishment Clause forbids states from favoring one religion over others, the Free Exercise Clause prevents states from taking an adversarial position to the practice of one's faith.[30] Thus, if the board of education were to refuse to reimburse parents for the transportation of their children to religious schools yet reimburse parents who sent their children to other schools, the policy would be hostile toward religion.[31]

B. The Supreme Court's Establishment Clause Tests

Since incorporating the Establishment Clause against the states, the Supreme Court has tried but failed to devise a test for all cases concerning whether a state action has unconstitutionally advanced one religion over that of others. By some counts, there have been as many as ten constitutional standards applied at one time or another, even by the justices sitting on a single court.[32] While justices past and present have applied a multitude of tests, the four most common include: (1) the *Lemon* test; (2) the endorsement test; (3) the coercion test; and (4) the history-and-tradition test.

1. The *Lemon* Test

In 1971, the Supreme Court consolidated two cases where state laws provided public funds to support sectarian schools in *Lemon v.*

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[26] *See Everson*, 330 U.S. at 15. Notably, the Free Exercise Clause has also been incorporated against the states. *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

[27] Frederick Mark Gedicks, *Incorporation of the Establishment Clause Against the States: A Logical, Textual, and Historical Account*, 88 IND. L.J. 669, 670 (2013).

[28] 330 U.S. at 3.

[29] *Id.* at 5.

[30] *Id.* at 15–16.

[31] *See id.* at 17–18.

[32] Steven G. Gey, *Life After the Establishment Clause*, 110 W. VA. L. REV. 1, 35–36 (2007).

Kurtzman.[33] A Pennsylvania statute provided nonpublic schools with "reimbursement for the cost of teachers' salaries, textbooks, and instructional materials in specified secular subjects."[34] A Rhode Island statute provided state aid by "pay[ing] directly to teachers in nonpublic elementary schools a supplement of 15% of their annual salary."[35] Writing for the Court, Chief Justice Burger noted that while a state statute reimbursing parents for their children's bus transportation to parochial schools was upheld in *Everson*, the Court could "only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law."[36]

Chief Justice Burger attempted to provide a unified constitutional standard for all cases invoking the Establishment Clause.[37] Relying on its treatment of similar cases to formulate the aptly named *Lemon* test, the Court stated: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster 'an excessive government entanglement with religion.'"[38] If the statute failed any prong of the test, it violated the Establishment Clause.[39] The Court concluded the purpose of the Pennsylvania and Rhode Island statutes was to "enhance the quality of the secular education in all schools covered by the compulsory attendance laws" rather than promote religion.[40] The Court also recognized that the states took precautions to ensure the funding was limited to secular education so as not to advance religion but did not expressly decide whether the second prong was satisfied.[41] However, the state laws were unconstitutional because "the cumulative impact of the entire relationship arising under the statutes in each state involve[d] excessive entanglement between government and religion."[42]

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[33] 403 U.S. 602, 606 (1971).

[34] *Id.* at 606–07; *see also id.* at 609–10 (discussing the Pennsylvania statute in greater detail).

[35] *Id.* at 607; *see also id.* at 607–08 (discussing the Rhode Island statute in greater detail).

[36] *Id.* at 612.

[37] *Id.*

[38] *Id.* at 612–13 (internal quotation marks and citations omitted).

[39] *See id.*

[40] *Id.* at 613.

[41] *Id.*

[42] *Id.* at 614.

In the years following *Lemon*, the test was applied "to require a strict separation between church and state."[43] Criticism soon followed. Scholars and jurists have slammed the *Lemon* test for being unpredictable,[44] unworkable,[45] and inconsistent with the original meaning of the Establishment Clause.[46] As one example, the Court has noted a "Catch-22" situation in that "the 'entanglement' prong forbids what the 'effects' prong requires."[47] These apparent flaws in the *Lemon* test led to its failure as a "grand unified theory of the Establishment Clause,"[48] made clear by the multitude of tests the Supreme Court has since conceived.

2. The Endorsement Test

Justice O'Connor devised the endorsement test in her concurring opinion in the 1984 case of *Lynch v. Donnelly*.[49] In this case, the Court applied *Lemon* and upheld the constitutionality of a nativity scene erected alongside a variety of secular Christmas displays on state grounds during the holiday season.[50] Justice O'Connor agreed with the decision but sought "to suggest a clarification of [the Court's] Establishment Clause doctrine."[51] She believed there were two ways

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[43] *Shifting Boundaries: The Establishment Clause and Government Funding of Religious Schools and Other Faith-Based Organizations*, PEW RSCH. CTR. (May 14, 2009), https://www.pewresearch.org/religion/2009/05/14/shifting-boundaries6.

[44] *See, e.g.*, Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 399 (1993) (Scalia, J., concurring) (providing examples of the *Lemon* test's inconsistent application); Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 314–15 (1986) (describing the Supreme Court's Establishment Clause jurisprudence as "producing a schizophrenic pattern of decisions").

[45] *See, e.g.*, Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2080–81 (2019) (noting the variety of cases to which the *Lemon* test cannot adequately apply); *see also* Mark V. Tushnet, *Reflections on the Role of Purpose in the Jurisprudence of the Religion Clauses*, 27 WM. & MARY L. REV. 997, 1003–04 (1986) (explaining types of cases "not readily susceptible to analysis under the ordinary *Lemon* approach").

[46] *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 108 (1985) (Rehnquist, J., dissenting) (stating that two of the three prongs of the *Lemon* test "are in no way based on either the language or intent of the drafters" of the Establishment Clause).

[47] Michael W. McConnell, *Religious Participation in Public Programs: Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 119 (1992) (citing Bowen v. Kendrick, 487 U.S. 589, 615 (1988)).

[48] *Am. Legion*, 139 S. Ct. at 2087.

[49] 465 U.S. 668, 691 (1984) (O'Connor, J., concurring).

[50] *Id.* at 670–71, 687 (majority opinion).

[51] *Id.* at 687 (O'Connor, J., concurring).

the government could violate the Establishment Clause: entanglement and endorsement.[52] "[E]xcessive entanglement with religious institutions [could] interfere with the independence of the institutions, give the institutions access to government or governmental powers not fully shared by nonadherents of the religion, and foster the creation of political constituencies defined along religious lines."[53] Alternatively, she thought "government endorsement or disapproval of religion" amounted to a "more direct infringement."[54] She went on to say that "[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message."[55]

Squaring the endorsement test with *Lemon*, Justice O'Connor wrote: "The purpose prong . . . asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of the government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval."[56] She would clarify her endorsement test in another concurring opinion in a later case, stating "the endorsement test necessarily focuses upon the perception of a reasonable, informed observer."[57] As opposed to a hypothetical ordinary individual, "the reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious display appears."[58]

The endorsement test was largely regarded as an improvement upon *Lemon*.[59] While the endorsement test is rarely applied by the Supreme Court, "[l]ower federal courts and state courts have applied the test in hundreds of cases . . . ."[60] However, the endorsement test is not without criticism. Indeed, the endorsement test has been called "no test all, but merely a label for the judge's largely subjective

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[52] *Id.* at 687–88.

[53] *Id.*

[54] *Id.* at 688.

[55] *Id.*

[56] *Id.* at 690.

[57] Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 773 (1995) (O'Connor, J., concurring).

[58] *Id.* at 780.

[59] *See* Jesse H. Choper, *The Endorsement Test: Its Status and Desirability*, 18 J.L. & POLITICS 499, 504–10 (2002).

[60] Jay D. Wexler, *The Endorsement Court*, 21 WASH. U. J.L. & POL'Y 263, 264 (2006).

impressions."[61] Justice Anthony Kennedy criticized his colleague's test as "flawed in its fundamentals and unworkable in practice."[62] Pitfalls include purported difficulty in "describing the qualities and characteristics of the 'reasonable observer'"[63] and a concern that "the endorsement test is inherently biased in favor of majority religious traditions."[64]

3. The Coercion Test

Justice Kennedy introduced the coercion test in his separate opinion in *County of Allegheny v. ACLU*,[65] but it is most often associated with his majority opinion in *Lee v. Weisman*.[66] Justice Kennedy wrote: "It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'"[67] In other words, this test considers whether the state gives direct aid to religion in a manner that tends to establish a state church or forces its people to participate in or support religion against their will. If either is true, the government action fails the coercion test. Justice Kennedy previously noted several instances where the Court invalidated coercive government acts, including cases that involved starting each day with a schoolwide prayer[68] and requiring a religious oath to obtain a government position.[69]

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[61] Michael Stokes Paulsen, Lemon *is Dead*, 43 CASE W. RSRV. L. REV. 795, 815 (1993).

[62] Cnty. of Allegheny v. ACLU, 492 U.S. 573, 669 (1989) (Kennedy, J., concurring in part and dissenting in part).

[63] Choper, *supra* note 59, at 510–11.

[64] Wexler, *supra* note 60, at 276; *see also* Mark Strasser, *The Protection and Alienation of Religious Minorities: On the Evolution of the Endorsement Test*, 2008 MICH. ST. L. REV. 667, 668 (2008) ("[T]he Endorsement Test is often not used to protect minority religious viewpoints; instead, it is applied to validate practices that seem to violate the express terms of the test and to reject the reasonableness of those individuals feeling offended when their religious views or practices are ignored or undermined.").

[65] 492 U.S. at 659 (Kennedy, J., concurring in part and dissenting in part) ("[G]overnment may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion . . . .").

[66] 505 U.S. 577 (1992).

[67] *Id.* at 587 (alteration in original) (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984)).

[68] *Cnty. of Allegheny*, 492 U.S. at 660 (citing Engel v. Vitale, 370 U.S. 421 (1962)).

[69] *Id.* (citing Torcaso v. Watkins, 367 U.S. 488 (1961)).

While Justice Kennedy thought that instances of either direct or indirect coercion would be unconstitutional,[70] Justice Scalia suggested history confined the understanding of coercion to that which compels "religious orthodoxy and of financial support *by force of law and threat of penalty*."[71] Justice Thomas agreed, saying that "[t]he traditional 'establishments of religion' to which the Establishment Clause is addressed necessarily involve actual legal coercion."[72] However, notwithstanding the musings of Justices Scalia and Thomas, the Court has reaffirmed the necessity of an indirect coercion analysis.[73]

4. The History-and-Tradition Test

While history and tradition has been a part of many analyses of the Establishment Clause and other issues for decades, it rarely operates as a standalone test. Rather, a review of history and tradition is often undertaken in combination with another standard. The Court has evaluated history and tradition in a variety of cases,[74] including those concerning prayer. *Engel v. Vitale* was one such case where the Court considered a challenge to a public school system's encouragement of the recitation of a prayer before each school day.[75] The Court noted: "It is a matter of history that this very practice of establishing governmentally composed prayers for religious services was one of the reasons which caused many of our early colonists to leave England and seek religious freedom in America."[76] However, when assessing the practice of opening each session of the Nebraska state legislature with a prayer in *Marsh v. Chambers*, the Court stated: "The opening

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[70] *See Lee*, 505 U.S. at 592.

[71] *Id.* at 640 (Scalia, J., dissenting).

[72] Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 52 (2004) (Thomas, J., concurring).

[73] *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 311–12 (2000).

[74] *See, e.g.*, Walz v. Tax Comm'n, 397 U.S. 664, 671 (1970) ("In *Everson* the Court declined to construe the Religion Clauses with a literalness that would undermine the ultimate constitutional objective as illuminated by history."); Lynch v. Donnelly, 465 U.S. 668, 684, 686 (1984) ("[T]here is no evidence of political friction or divisiveness over the creche in the 40-year history of Pawtucket's Christmas celebration. . . . To forbid the use of this one passive symbol . . . would be a stilted overreaction contrary to our history and to our holdings."); Van Orden v. Perry, 545 U.S. 677, 683 (2005) (Our cases . . . point in two directions in applying the Establishment Clause. One face looks toward the strong role played by religion and religious traditions throughout our Nation's history."). The Court recently adopted a similar standard for cases involving the Second Amendment. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 17 (2022).

[75] 370 U.S. 421, 422 (1962).

[76] *Id.* at 425.

of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country."[77] Such a statement gives at least some credence to the Court's contention that "[t]he passage of time gives rise to a strong presumption of constitutionality" under the history-and-tradition test.[78]

Rarely, however, will history and tradition alone be enough to determine the proper outcome of an Establishment Clause challenge. In *Town of Greece v. Galloway*, the Court acknowledged "*Marsh* must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation."[79] This was not the first time a Supreme Court justice had acknowledged the insufficiency of history and tradition. In *Walz v. Tax Commission of New York City*, Chief Justice Burger said, "no one acquires a vested or protected political right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it."[80]

Other justices have conceded, expressly or impliedly, that the history-and-tradition test cannot sustain itself in the absence of another standard. In her concurring opinion in *County of Allegheny v. ACLU*, Justice O'Connor stated: "Historical acceptance of a practice does not in itself validate that practice under the Establishment Clause if the practice violates the values protected by that Clause."[81] Although Justice O'Connor was applying her endorsement test, she found that "the 'history and ubiquity' of a practice is relevant because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion."[82] Similarly, some justices have reviewed the history and tradition of an action while simultaneously conducting some sort of coercion analysis—and reached different conclusions.[83]

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[77] 463 U.S. 783, 786 (1983).

[78] Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2085 (2019).

[79] 572 U.S. 565, 576 (2014).

[80] 397 U.S. 664, 678 (1970).

[81] 492 U.S. 573, 630 (1989) (O'Connor, J., concurring).

[82] *Id.*

[83] *Compare* Engel v. Vitale, 370 U.S. 421, 432 (1962) ("Another purpose of the Establishment Clause rested upon an awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand."), *with Town of Greece*, 572 U.S. at 584 ("Our tradition assumes adult citizens, firm in their own beliefs, can tolerate and perhaps appreciate a ceremonial prayer delivered by a person of a different faith.").

C. The Constitutionality of School Prayer

The Supreme Court has long held that state-sponsored prayer in public schools is unconstitutional. In 1962, the Court decided school prayer was unconstitutional for the first time in *Engel v. Vitale*.[84] In *Engel*, the New York state legislature had given the State Board of Regents broad authority over its public schools.[85] Wielding this power, the Board of Regents insisted school districts adopt the following prayer as part of its daily procedure: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."[86] The local school board instructed the principal to ensure this prayer was recited by each class at the start of each school day.[87] The parents of students soon brought an action asserting the policy was unconstitutional under the Establishment Clause.[88] The Board of Regents and the respondents "concede[d] the religious nature of prayer, but [sought] to distinguish this prayer because it [was] based on our spiritual heritage"[89] or, in other words, history and tradition. After considering the reasons precipitating the Establishment Clause, the Supreme Court determined: "There can be no doubt that New York's state prayer program officially establishe[d] the religious beliefs embodied in the Regent's prayer,"[90] and the practice was "wholly inconsistent with the Establishment Clause."[91]

The Court continued to protect students from school-sponsored prayer in subsequent cases. *School District of Abington Township v. Schempp* was decided the year after *Engel*. *Schempp* consolidated two cases, including one from Maryland and the other from Pennsylvania.[92] In *Schempp*, the Court held that state laws authorizing daily Bible readings and recitations of the Lord's Prayer in public schools were unconstitutional even though parents could choose to opt out their children.[93] Then, in *Wallace v. Jaffree*, the Court concluded that

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[84] 370 U.S. at 424.

[85] *Id.* at 422–23.

[86] *Id.* at 422.

[87] *Id.*

[88] *Id.* at 423.

[89] *Id.* at 425 (internal quotation marks omitted).

[90] *Id.* at 430.

[91] *Id.* at 424.

[92] 374 U.S. 203, 205 (1963).

[93] *Id.* at 224–25.

beginning each school day with a moment of silence for "voluntary prayer" was violative of the Establishment Clause because the statute was enacted "for the *sole purpose* of expressing the State's endorsement of prayer activities."[94] Absent such a purpose, however, a moment of silence is constitutionally permissible.[95]

The Court has protected students from school-sponsored prayer not just in the classroom but also during extracurricular activities and other school events. For example, invocations at graduation ceremonies and even student-led, student-initiated prayers at high school football games have been held unconstitutional under the Establishment Clause.[96] In those cases, the Court said that "[t]he degree of school involvement" for both the graduation prayers and the pregame prayers "bore the imprint of the State and thus put school-age children who objected in an untenable position."[97] Although neither a graduation ceremony nor a football game requires student attendance, "adolescents are often susceptible to pressure from their peers towards conformity, and that . . . influence is strongest in matters of social convention."[98]

D. The Constitutionality of Legislative Prayer

While the Supreme Court has consistently held that state-sanctioned prayers in public schools or at school functions are unconstitutional, the Court has held legislative prayers are not violative of the Establishment Clause. The earliest case to consider the issue of legislative prayer was the 1983 case of *Marsh v. Chambers*.[99] In that case, the Nebraska state legislature had a longstanding practice of opening each session with a prayer given by a chaplain who was compensated with public funds.[100] A member of the state legislature sought to enjoin the practice, alleging a violation of the Establishment Clause.[101] The district court found that paying the chaplain from

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[94] 472 U.S. 38, 60 (1985) (emphasis added).

[95] *See id.* at 59.

[96] Lee v. Weisman, 505 U.S. 577, 599 (1992); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 294, 317 (2000). Prior to *Santa Fe* (and *Lee*), invocations at high school football games were declared unconstitutional by the Eleventh Circuit, and the Supreme Court had denied certiorari. Jager v. Douglas Cnty. Sch. Dist., 862 F.2d 824, 834–35 (11th Cir.), *cert. denied*, 490 U.S. 1090 (1989).

[97] *Lee*, 505 U.S. at 590; *Santa Fe*, 530 U.S. at 305 (quoting *Lee*, 505 U.S. at 590).

[98] *Santa Fe*, 530 U.S. at 311–12 (quoting *Lee*, 505 U.S. at 593).

[99] 463 U.S. 783 (1983).

[100] *Id.* at 784–85.

[101] *Id.* at 785.

public funds, rather than the prayers themselves, was unconstitutional.[102] The Eighth Circuit, however, refused to separate the paying from the praying and instead applied the *Lemon* test to the whole practice.[103] Accordingly, the Eighth Circuit held that the practice failed all three parts of the test, concluding that the purpose and effect of having the same chaplain offer prayers for sixteen years "was to promote a particular religious expression" while compensating the chaplain out of public funds created an entanglement between the government and religion.[104]

On appeal to the Supreme Court, Chief Justice Burger traced legislative prayer back to Colonial America and the Continental Congress.[105] He noted the First Congress had agreed on the language of the Bill of Rights just days after it had authorized the appointment of paid chaplains.[106] While historical practice alone cannot excuse modern constitutional violations, the historical evidence demonstrated the intent of the founders in that they saw "no real threat to the Establishment Clause arising from a practice of [legislative] prayer . . . ."[107]

To be sure, the Court reviewed whether the specific aspects of Nebraska's chaplaincy practice was constitutional under the Establishment Clause. Specifically, the Court considered that a chaplain of only one denomination has been paid by public funds to offer a Judeo-Christian prayer for the last sixteen years.[108] These factors, however, were not an issue for the Court.[109] First, choosing the same chaplain from a single denomination to deliver the prayer for sixteen years was not to "advance[] the beliefs of a particular church."[110] Rather, the chaplain was retained "because his performance and personal qualities were acceptable to the body appointing him."[111] In addition, guest chaplains of other denominations would fill in to offer prayers in the regular chaplain's absence.[112] Paying the chaplain at public

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[102] *Id.* (citing 504 F. Supp. 585 (D. Neb. 1980)).

[103] *Id.* at 785–86 (citing 675 F.2d 228 (8th Cir. 1982)).

[104] *Id.* at 786.

[105] *Id.* at 786–87.

[106] *Id.* at 788.

[107] *Id.* at 791.

[108] *Id.* at 792–93.

[109] *Id.* at 793–94.

[110] *Id.* at 793.

[111] *Id.*

[112] *Id.*

expense was not unconstitutional given the past history and present practice of legislative bodies providing similar remuneration.[113] Nor was the content of the prayer an issue because it did not promote or denigrate any particular faith.[114] Thus, the Court held that Nebraska's legislative prayer practice did not violate the Establishment Clause of the Constitution.[115]

In dissent, Justice Brennan accused the Court of "carving out an exception to the Establishment Clause . . . to accommodate legislative prayer."[116] Legislative prayer, he said, "clearly violates the principles of neutrality and separation that are embedded within the Establishment Clause,"[117] and "it is not saved either by its history or by any other considerations suggested in the Court's opinion."[118] Justice Brennan added:

> [Legislative prayer] has the potential for degrading religion by allowing a religious call to worship to be intermeshed with a secular call to order. And it injects religion into the political sphere by creating the potential that each and every selection of a chaplain, or consideration of a particular prayer, or even reconsideration of the practice itself, will provoke a political battle along religious lines and ultimately alienate some religiously identified group of citizens.[119]

In 2014, the Supreme Court was presented with a similar question in *Town of Greece v. Galloway* where a town began its monthly board meetings with an invocation.[120] Not to be swayed by Justice Brennan's dissent in *Marsh v. Chambers*, the Court stated that "*Marsh* stands for the proposition that it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted."[121] Relying on this rationale, the Court held that the Town of Greece did not violate the Establishment Clause.[122] Justice Kennedy distinguished prayer before a town's board meetings from that of a school's graduation ceremony.[123] Because "school authorities maintained close supervision over the conduct of

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[113] *Id.* at 794.

[114] *Id.* at 794–95.

[115] *Id.* at 795.

[116] *Id.* at 796 (Brennan, J., dissenting).

[117] *Id.* at 808.

[118] *Id.* at 796.

[119] *Id.* at 808 (footnote omitted).

[120] 572 U.S. 565, 569–70 (2014).

[121] *Id.* at 577.

[122] *Id.* at 570.

[123] *Id.* at 590 (citing Lee v. Weisman, 505 U.S. 577 (1992)).

the students and the substance of the ceremony, a religious invocation was coercive as to an objecting student."[124] On the other hand, adults are "not readily susceptible to religious indoctrination or peer pressure."[125] Those present at board meetings have the ability to come and go as they please, such that if they were to object to a prayer and walk out of the room, "their absence will not stand out as disrespectful or even noteworthy."[126] If they were to sit silently in the meeting room during the prayer, Justice Kennedy was confident "their quiet acquiescence will not, in light of our traditions, be interpreted as an agreement with the words or ideas expressed."[127] Thus, the Court held that the prayer was ceremonial in nature and was not meant "to exclude or coerce nonbelievers."[128]

The Supreme Court's jurisprudence on legislative prayer is important because of its application in the lower courts in response to challenges to public school board meetings opened with an invocation. Such challenges have been heard by the Sixth Circuit in *Coles v. Cleveland Board of Education*[129] and the Ninth Circuit in *Bacus v. Palo Verde Unified School District*.[130] The Sixth Circuit recognized its conundrum, stating:

> This case puts the court squarely between the proverbial rock and a hard place. The rock is *Lee v. Weisman*, holding that opening prayers at high school graduation ceremonies violate the Establishment Clause of the First Amendment. The hard place is *Marsh v. Chambers*, ruling that opening prayers are constitutionally permissible at sessions of a state legislature.[131]

Both the Sixth and Ninth Circuits concluded the prayers to open school board meetings in *Coles* and *Bacus*, respectively, were unconstitutional.[132] However, after the Supreme Court held opening invocations at town council meetings were constitutional in *Town of Greece v. Galloway*, the Fifth Circuit determined prayers at school board meetings were likewise constitutional in *American Humanist Association*

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[124] *Id.* (citing *Lee*, 505 U.S. at 592–94).

[125] *Id.* (internal quotation marks omitted) (quoting Marsh v. Chambers, 463 U.S. 783, 792 (1983)).

[126] *Id.*

[127] *Id.*

[128] *Id.* at 591.

[129] 171 F.3d 369 (6th Cir. 1999).

[130] 52 F. App'x 355 (9th Cir. 2002).

[131] *Coles*, 171 F.3d at 371 (citations omitted).

[132] *Id.* at 385; *Bacus*, 52 F. App'x at 357.

v. McCarty.[133] While permitting federal and state legislatures to open session with an invocation blurs the line between church and state, allowing school boards to begin their public meetings with prayer could be seen as an encroachment on the secular nature of public schools and open the door to more overt incursion.

III. TWO FOOTBALL COACHES' PRAYERS FOR RELIEF

In addition to the distinction between school prayer and legislative prayer, the Supreme Court's application of the Establishment Clause tests has led to other seemingly contradictory results. The Court has held constitutional a Christmas nativity scene in Pawtucket but concluded Allegheny County's analogous display in Pittsburgh was violative of the Establishment Clause.[134] Similarly, a monument of the Ten Commandments on the grounds of the Texas State Capitol was constitutional but posting the Ten Commandments at two county courthouses in Kentucky was not, despite both cases being heard and decided on the same days.[135]

It would be one thing if the apparent inconsistency in the Court's decisions on these and other Establishment Clause cases could be attributed to the ever-changing makeup of the Court. However, much of the discrepancy stems from the justices themselves choosing to embrace different tests, even for cases involving generally the same issue. For example, Justice O'Connor herself "authored or joined opinions embracing no fewer than six different Establishment Clause standards."[136] In the parallel cases concerning displays of the Ten Commandments, Justice Breyer provided the swing vote, which resulted in the Court reaching different conclusions on essentially the same question. Justice Breyer took issue with the "substantially religious objectives of those who mounted [the Ten Commandments]" in the McCreary County courthouses whereas the display at the Texas State Capitol "serv[ed] a mixed but primarily nonreligious purpose . . . ."[137]

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[133] 851 F.3d 521 (5th Cir. 2017), *cert. denied*, Am. Humanist Ass'n v. Birdville Indep. Sch. Dist., 138 S. Ct. 470 (2017).

[134] *Compare* Lynch v. Donnelly, 465 U.S. 668 (1984), *with* Cnty. of Allegheny v. ACLU, 492 U.S. 573 (1989).

[135] *Compare* McCreary Cnty. v. ACLU, 545 U.S. 844 (2005), *with* Van Orden v. Perry, 545 U.S. 677 (2005). *See also* Stone v. Graham, 449 U.S. 39 (1980) (holding unconstitutional the posting of the Ten Commandments in public school classrooms).

[136] Steven G. Gey, *Reconciling the Supreme Court's Four Establishment Clauses*, 8 U. PA. J. CONST. L. 725, 728–29 (2006).

[137] *Van Orden*, 545 U.S. at 703 (Breyer, J., concurring).

Thus, it seems that the justices' granular review of the circumstances of each case reveals narrow distinctions that can lead to these diverging decisions.[138] Therefore, in the cases concerning the prayers of two high school football coaches, it is unsurprising that the Supreme Court declined to disturb the Third Circuit's holding in *Borden* yet decided to reverse the Ninth Circuit in *Kennedy*. To find out why, we must take a closer look at the two cases.

A. Borden v. School District of the Township of East Brunswick

1. Factual and Procedural Background

Marcus Borden became the head coach of the East Brunswick High School football team in 1983 and was in his twenty-third season at the time the dispute arose in 2005.[139] During that time, he engaged his team in two pre-game rituals: a prayer before the team dinner and another prayer in the locker room immediately before his team took the field.[140] According to Borden, it was never his intention "to impose [his] religious beliefs on anyone. . . . As a football coach, you're striving to have everybody on the same page."[141] Clearly, Borden and his employer, the School District of the Township of East Brunswick, were not on the same page and these prayers led to litigation.

Predating Borden's tenure, a local minister said grace prior to each pre-game meal where the students on the team, the students' parents and guests, and the cheerleaders were in attendance.[142] However, in 1997, the school's athletic director informed Borden that the minister could no longer pray in this manner.[143] Instead, from 1997 to 2003, the students took turns reading a prayer the minister had written.[144] When the minister retired in 2003, Borden himself began blessing the meal before the first game of every season, then he

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[138] Such decisions, however, leave precedent on which future parties cannot always rely and further complicate Establishment Clause jurisprudence.

[139] Borden v. Sch. Dist., 523 F.3d 153, 159–60 (3d Cir. 2008), *cert. denied*, 555 U.S. 1212 (2009).

[140] *Id.* at 159.

[141] Bill Finley, *Church and Team: Where to Draw the Line?*, N.Y. TIMES (Aug. 5, 2006), https://www.nytimes.com/2006/08/05/nyregion/nyregionspecial2/06Rcoach.html.

[142] *Borden*, 523 F.3d at 159.

[143] *Id.*

[144] *Id.*

would choose a senior student to say a prayer prior to each pre-game meal thereafter.[145] Borden would have those present at the meal stand during the prayer.[146]

After the pre-game meal, the team would return to the locker room where the players would kneel around Borden while he discussed game strategy on a chalkboard or dry erase board.[147] Once this discussion concluded, Borden led the team in prayer, asking for guidance, courage, determination, and to be free from injury.[148] This tradition continued for the duration of the twenty-three years preceding the lawsuit until the school district began receiving complaints.[149] One parent's son was a player on the team and "felt uncomfortable during the prayer and feared that the coach would select him to say the prayer."[150] After being confronted by the principal and athletic director, Borden continued to have a player say a prayer before the pre-game meal, instructing those who "felt uncomfortable" to "wait in the restroom until it was over."[151]

After receiving more complaints, the school district provided guidelines to Borden that any prayers must be student-initiated and free from coercion or even the encouragement of staff.[152] Nor could staff participate in student-initiated prayer.[153] Borden resigned in protest but withdrew his resignation a week and a half later and agreed to follow district policy.[154] However, prior to the 2006 season, Borden instructed his team captains to determine whether his players wished to continue the prayer rituals.[155] Hearing from his captains that the players wished to do so, Borden silently participated in the student-led prayers.[156]

Borden sued and sought: (1) a declaratory judgment that the district's guidelines were unconstitutional; (2) preliminary and

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[145] *Id.*

[146] *Id.*

[147] *Id.*

[148] *Id.* at 159–60.

[149] *Id.* at 160.

[150] *Id.*

[151] *Id.*

[152] *Id.* at 160–61.

[153] *Id.* at 161.

[154] *Id.*

[155] *Id.* at 162.

[156] *Id.*

permanent injunctions preventing the enforcement of the guidelines against him; and (3) an order vacating the guidelines.[157] Borden and the school district both moved for summary judgment.[158] The school district "argu[ed] it did not violate the Free Exercise Clause, and its policy was necessary because Borden's prayer activities violated the Establishment Clause."[159] Rather than challenge his ability to lead the prayers, Borden advocated only for his purported right to bow his head and take a knee, asserting this "symbolic conduct" was protected by the First and Fourteenth Amendments as well as the New Jersey Constitution.[160] He also argued "the School District's justification for its policy was based on an erroneous interpretation of the Establishment Clause."[161] Borden's attorney insisted that "[t]he event of a high school football team saying a prayer is such a part of the culture of our country that it is not a religious event . . . . Even if it is a religious event, the coach is allowed to show respect for the event by bowing his head or bending his knee."[162]

In finding the policy unconstitutional, the District Court for the District of New Jersey granted Borden's motion, stating:

> I agree that an Establishment Clause violation would occur if the coach initiated and led the activity, but I find nothing wrong with remaining silent and bowing one's head and taking a knee as a sign of respect for his players' actions and traditions, nor do I believe would a reasonable observer.[163]

The school district appealed.[164]

2. The Third Circuit's Analysis

On appeal, the Third Circuit reviewed, *inter alia*, the district court's finding that Borden's silent acts would not violate the Establishment Clause.[165] The court listed three tests which the Supreme Court had utilized to determine whether government action amounts

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[157] *Id.* at 163.

[158] *Id.*

[159] *Id.*

[160] *Id.*

[161] *Id.* at 163–64.

[162] Michael S. Schmidt, *Coach Sues Over Right to Pray with Team*, N.Y. TIMES (Nov. 23, 2005), https://www.nytimes.com/2005/11/23/sports/coach-sues-over-right-to-pray-with-team.html.

[163] *Borden*, 523 F.3d at 164.

[164] *Id.*

[165] *Id.* at 165.

to a violation of the Establishment Clause: the coercion test, the *Lemon* test, and the endorsement test.[166] The Third Circuit determined the endorsement test was the appropriate standard here, which asks "whether a reasonable observer familiar with the history and context of the display would perceive the display as a government endorsement of religion."[167]

The court relied on the Supreme Court case of *Santa Fe Independent School District v. Doe*, and noted the long tradition where a student chaplain would begin Santa Fe High School football games with prayer.[168] Upon realizing the Establishment Clause would not permit such prayers, the Santa Fe Independent School District changed the policy so that students would vote first on whether to have a prayer before the game and then which student would give the prayer.[169] In *Santa Fe*, the Supreme Court "considered the many years of pre-game prayers at the school, and the evolution of the policy" and determined the practice violated the Establishment Clause because "an objective Santa Fe High School student [would] unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval."[170]

Given this Supreme Court precedent, the Third Circuit decided it "must consider all of [Borden's] prior prayer activities with his team as the Supreme Court did in *Santa Fe*."[171] The court considered that Borden first had a chaplain bless the pre-game meal before later selecting players to say grace.[172] Borden himself also led the prayers before at least three meals and in the locker room prior to each game for twenty-three years.[173] In advocating for his alleged right to silently respect his players' prayers with a bowed head and bended knee, Borden cited the Fifth Circuit in *Doe v. Duncanville Independent School District*, which stated "neither the Establishment Clause nor the district court's order prevent [school district] employees from treating students' religious beliefs and practices with deference and respect;

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[166] *Id.* at 175.

[167] *Id.* (internal quotation marks omitted) (quoting Modrovich v. Allegheny Cnty., 385 F.3d 397, 401 (3d Cir. 2004)).

[168] *Id.* at 176 (citing Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 294, 309 (2000)).

[169] *Id.* (citing *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 306).

[170] *Id.* at 176–77 (citing *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 308–310).

[171] *Id.* at 176.

[172] *Id.* at 177.

[173] *Id.*

indeed, the constitution requires this. Nothing compels [school district] employees to make their non-participation vehemently obvious or to leave the room when students pray . . . ."[174] The Third Circuit, however, found this argument "unavailing" because the question is not about Borden's intent but instead inquires into the perception of the reasonable observer.[175] In addition, Borden had conveniently omitted the next sentence in the Fifth Circuit's opinion, which stated, "if while acting in their official capacities, [school district] employees join hands in a prayer circle or otherwise manifest approval and solidarity with student religious exercises, they cross the line between respect for religion and endorsement of religion."[176]

Thus, the Third Circuit reversed and held the policy was not facially unconstitutional or as applied to Borden.[177] Given Borden's long history of organizing, leading, and participating in prayer with the football team, "a reasonable observer would conclude that he [was] continuing to endorse religion" even if he were only to engage in the silent acts of bowing his head during the blessing of the pregame meal and kneeling with his team during the prayer in the locker room.[178] Therefore, the school district's policy was necessary to avoid violating the Establishment Clause.[179]

The concurring opinions in *Borden* differed from the opinion of the court insofar as the lead opinion suggested they "might reach a different result . . . absent Borden's 23-year history of promoting team prayer" if only the "respectful display" of bowing his head and taking a knee during student prayers were at issue.[180] One concurring judge thought an Establishment Clause violation may persist if the reasonable observer standard were applied to that hypothetical.[181] The other concurring judge, however, disagreed and thought "a reasonable observer would not conclude that the 'respectful display' . . . would violate the Establishment Clause" regardless of Borden's prior prayer

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[174] *Id.* (alteration in original) (internal quotation marks omitted) (quoting Doe v. Duncanville Indep. Sch. Dist., 70 F.3d 402, 406 n.4 (5th Cir. 1995)).

[175] *Id.* at 177–78.

[176] *Id.* at 178 (alteration in original) (internal quotation marks omitted) (quoting *Duncanville Indep. Sch. Dist.*, 70 F.3d at 406 n.4).

[177] *Id.* at 179.

[178] *Id.*

[179] *Id.*

[180] *Id.* (McKee, J., concurring).

[181] *Id.* at 179–180.

practices.[182] These separate opinions "underscore the complicated nature of symbolic religious conduct by teachers during extracurricular activities," especially where passive acts could be reasonably viewed as either a showing of respect or a tacit endorsement.[183] Moreover, while the Third Circuit panel determined Borden's constitutional rights were not violated, the judges' differing conclusions serve to reinforce the challenges of Establishment Clause review.

B. Kennedy v. Bremerton School District

1. Factual and Procedural Background

In 2008, Joseph Kennedy joined the coaching staff at Bremerton High School as an assistant football coach for the varsity team and the head football coach for the junior varsity team.[184] After each game, Kennedy said a 30-second prayer at the 50-yard line, initially on his own but players on his team and the opposing team eventually joined him.[185] While the majority claims that Kennedy simply acquiesced in players' request to join him in prayer,[186] the dissent asserts Kennedy had "consistently invited others to join his prayers and for years led student athletes in prayer at the same time and location."[187] In time, Kennedy started "incorporating short motivational speeches with his prayer,"[188] which contained "overtly religious references."[189] Kennedy also led the team in pregame and postgame prayers in the locker room, which was identified as a "school tradition" prior to Kennedy becoming a coach.[190]

The school district first became aware of Kennedy's prayer activities in September 2015 when the coach of another team brought it to their attention.[191] The athletic director instructed Kennedy not to

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[182] *Id.* at 186 (Barry, J., concurring).

[183] Brian S. Gwyn, Note, *Adopting a Respectful Posture Toward Teacher Religious Expression: An Establishment Clause Analysis of North Carolina's Respect for Student Prayer and Religious Activity Law*, 13 FIRST AMEND. L. REV. 426, 499 (2015).

[184] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2435 (2022) (Sotomayor, J., dissenting).

[185] *Id.* at 2416 (majority opinion).

[186] *Id.*

[187] *Id.* at 2434 (Sotomayor, J., dissenting).

[188] *Id.* at 2416 (majority opinion).

[189] *Id.* at 2436 (Sotomayor, J., dissenting).

[190] *Id.* at 2416 (majority opinion).

[191] *Id.* at 2435 (Sotomayor, J., dissenting).

lead prayers with players, yet when the game concluded, "Kennedy led a prayer out loud, holding up a player's helmet as the players kneeled around him."[192] The school district promptly responded with a letter recognizing "two problematic practices":

> First, Mr. Kennedy had provided "inspirational talk[s]" that included "overtly religious references" likely constituting "prayer" with the students "at midfield following the completion of . . . game[s]." Second, he had led "students and coaching staff in a prayer" in the locker-room tradition that "predated [his] involvement with the program."[193]

To clarify the school district's expectations, the superintendent "emphasized that 'school staff may not indirectly encourage students to engage in religious activity' or 'endors[e]' religious activity" and instead "'must remain neutral' 'while performing their job duties.'"[194] Kennedy was also advised, "[i]f students engage in religious activity, school staff may not take any action likely to be perceived by a reasonable observer, who is aware of the history and context of such activity at [Bremerton High School], as endorsement of that activity."[195] He was specifically told to refrain from infusing religious expressions into his motivational speeches "so as to avoid alienation of any team member."[196] Finally, the superintendent made clear that Kennedy was "free to engage in religious activity, including prayer, so long as it does not interfere with [his] job responsibilities" and was "nondemonstrative or conducted separately from students . . . ."[197]

After receiving the letter from the superintendent, Kennedy initially appeared to comply with the school district's instructions.[198] However, he later had his attorney send a letter in response, asserting that Kennedy would resume his practice of praying at midfield right after the October 16, 2015, football game ended and allow players to join him, in defiance of the school district's directive.[199] The Supreme Court's majority opinion emphasized that Kennedy's intent was to "wai[t] until the game is over and the players have left the field

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[192] *Id.* at 2436.

[193] *Id.* at 2416 (majority opinion) (alterations and omission in original) (citations omitted).

[194] *Id.* at 2436 (Sotomayor, J., dissenting) (alteration in original).

[195] Kennedy v. Bremerton Sch. Dist., 991 F.3d 1004, 1011 (9th Cir. 2021), *rev'd*, 142 S. Ct. 2407 (2022) (first alteration in original).

[196] *Kennedy*, 142 S. Ct. at 2436 (Sotomayor, J., dissenting).

[197] *Id.* at 2436–37.

[198] *Id.* at 2417 (majority opinion).

[199] *Id.* at 2437 (Sotomayor, J., dissenting).

and then wal[k] to mid-field to say a short, private, personal prayer."[200] Despite Kennedy's stated desire to pray a personal prayer, the dissent pointed out that the majority seemed to have overlooked the fact that Kennedy had "consistently invited others to join his prayers" and "made multiple media appearances to publicize his plans to pray at the 50-yard line," which led to numerous threatening messages toward the school district.[201]

The school district responded with another letter, noting that while Kennedy may not have invited others to join him in prayer following the game on September 17, he had invited others "on many previous occasions."[202] The school district also disputed that Kennedy's prayers "occurr[ed] 'on his own time,'" asserting that he "'remain[ed] on duty' when his prayers occurred 'immediately following completion of the football game, when students are still on the field, in uniform, under the stadium lights, with the audience still in attendance, and while Mr. Kennedy is still in his District-issued and District-logoed attire.'"[203]

At the conclusion of the game on October 16, Kennedy began praying alone at midfield but was soon joined by a host of players and coaches from the opposing team and television news cameras.[204] Rather than engaging in silent prayer, Kennedy's prayer was "verbal" and "audible."[205] Kennedy also claimed the gathering around him during his prayer was "spontaneous" but given the "significant amount of publicity advertising" that Kennedy himself had generated,[206] that contention was unsupported. Furthermore, a crowd of people jumped the fence and rushed the field, leading to the school district's inability to "supervise effectively" and "keep kids safe."[207] In fact, several members of the student band were knocked to the ground by those rushing the field.[208] Days later, Kennedy "made numerous media appearances . . . to, in his words, 'spread[] the word of what was

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[200] *Id.* at 2422 (majority opinion) (alterations in original).

[201] *Id.* at 2434, 2437 (Sotomayor, J., dissenting).

[202] *Id.*

[203] *Id.* (alterations in original) (citations omitted).

[204] *Id.* at 2438.

[205] Kennedy v. Bremerton Sch. Dist., 991 F.3d 1004, 1013 (9th Cir. 2021), *rev'd*, 142 S. Ct. 2407 (2022).

[206] *Id.*

[207] *Id.*

[208] *Kennedy*, 142 S. Ct. at 2438 (Sotomayor, J., dissenting).

going on in Bremerton.'"[209] In dissent, Justice Sotomayor asserts the majority "ignores the severe disruption to school events caused by Kennedy's conduct."[210]

On October 23, 2015, the school district informed Kennedy that it was willing to accommodate Kennedy's prayer as long as it "did not interfere with his duties or risk perceptions of endorsement."[211] However, the school district remained concerned that "any reasonable observer saw a District employee, on the field only virtue of his employment with the District, still on duty, under the bright lights of the stadium, engaged in what was clearly, given [his] prior public conduct, overtly religious conduct."[212] Choosing not to accept or even suggest a reasonable accommodation, Kennedy remained adamant that he would continue the practice of praying at the 50-yard line after football games, and he did so on October 23 and October 26, 2015, alone at the first game and surrounded by several others at the second game.[213]

Soon after the football game on October 26, 2015, Kennedy was placed on paid administrative leave "for engaging in 'public and demonstrative religious conduct while still on duty as an assistant coach.'"[214] Although Kennedy's prior performance reviews were "uniformly positive evaluations,"[215] he was recommended not to be rehired because he "'failed to follow district policy' regarding religious expression and 'failed to supervise student-athletes after games.'"[216]

Kennedy sued the school district, alleging his Free Speech and Free Exercise rights under the First Amendment were violated, and moved for a preliminary injunction to require his reinstatement.[217]

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[209] *Kennedy*, 991 F.3d at 1013 (alteration in original).

[210] *Kennedy*, 142 S. Ct. at 2434 (Sotomayor, J., dissenting). In addition to disrupting school events, Kennedy's demonstrative prayer and media blitz led others to curse at and threaten the head football coach, causing him concern for his physical safety and prompting his resignation after eleven years leading the team. *Kennedy*, 991 F.3d at 1013–14.

[211] *Kennedy*, 142 S. Ct. at 2438–39 (Sotomayor, J., dissenting).

[212] *Id.* at 2439 (alteration in original) (citation omitted) (internal quotation marks omitted).

[213] *Id.*

[214] *Id.* at 2418–19 (majority opinion).

[215] *Id.* at 2419.

[216] *Id.* The majority omits that Kennedy also received negative feedback on his evaluation for "demonstrat[ing] a lack of cooperation with administration" and "contribut[ing] to negative relations between parents, students, community members, coaches and the school district." *Id.* at 2440 (Sotomayor, J., dissenting).

[217] *Id.* at 2419 (majority opinion).

The district court denied the motion, the Ninth Circuit affirmed, and the Supreme Court denied Kennedy's writ of certiorari.[218] When the case returned to the district court, both parties moved for summary judgment.[219] The district court denied Kennedy's motion and granted the school district's motion, and the Ninth Circuit affirmed, stating Kennedy's actions "were enough to lead an 'objective observer' to conclude that the [School] District 'endorsed Kennedy's religious activity by not stopping the practice.'"[220] Kennedy's petition for a rehearing was denied by the Ninth Circuit, but this time the Supreme Court granted certiorari.[221]

2. The Supreme Court's Analysis

Writing for the Court, Justice Gorsuch explained that the First Amendment's Free Exercise and Free Speech Clauses "work in tandem. Where the Free Exercise Clause protects religious exercises, whether communicative or not, the Free Speech Clause provides overlapping protection for expressive religious activities."[222] Justice Gorsuch stated that the Free Exercise and Free Speech Clauses are not "warring" with the Establishment Clause to which Kennedy's rights must "yield" and instead suggests they are "complementary,"[223] although any description of how those clauses complement the Establishment Clause is absent from the opinion.

Justice Gorsuch then asserted that the district court and the Ninth Circuit's reliance on the endorsement test was misplaced since the Court had apparently "long ago abandoned *Lemon* and its endorsement test offshoot."[224] Rather, he states that courts should interpret the Establishment Clause "by 'reference to historical practices and understandings'"[225] without explicating how historical practices and understandings inform the decision in this case. Instead, the Court responded at length to what Justice Gorsuch called the school district's "backup argument" that if it had permitted Kennedy's prayers, it would have violated the Establishment Clause under the coercion

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[218] *Id.*

[219] *Id.* at 2420.

[220] *Id.* (quoting 991 F.3d 1004, 1017–18 (9th Cir. 2021)).

[221] *Id.* at 2420–21.

[222] *Id.* at 2421.

[223] *Id.* at 2426 (quoting Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947).

[224] *Id.* at 2427.

[225] *Id.* at 2428 (quoting Town of Greece v. Galloway, 572 U.S. 565, 576 (2014)).

test.[226] Justice Gorsuch thought "there is a pretty obvious reason why the Ninth Circuit did not adopt this theory in the proceedings below: The evidence cannot sustain it."[227] Focusing on Kennedy expressing a desire to pray alone, Justice Gorsuch said that Kennedy "never coerced, required, or asked any student to pray" and that the school district acknowledged there was "no evidence that students [were] directly coerced to pray with Kennedy."[228] However, the Court has previously recognized that indirect coercion may rise to the level of an Establishment Clause violation.[229]

In dissent, Justice Sotomayor contended that the majority "misconstrued the facts" and erred by failing to consider "the context and history of Kennedy's prayer practice."[230] She stated, "[t]aken together, [the Establishment Clause and Free Exercise Clause] express the view . . . 'that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State'" and should be "committed to the private sphere."[231] She noted that "[t]he State 'exerts great authority and coercive power' in schools,"[232] and "children . . . are uniquely susceptible to 'subtle coercive pressure'"[233] on account of students' "emulation of teachers as role models" and their "susceptibility to peer pressure."[234] She went on to cite a long list of the Court's decisions where it had held prayer in public school and related activities to be unconstitutional.[235] Thus, Justice Sotomayor argued that there was valid that Kennedy's prayers were coercive, especially since several students had indicated "they felt social pressure to follow their coach and teammates."[236]

Justice Gorsuch maintained Kennedy's prayers were a "private religious exercise [that] did not come close to crossing any line one might imagine separating protected private expression from

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[226] *Id.* at 2428–29.

[227] *Id.* at 2429.

[228] *Id.* (alteration in original).

[229] *See* Engel v. Vitale, 370 U.S. 421, 430–31 (1962); Lee v. Weisman, 505 U.S. 577, 592 (1992).

[230] *Kennedy*, 142 S. Ct. at 2434 (Sotomayor, J., dissenting).

[231] *Id.* at 2441 (internal quotation marks omitted) (quoting *Lee*, 505 U.S. at 589).

[232] *Id.* at 2442 (quoting Edwards v. Aguillard, 482 U.S. 578, 584 (1987)).

[233] *Id.* (quoting *Lee*, 505 U.S. at 588).

[234] *Id.* (internal quotation marks omitted) (quoting *Edwards*, 482 U.S. at 584).

[235] *Id.*

[236] *Id.* at 2443.

impermissible government coercion."[237] Unlike *Lee* and *Santa Fe*, he thought it was important that Kennedy's prayers "were not publicly broadcast or recited to a captive audience," nor were students "required or expected to participate."[238] Justice Sotomayor, however, cited the Court's precedent that the inquiry demands "'an examination of the circumstances surrounding' the change in policy, the 'long-established tradition' before the change, and the 'unique circumstances' of the school in question."[239] She thought "the Court's myopic framing of the facts" neglected to mention Kennedy's past prayer practices and the pressure his players had felt, as well as his intent to continue to pray demonstratively with anyone who "voluntarily" chose to join him.[240] Indeed, Kennedy's history of praying at midfield following the conclusion of football games was widely known, his prayers on the three occasions in question were observed by his players and other students, and could properly be considered to amount to indirect coercion.[241]

Justice Sotomayor also argued that as "a school official, . . . [Kennedy's] right to pray at any time and in any manner he wishes while exercising his professional duties is not absolute."[242] Although the majority claimed the Free Exercise and Establishment Clauses were not in conflict, the dissent noted that the Court "has long recognized that these two Clauses . . . 'often exert conflicting pressures,'"[243] were "frequently in tension,"[244] and "tend to clash."[245] She contended:

> The Court inaccurately implies that the courts below relied upon a rule that the Establishment Clause must always "prevail" over the Free Exercise Clause. In focusing almost exclusively on Kennedy's free exercise claim, however, and declining to recognize the conflicting rights at issue, the Court substitutes one supposed blanket rule for another. The proper response where tension arises between the two Clauses is not to ignore it, which effectively silently elevates one party's right above others. The

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[237] *Id.* at 2429 (majority opinion).

[238] *Id.* at 2432.

[239] *Id.* at 2444 (Sotomayor, J., dissenting) (quoting Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 315 (2000)).

[240] *Id.* at 2452–53.

[241] *Id.* ("[T]he government may no more use social pressure to enforce orthodoxy than it may use more direct means.").

[242] *Id.* at 2445–46.

[243] *Id.* at 2447 (quoting Cutter v. Wilkinson, 544 U.S. 709, 719 (2005)).

[244] *Id.* (internal quotation marks omitted) (quoting Locke v. Davey, 540 U.S. 712, 718 (2004)).

[245] *Id.* (internal quotation marks omitted) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 668–69 (1970)).

> proper response is to identify the tension and balance the interests based on a careful analysis of "whether [the] particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so."[246]

Accordingly, Justice Sotomayor argued the Establishment Clause prohibited a school district from "allow[ing] 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."[247]

Justice Sotomayor also worried that the Court's abandonment of *Lemon* "call[ed] into question decades of subsequent precedents that it deems 'offshoot[s]' of that decision."[248] She expressed additional concern that although the Court declined to provide "any meaningful explanation of its history-and-tradition test,"[249] such a test has yielded problems before.[250] While the coercion test remains, it is "nearly toothless" and "fail[s] to acknowledge the unique pressures faced by students while participating in school-sponsored activities."[251]

After having his demonstrative public prayer validated by the Supreme Court, Kennedy was reinstated as an assistant football coach at Bremerton High School.[252]

C. Distinguishing Borden *and* Kennedy

As public school districts, both East Brunswick and Bremerton were concerned with running afoul of the Establishment Clause of

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[246] *Id.* (alteration in original) (citations omitted) (quoting *Walz*, 397 U.S. at 669).

[247] *Id.* at 2441.

[248] *Id.* at 2434 (second alteration in original).

[249] *Id.* at 2450.

[250] *See id.* Justice Sotomayor recognized the Court's lack of explanation of its "history-and-tradition test" would "offer[] essentially no guidance for school administrators." *Id.*

[251] *Id.* at 2434.

[252] Bill Chappell, *High School Football Coach Who Led Prayers on the Field Will Get His Job Back*, NPR (Oct. 27, 2022, 12:03 PM), https://www.npr.org/2022/10/27/1131880548/football-coach-prayers-reinstated. While Bremerton School District reinstated Kennedy after the Supreme Court's decision, he resigned from his position after the first game of the 2023 high school football season. Paradise Afshar, *Football Coach Who Won Supreme Court Case for Right to Pray on the Field Resigns After One Game*, CNN (Sept. 6, 2023, 7:23 PM), https://www.cnn.com/2023/09/06/us/washington-football-coach-pray-resigns.

the First Amendment by the actions of their employees.[253] At the same time, the school districts had to be careful not to violate their employees' constitutional rights. While the cases appear similar, there are several reasons the Third Circuit in *Borden* and the Supreme Court in *Kennedy* reached different conclusions concerning the prayers of the two football coaches.

First, the facts of the two cases are distinguishable. In *Borden*, the coach offered prayers prior to the game, including once before the pregame meal then again in the locker room after discussing game strategy and immediately before his team took the field.[254] Borden intended the prayers to "promote team unity,"[255] which is undeniably important for success in football. However, he stated that those who wished not to participate in the prayer could "wait in the restroom until it [was] over,"[256] apparently unaware that relegating nonconforming players to the restroom would likely create more division than team unity. By giving those who objected to the prayers no practical alternative,[257] Borden essentially had a captive audience. Conversely, Kennedy's prayers at issue took place immediately after the game concluded.[258] While Kennedy still had a duty to supervise his players following the game, "[t]he [school d]istrict permitted other members of the coaching staff to forgo supervising students briefly after the game to do things like visit with friends or take personal phone calls."[259] In addition, players were free to "head[] to the locker room, board[] the bus, or . . . sing[] the school fight song" during the time Kennedy prayed at midfield.[260]

Second, the causes of action and the relief sought by the two coaches differed. In addition to claims under the state constitution,

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[253] Borden v. Sch. Dist., 523 F.3d 153, 163 (2008), *cert. denied*, 555 U.S. 1212 (2009); *Kennedy*, 142 S. Ct. at 2419, 2426.

[254] 523 F.3d at 159.

[255] Finley, *supra* note 141.

[256] *Borden*, 523 F.3d at 160.

[257] The Supreme Court has stated students cannot be forced to choose "between whether to [participate] or to risk facing a personally offensive religious ritual" because under the First Amendment, "the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice." Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 312 (2000) (quoting Lee v. Weisman, 505 U.S. 577, 596 (1992)).

[258] *Kennedy*, 142 S. Ct. at 2437 (Sotomayor, J., dissenting).

[259] *Id.* at 2423 (majority opinion).

[260] *Id.* at 2417.

Borden claimed the school district violated his Due Process and Equal Protection rights under the Fourteenth Amendment[261] whereas Kennedy alleged violations of his rights under the Free Speech and Free Exercise Clauses of the First Amendment.[262] Although Borden previously led or selected others to lead the prayers, he only requested that the court allow him to passively participate with a bowed head and bended knee in student-led prayers.[263] In contrast, Kennedy desired to continue to pray a personal—yet demonstrative—prayer at midfield and allow others to join him.[264] Indeed, Kennedy refused to even engage in any discussions with administrators to reach an acceptable accommodation despite the school district's concern that Kennedy's prayers could alienate some of his players.[265]

Third, the Third Circuit and the Supreme Court applied two different Establishment Clause tests. In *Borden*, the Third Circuit applied the endorsement test and considered "whether a reasonable observer familiar with the history and context of the display would perceive the display as a government endorsement of religion."[266] Importantly, the Third Circuit thought Borden's past prayer practices were relevant to the perception of a reasonable observer.[267] In *Kennedy*, however, Justice Gorsuch asserted the Court had "long ago abandoned *Lemon* and its endorsement test offshoot."[268] Instead, Establishment Clause issues "must be interpreted by 'reference to historical practices and understandings.'"[269] But rather than apply a test grounded in history and tradition, the Court engaged in a coercion analysis.[270] Unlike the Third Circuit in *Borden*—and the Court's own precedent in *Santa Fe*—the majority opinion excused Kennedy's past prayer practices and focused exclusively on the three prayers for which he was disciplined.[271]

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[261] *Borden*, 523 F.3d at 163.

[262] *Kennedy*, 142 S. Ct. at 2419.

[263] *Borden*, 523 F.3d at 158, 162–63.

[264] *Kennedy*, 142 S. Ct. at 2437 (Sotomayor, J., dissenting).

[265] *Id.* at 2436, 2439.

[266] 523 F.3d at 175 (internal quotation marks omitted) (quoting Modrovich v. Allegheny Cnty., 385 F.3d 397, 401 (3d Cir. 2004)).

[267] *Id.* at 176–77.

[268] 142 S. Ct. at 2427.

[269] *Id.* at 2428 (quoting Town of Greece v. Galloway, 572 U.S. 565, 576 (2014)).

[270] *Id.* at 2429–32.

[271] *Id.* at 2422.

The coercion test likely would have led to the same outcome in *Borden* while the Supreme Court decided the prayers in *Kennedy* were not coercive. Although the Third Circuit's principal opinion chose not to deploy the coercion test,[272] the time and place of Borden's prayers in addition to other conduct by the coach and his team captains presented strong evidence of pressure. One of the concurring opinions explored the facts through the lens of the coercion test and thought nonconforming players "might feel subtle . . . coercion to participate in the ritual despite disagreement or discomfort with it," which would "raise[] a serious Establishment Clause issue . . . ."[273] In *Kennedy*, however, the factual differences undoubtedly make the coercion test a closer call. Any coercion by Kennedy's prayers would have been less obvious than Borden's prayers due to the differences between the time and place of each coach's prayers. An argument can certainly be made that Kennedy's prayers crossed the line, too. Indeed, Justice Sotomayor's dissent made a strong case that the prayers were coercive of his players.[274] But since the majority opinion accepted Kennedy's purported desire to pray alone despite evidence to the contrary and narrowed the scope of review only to the three most recent prayers where none of Kennedy's players had joined him, Justice Gorsuch concluded there was no coercion.[275] While players may have been free to leave or choose to join him in prayer,[276] a coach who openly prays at midfield right after a game may exert indirect coercive pressure on his team. At the very least, there appears to have been a genuine issue of material fact that would support the matter proceeding to trial.

Had the Supreme Court applied *Lemon* or the endorsement test, Kennedy's prayers likely would have violated the Establishment Clause. Since Kennedy was "on the field only by virtue of his employment with the [school d]istrict, still on duty, under the bright lights of the stadium, engaged in what was clearly, given [his] prior public conduct, overtly religious conduct,"[277] his prayers would have lacked a secular purpose, had the effect of promoting religion, and created an entanglement between government and religion. Under the endorsement test, a reasonable observer would likely perceive Kennedy's prayers as

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[272] *See Borden*, 523 F.3d at 175.

[273] *Id.* at 181 (McKee, J., concurring).

[274] *See Kennedy*, 142 S. Ct. at 2443–44 (Sotomayor, J., dissenting).

[275] *Id.* at 2430 (majority opinion).

[276] *See id.* at 2417–18.

[277] *Id.* at 2439 (Sotomayor, J., dissenting).

government endorsement of religion because his prayers occurred "immediately following completion of the football game, when students [were] still on the football field, in uniform, under the stadium lights, with the audience still in attendance, and while [he was] still in his District-issued and District-logoed attire."[278] Thus, Kennedy's prayers probably would have failed all three prongs of *Lemon* as well as the endorsement test.

D. The Implications of the Supreme Court's Kennedy *Decision*

The decision in *Kennedy* clarified, to some extent, the approach the current Supreme Court will take to address questions between the Free Exercise and Establishment Clauses. The *Lemon* test and "its endorsement test offshoot" have explicitly been "abandoned."[279] Although Justice Gorsuch did not shed light on what a history-and-tradition analysis looks like, a court must begin review of an Establishment Clause issue "by 'reference to historical practices and understandings.'"[280] The history-and-tradition test, however, is rather amorphous, which has proven to be problematic in other applications.[281] A selective review of the history of most issues could lead to whatever result the majority of the Court may want.[282] Even legislative prayer and its supposed "unambiguous and unbroken history of more than 200 years"[283] is not without historical contrasts.[284] Thus, while the Court may faithfully apply their version of history, the test is likely to lead to even more inconsistent results than *Lemon* as the makeup of the Court changes in the future.[285]

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[278] *Id.* at 2437.

[279] *Id.* at 2427 (majority opinion).

[280] *Id.* at 2428 (quoting Town of Greece v. Galloway, 572 U.S. 565, 576 (2014)).

[281] *See* Clara Fong et al., *Judges Find Supreme Court's Bruen Test Unworkable*, BRENNAN CTR. FOR JUST. (June 26, 2023), https://www.brennancenter.org/our-work/research-reports/judges-find-supreme-courts-bruen-test-unworkable.

[282] *See* Zack Needles, *The Problem with SCOTUS*'s *History-and-Tradition Approach*, AM. LAW. (June 28, 2022, 6:00 AM), https://www.law.com/2022/06/28/the-problems-with-scotuss-history-and-tradition-approach-the-morning-minute/.

[283] Marsh v. Chambers, 463 U.S. 783, 792 (1983).

[284] *See id.* at 800 n.10 (1983) (Brennan, J., dissenting).

[285] "[R]eliance on history, as well as the text, is not exclusive to constitutional conservatives. Many liberals are just as eager to array the historical record on their side. As often as not, the divide is over which side has the better grasp of the history, as well as which historical events matter the most." Carl H. Esbeck, *Uses and Abuses of Textualism and Originalism in Establishment Clause Interpretation*, 2011 UTAH L. REV. 489, 493 (2011).

By engaging in a thorough coercion analysis,[286] the *Kennedy* Court appeared to acknowledge that history and tradition alone may not be enough to decide Establishment Clause cases. However, the majority opinion seemed to suggest that more direct coercive action is necessary to find a public employee's religious expression causes the government to violate the Establishment Clause.[287] Justice Sotomayor asserted that the Court's decision would provide little to no guidance for school administrators to ensure their employees do not cause the school to violate the Establishment Clause.[288] Schools—and courts—will continue to grapple with the extent to which a football coach can exercise his rights under the Free Exercise Clause while simultaneously not violating the Establishment Clause. After *Kennedy*, can a coach, like Borden, say grace before a team meal or in the locker room prior to leading his players to the field? Can he kneel in prayer, whether alone or with others, at midfield *before* a game begins? Can he pray and give motivational speeches infused with religious references at the 50-yard line surrounded by his players so long as there was no direct coercion?

The Supreme Court's decision in *Kennedy* did not invalidate the Third Circuit's ruling in *Borden*, but it is worth pondering whether the outcome would be different now. After all, the Third Circuit analyzed the issue under the endorsement test,[289] which, along with *Lemon*, is now disfavored.[290] Would Borden be able to kneel silently in a display of respect as his players prayed? Would the long history and tradition of Borden's prayers both before meals and in the locker room prior to taking the field, as well as the ubiquity of the practice by other coaches across the country, have made a difference? Would he be able to lead the prayers himself for the players who chose to be present and participate? Borden retired from coaching in 2013,[291] but other religious coaches at public schools will surely see just how much the courts will allow God into football and other sports.

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[286] *See Kennedy*, 142 S. Ct. at 2428–32.

[287] *See id.* at 2429–30.

[288] *Id.* at 2450 (Sotomayor, J., dissenting).

[289] Borden v. Sch. Dist., 523 F.3d 153, 175 (3d Cir. 2008), *cert. denied*, 555 U.S. 1212 (2009).

[290] *See Kennedy*, 142 S. Ct. at 2427.

[291] *See* John Saccenti, *Bears Coach Marcus Borden Steps Down*, PATCH (Jan. 11, 2013, 6:32 PM), https://patch.com/new-jersey/eastbrunswick/bears-coach-marcus-borden-steps-down; *NJ Football: Borden Resumes Big Central Football Conference Camp Caravan Tour*, MY CENT. JERSEY (Aug. 7, 2022, 3:48 PM), https://www.mycentraljersey.com/story/sports/high-school/football/2022/08/07/nj-football-borden-resumes-big-central-football-conference-tour/65394733007/.

The precedential value of prior Supreme Court decisions that relied on *Lemon* or the endorsement test is now unclear. As the presence of religion in public spaces is sure to grow, it is worth contemplating the extent to which the *Kennedy* decision may impact the classroom. In *Engel v. Vitale*, the Court characterized "the governmental endorsement of [the Regents' Prayer]" as "relatively insignificant when compared to the governmental encroachments upon religion which were commonplace 200 years ago."[292] Since school prayer was a regular and accepted practice in the past, would an analysis grounded in history and tradition open the door to instances of school prayer in the future? Similar to Kennedy's personal prayers at the 50-yard line at the conclusion of football games, imagine a teacher kneeling in private prayer at the front of the classroom immediately after administering a test to her students. While such a prayer would not be as obviously coercive as the prayer in *Engel*, would that be permitted following *Kennedy*? In *Wallace v. Jaffree*, the state law at issue was unconstitutional because its purpose was "to return voluntary prayer to public school."[293] Without *Lemon*, does the purpose of the statute no longer matter? Could a state legislature pass a similar law today with the intent to advance a religious practice as long as it comports with at least one possible reading of history and tradition and is not exceedingly coercive?

The *Kennedy* decision may have raised more questions than it answered, but there is now little reason to wonder about the relationship between the Free Exercise and Establishment Clauses. Notwithstanding Justice Gorsuch's assertion to the contrary,[294] the Court appears to be elevating the Free Exercise Clause (and the Free Speech Clause) above the Establishment Clause. Justice Sotomayor maintained "[t]he proper response is to identify the tension [between the Free Exercise and Establishment Clauses] and balance the interests" but the Court appears to have "substitute[d] one supposed blanket rule for another."[295] As long as a public employee can convince a court that his religious conduct was motivated by personal religious beliefs and can justify such conduct as aligning with a longstanding historical practice and/or stopping short of direct coercion, the religious conduct

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[292] 370 U.S. 421, 436 (1962).

[293] 472 U.S. 38, 43 (1985).

[294] *Kennedy*, 142 S. Ct. at 2426 (quoting Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947)) ("A natural reading of that sentence would seem to suggest the Clauses have 'complementary' purposes, not warring ones where one Clause is sure to prevail over the others.").

[295] *Id.* at 2447 (Sotomayor, J., dissenting).

may very well supersede any effort to restrict the conduct on Establishment Clause grounds.

In addition, the Supreme Court has a long history of evaluating whether government action is hostile toward religion,[296] and the Court has increasingly relied on this principle in recent years.[297] Justice Gorsuch did not engage in a formal analysis to determine whether the school district's policy was hostile to Kennedy's religious beliefs.[298] However, Justice Gorsuch asserted the school district paradoxically tried to suppress Kennedy's protected religious expression in order to comply with the Constitution. He concluded the majority opinion by stating:

> 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. And the only meaningful justification the government offered for its reprisal rested on a mistaken view that it had a duty to ferret out and suppress religious observances even as it allows comparable secular speech. The Constitution neither mandates nor tolerates that kind of discrimination.[299]

Along with Howard Gillman, the chancellor of the University of California, Irvine, constitutional law scholar Erwin Chemerinsky characterized the Free Exercise Clause as previously operating as "a sort of shield, a protection for religious minorities from the prejudices of the powerful," but now the Court seems to be "transforming this First Amendment clause into a sword . . . to strike down hard-fought advances in civil rights . . . ."[300]

By praying at midfield immediately after football games, Kennedy wore his religious beliefs on his proverbial sleeve while the logo of

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[296] *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 654 (1943) ("The essence of the religious freedom guaranteed by our Constitution is therefore this: no religion shall either receive the state's support or incur its hostility."); Everson, 330 U.S. at 18 ("[T]he state [must] be a neutral in its relations with groups of religious believers and nonbelievers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them.").

[297] *See, e.g.*, Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1732 (2018); Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2089 (2019).

[298] *See Kennedy*, 142 S. Ct. at 2422 n.1.

[299] *Id.* at 2433.

[300] Howard Gillman & Erwin Chemerinsky, *The Weaponization of the Free-Exercise Clause*, THE ATLANTIC (Sept. 18, 2020), https://www.theatlantic.com/ideas/archive/2020/09/weaponization-free-exercise-clause/616373/.

Bremerton High School was simultaneously stitched across his actual shirt. When a government employee so obviously on duty can engage in overt religious displays for the purpose of being seen by others, including impressionable students over whom he exercises control, those who do not adhere to the historically majority religion may be subjected to the indirect coercion the Court had warned against in *Lee v. Weisman*.[301] Permitting even such subtle pressure appears to aggrandize the Free Exercise Clause to the detriment of the Establishment Clause. When the Free Exercise and Establishment Clauses do not stand on equal footing, the wall of separation between church and state crumbles.[302]

Since the Supreme Court has disposed of *Lemon* and the endorsement test, embraced an interpretation by reference to history and tradition, and recognized that the extent of coercion matters, some state legislators are pushing harder to insert religion into public schools.[303] In West Virginia, a bill that would allow the teaching of creationism in public schools has passed the state senate.[304] Similarly, a Texas bill requiring that the Ten Commandments be placed in every public school classroom passed its state senate.[305] The Supreme Court has previously held that similar laws were unconstitutional under *Lemon*.[306] However, now that *Lemon* has been abrogated, the legislation may be successful this time. State Senator Phil King, the

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[301] *See* Lee v. Weisman, 505 U.S. 577, 591–92 (1992).

[302] Heather L. Weaver & Daniel Mach, *The Supreme Court Benches the Separation of Church and State*, AM. C.L. UNION (July 6, 2022), https://www.aclu.org/news/religious-liberty/the-supreme-court-benches-the-separation-of-church-and-state; Michelle Boorstein, *Under Right-Leaning Supreme Court, the Church-State Wall is Crumbling*, WASH. POST (July 17, 2022, 6:00 AM), https://www.washingtonpost.com/religion/2022/07/17/supreme-court-church-state-religion-coach/.

[303] *See, e.g.*, Jack Jenkins, *In Texas, Republicans Push Bills Aimed at Enhancing Faith's Role in School*, WASH. POST (Apr. 25, 2023, 11:27 AM), https://www.washingtonpost.com/religion/2023/04/25/texas-republicans-push-bills-aimed-enhancing-faiths-role-school/.

[304] S.B. 619, 86th Leg., 2023 Reg. Sess. (W. Va. 2023) ("Teachers in public schools . . . may teach intelligent design as a theory of how the universe and/or humanity came to exist.").

[305] S.B. 1515, 88th Leg., Reg. Sess. (Tex. 2023) ("A public elementary or secondary school shall display in a conspicuous place in each classroom of the school . . . the Ten Commandments."). The bill, however, may have failed due to the Texas State House missing a deadline to vote to advance the bill. Ashley Killough & Tina Burnside, *A Bill That Would Have Required Texas Public Schools to Display the Ten Commandments Has Failed*, CNN (May 24, 2023, 3:39 AM), https://www.cnn.com/2023/05/24/us/texas-ten-commandments-bill/index.html.

[306] *See* Stone v. Graham, 449 U.S. 39, 42 (1980); Edwards v. Aguillard, 482 U.S. 578, 596–97 (1987).

author of the Texas bill, explicitly acknowledged such a bill would not have been "legally feasible" prior to the *Kennedy* decision.[307] He contends, "[r]eligious liberty was a bedrock of America's founding," and it was common for public schools to "display the Ten Commandments, as part of America's history and tradition."[308] If that is accepted as true, the coercion test may not be enough to prevent creationism, the Ten Commandments, and even prayer from entering public schools.

IV. CONCLUSION

The Supreme Court has said that government "must be neutral in matters of religio[n]" neither advancing nor inhibiting "religious theory, doctrine, or practice."[309] In *Kennedy*, the majority of the Court decided that Bremerton School District improperly restricted Kennedy's private religious expression[310] while the dissent thought the school district's actions were necessary to restrain Kennedy from using his platform as a public employee to impose his religious views on others.[311] Prior Supreme Court decisions involving school prayer—and other cases like the Third Circuit in *Borden*—would have suggested Kennedy's claim was a longshot or, in football terms, a Hail Mary. But the prevalence of prayer and other expressions of faith in football made the sport the ideal vehicle for those wanting prayer in the public school setting.

According to Justice Gorsuch, the Free Exercise Clause (and the Free Speech Clause) are not "warring" with the Establishment Clause, and instead the clauses are "complementary."[312] Indeed, in *Kennedy* he unequivocally stated: "There is no conflict between the constitutional commands before us."[313] However, it would seem that in the context of a public employee's deliberate religious expression while at work, the Free Exercise Clause and the Establishment Clause occupy the same space, and as one gets bigger, the other must necessarily

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[307] Sen. Phil King, BILL ANALYSIS: AUTHOR'S/SPONSOR'S STATEMENT OF INTENT, S.B. 1515, 88th Leg., Reg. Sess., at 1 (Tex. 2023), https://capitol.texas.gov/tlodocs/88R/analysis/pdf/SB01515I.pdf.

[308] *Id.*

[309] *See* Epperson v. Arkansas, 393 U.S. 97, 103–04 (1968).

[310] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2433 (2022).

[311] *Id.* at 2453 (Sotomayor, J., dissenting).

[312] *Id.* at 2426.

[313] *Id.* at 2432.

get smaller. To avoid "elevat[ing] one party's right above others,"[314] perhaps a better way to consider the competing interests is to balance those interests akin to the way the Court has instructed that the free speech rights of public employees should be balanced with the interests of their public employers under the *Pickering* test.[315]

Although the coercion analysis remains relevant, the Court's vague history-and-tradition test will continue to allow for tension between the Establishment and Free Exercise Clauses. It is worth remembering that the Free Exercise Clause "has never meant that a majority could use the machinery of the State to practice its beliefs."[316] However, after *Kennedy* and the relegation of the Establishment Clause, coaches, teachers, and other public school employees of faith may feel free to engage in demonstrative prayer, even while on duty in front of impressionable students under their control. This may be true despite an apparent inconsistency between demonstrative prayer and the Bible itself.[317] But given the Court's priority for individuals' freedom to practice their religion when and how they wish, the Establishment Clause may often fail as a defense against alleged violations of the Free Exercise Clause. Consequently, public school districts and other public employers will need to be cognizant that their employees' religious practices will receive greater protection following the Court's decision in *Kennedy*.

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[314] *Kennedy*, 142 S. Ct. at 2447 (Sotomayor, J., dissenting).

[315] *See* Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968). The Supreme Court has never applied the *Pickering* balancing test to a Free Exercise claim. *See Kennedy*, 142 S. Ct. at 2433 (Thomas, J., concurring). However, some courts of appeals have applied the *Pickering* test or stated that *Pickering* does apply to such claims without rebuke from the High Court thus far. *See, e.g.*, Brown v. Polk Cnty., 61 F.3d 650, 658–59 (8th Cir. 1995); Scarbrough v. Morgan Cnty. Bd. of Educ., 470 F.3d 250, 260 (6th Cir. 2006); Walden v. Ctrs. for Disease Control & Prevention, 669 F.3d 1277, 1286 (11th Cir. 2012).

[316] Sch. Dist. v. Schempp, 374 U.S. 203, 226 (1963).

[317] *See* Matthew 6:5–6.