Commentary

The Praying Football Coach Supreme Court Decision: Five Implications for School Administrators

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Abstract

School administrators have often been admonished that it is illegal for teachers and other employees to pray in front of students. *Kennedy v. Bremerton School District,* also known as "the praying football coach" decision, appears to have changed that, but many questions remain as to the extent and implications of this unprecedented U.S. Supreme Court decision. This article describes why this court case was so significant. It summarizes the relevant facts of the case and the Court's majority and dissenting opinions. The article also provides school leaders with guidance about how to respond to this seminal case by concluding with five implications of the Court's decision.

Keywords: school law, U.S. Supreme Court, religion, church-state, legal issues

In 2022, the U.S. Supreme Court ruled against a school district reasoning that the district must allow a football coach's post-game prayer. The case, *Kennedy v. Bremerton School District*, is confusing to many school leaders, teachers, and legal scholars who wonder if the decision signals a major shift in how religion should be viewed in public schools. This article aims to provide clarity and offer legal guidance on that question. First, it describes the significance of church-state issues in schools and it details the Supreme Court precedent about this issue that has developed over the course of sixty years. Second, it summarizes the facts of the *Kennedy* case, as well as the majority and dissenting opinions. Finally, it provides educators with five implications of this seminal case.

Why does it matter if coaches pray?

Religious expression in schools may seem innocuous, leading some school leaders to ignore it. For example, leaders may overlook teachers praying with students because they believe it is easier to go along with community norms or they believe that praying is good and doesn't hurt anyone else. In contrast, other leaders recognize that the separation of church and state is one of the founding principles of American democracy.

The Founding Fathers were aware of the dangers of religious persecution and included the Establishment Clause in our Constitution, which forbids the government from creating laws relating to an "establishment of religion."

These opposing views on church-state interaction make sense considering the Constitution also includes the Free Exercise Clause, prohibiting the government from interfering with the "free exercise" of religion. Thus, school leaders and courts have repeatedly faced inherent constitutional tensions when confronting religion in public schools.

Due to these tensions and the changing legal landscape, it is imperative for school leaders to understand the *Kennedy* case as it signals a pivotal and unprecedented shift in how the Court addresses religion in schools. From the 1940s until 2000, the Supreme Court primarily took a separationist stance and prohibited many religious practices in public schools including:

- Religious instruction (1948, 1952)
- Teacher-led prayer (1962, 1985) and Bible reading (1963)
- Clergy-led invocations at graduation (1992)
- Student-led prayer before athletic events (2000)

In these decisions, the Supreme Court reasoned that the Establishment Clause prohibited coercion, endorsement, and entanglement of religion (McCarthy, 2022).

In the 1990s, the Court shifted to a more accommodationist stance. Recent Court decisions have permitted:

- State aid to religious schools for interpreters (1993), Title I/remedial instruction in religious schools (1997), materials/equipment (2000), vouchers (2002, 2011), grant funding (2017), tax credits (2020), and tuition reimbursement (2022)
- A football coach's post-game prayer (2022).

Throughout the 1990s, the Court focused on the Establishment Clause in evaluating church-state issues. In most cases, the Court found the Establishment Clause, prohibiting government-sanction religion, was

not violated and allowed the religious activity to continue. More recently though, the Court has turned its attention to the Free Exercise Clause in evaluating religious expression in schools. This new approach focuses on the religious expression of individuals and accommodates the expression in an attempt to avoid religious discrimination (McCarthy, 2022).

Some critics argue that *Kennedy* is a groundbreaking case that has seriously eroded the separation of church and state. They agree with *Kennedy's* dissenting justices in their warning that the decision "sets us further down a perilous path in forcing States to entangle themselves with religion, with all of our rights hanging in the balance" (*Kennedy v. Bremerton*, 2022, dissenting opinion, p. 35). If the line of reasoning used by the majority justices in the *Kennedy* case is extended to future cases, critics fear that church and state will be further entangled in public schools through prayer, funding, and/or curriculum.

Renowned church/state legal scholar, Dr. Martha McCarthy, warns that "[k]eeping church and state discrete in education has served us well [for over six decades], and we all should be fearful of its demise" (2022, p. 569). She explains that *Kennedy* should matter to educators because the Supreme Court left them with little guidance on how to apply this ruling to situations they face. McCarthy also discusses how the decision could be used to discriminate against students and school employees.

Some educators may "couch in religious beliefs their condemnation of LGBTQ [individuals]" (p. 569). Thus, the recent case matters because its implications stretch beyond one coach simply praying in a Christian community.

Who was the praying football coach, and how did the *Kennedy v. Bremerton School District* controversy start?

Joseph Kennedy was an assistant varsity football coach at Bremerton High School (BHS) in Washington State. For a number of years, he had developed a post-game routine of praying by himself on the 50-yard line.

Over time, students noticed, and he was joined not only by players on the Bremerton team, but also by players on the opposing teams. Kennedy also infused religious messages and led prayers into his pre- and post-game speeches and rituals where students and staff were in attendance (*Kennedy v. Bremerton School District*, 2022, dissenting opinion, p. 4).

Little by little, more students stopped by the after-game prayers, whether by invitation or by curiosity, and the size of the group grew until it was common for even the coaches of the opposing teams to join the circle. At some point, coaches from opposing teams reported to their administrators what was happening at BHS football games. Those administrators then called the BHS administrators about the prayer sessions (*Kennedy v. Bremerton School District*, 2022, dissenting opinion, p. 4).

BHS administrators informed Kennedy that he could continue a private practice of religion, but that it must be "physically separate from student activity, and students may not be allowed to join such activity" (Hoppe, Arasim, & Piper, 2020, p. 174). The school district believed that it was providing Kennedy with the religious accommodation that was required by the Free Exercise Clause.

Did Coach Kennedy comply with the accommodations suggested by the school district?

For a brief period of time, Kennedy complied. Then, he hired an attorney who submitted a letter to the District claiming Kennedy was entitled to religious accommodation under Title VII of the Civil Rights Act of 1964. The letter announced that Kennedy would resume his religious activity because his post-game activity occurred during "non-instructional hours" (Hoppe, Arasim, & Piper, 2020, p. 174). When Kennedy announced his intent to resume praying, he gained a great deal of media attention. Kennedy began to accept numerous speaking engagements in a media blitz, discussing his right to pray at school on the football field.

The conflict continued when the District told Kennedy that his job *could be* and *would be* in jeopardy if he continued his practice of praying after games and holding devotionals in the locker room. The District provided Kennedy with additional religious accommodations such as allowing him to pray after students had left the field and spectators had left the stands (Hoppe, Arasim, & Piper, 2020).

However, Kennedy argued that he had the right to express his religion freely in his own way and rejected the District's accommodations. As a result, the District claimed that Kennedy's prayer was a violation of the Establishment Clause because Kennedy was still wearing school-logoed clothing and was still on duty (Hoppe, Arasim, & Piper, 2020). Eventually, the District did not renew Kennedy's coaching contract for the coming school year citing Kennedy's "decision to persist in praying quietly without his students after three games in October 2015" (*Kennedy v. Bremerton*, 2022, majority opinion, p. 2).

In response, Kennedy filed a lawsuit against the District alleging violations of Free Speech and Free Exercise under the First Amendment. Both the federal district court and Ninth Circuit Court of Appeals decided in favor of the school district and Kennedy appealed the case to the Supreme Court.

What did the Supreme Court decide?

In a 6:3 decision, the Court's majority held in favor of the praying football coach. The majority opinion reasoned that there was no coercion surrounding Kennedy's post-game prayer. To reach its decision, the majority abandoned the *Lemon* test and applied a historical approach to determine whether religious activity violates the Establishment Clause.

For many years, the *Lemon* test, which derived from *Lemon v. Kurtzman* (1971), guided schools in determining whether religious activities in schools were legal. The *Lemon* test has three parts. Did the religious activity have a secular purpose? Was there a primary effect of the religious activity that either advanced or inhibited religion? Did the activity foster an excessive government entanglement with religion? If the activity had a secular purpose, did not advance or inhibit religion, or foster an excessive entanglement with religion, the religious activity was permissible.

However, in recent Supreme Court cases, the *Lemon* test has slowly been downgraded and used less as a measuring stick. In the majority opinion in *Kennedy*, Justice Gorsuch explained that the *Lemon* test as out of date and instead of applying it, "the Establishment Clause must be interpreted by 'reference to historical practices and understandings'" (p. 23). He asserted that the Court has a "traditional understanding that permitting private speech is not the same thing as coercing others to participate in it" (p. 29). Gorsuch identified "a long constitutional tradition" where citizens must learn "how to

tolerate diverse expressive activities" in order to live in a "pluralistic society" (p. 29).

Thus, the majority characterized Kennedy's prayer as a private, personal, and quiet act that was protected by the First Amendment's Free Exercise and Free Speech clauses. The majority affirmed that even though Kennedy was still on duty and being paid to supervise students, his prayer was conducted at a time when other coaches were permitted to check email and phone home, so supervisory duties were perfunctory at best.

The majority highlighted the standard set in *Tinker v. Des Moines* (1969) that both teachers and students have constitutional free speech rights that are not removed once they enter the schoolhouse gates but tempered that statement by stating that public school employees are not given boundless free speech rights where they "may deliver any message to anyone anytime they wish" (*Kennedy v. Bremerton School District*, 2022, majority opinion, p. 15).

What was the Supreme Court's Dissenting Opinion?

The dissenting opinion was written by Justice Sotomayor and argued that the majority misconstrued the facts (*Kennedy v. Bremerton School District*, 2022, dissenting opinion, p. 1). To support this assertion, Sotomayor provided a thorough summary of the factual record including details not provided by the media accounts. Uncharacteristic of Supreme Court opinions, Sotomayor also included three pictures of Coach Kennedy's prayers.

Sotomayor highlighted that during Kennedy's "personal religious observance," he was still

1. dressed in school-logoed, team attire,
2. located in areas of the school football field not open to the public,
3. actively involved in supervision of students on the football team immediately after the game and responsible for their behavior and conduct, and
4. often surrounded by his players as well as players and coaches from the opposing teams during his prayer.

The dissenting opinion reasoned that the majority had incorrectly focused on Kennedy's prayer without recognizing that it was "part of a longstanding practice of the employee ministering religion to students as the public watched" (p. 14).

The dissent identified that many different faiths are represented in the school district including: "Bahá'ís, Buddhists, Hindus, Jews, Muslims, Sikhs, Zoroastrians, and many denominations of Christians, as well as numerous residents who are religiously unaffiliated" (*Kennedy v. Bremerton School District*, 2022, dissenting opinion, p. 3).

Sotomayor also raised concerns about the coercion of players who sought to gain the coach's approval, as well as pressure from their peers to join in the prayer. The dissent highlighted that students' minds are developing and "are quite subject to coercive thought and that is especially true when those same students are seeking approval and playing time from a coach who is leading the devotional and prayer" (*Kennedy v. Bremerton School District*, 2022, dissenting opinion, p. 5).

The dissent concluded that Court majority erred by failing to attend to issues of endorsement and by abandoning the *Lemon* test. Ultimately, the Establishment Clause was violated because Kennedy was "on the job as a school official 'on government property' when he incorporated a public, demonstrative prayer" into a school event (p. 16).

What are the implications of *Kennedy* for school leaders?

1. The facts matter.
Although the Court sided with the coach, the decision only applies to the facts in this particular case. It is not a broad statement of law providing that prayer in schools is always legal. Importantly, the Court recognized that it involved "quiet," "post-game," and "personal" prayer" (*Kennedy v. Bremerton School District*, 2022, majority opinion, pp. 4-5).

Additionally, the coach was no longer "leading prayers with the team or before any other captive audience" (*Kennedy v. Bremerton School District*, 2022, majority opinion, p. 13). Therefore, school leaders should distinguish these facts from situations that they encounter. Notably, *Kennedy* involved a non-captive audience *after* an extracurricular event; it was not a situation during the instructional day, and the majority did not believe that the coach was proselytizing.

Another important distinction to note is that this case occurred at a high school. The Court stated, "[t]his Court has long recognized as well that 'secondary school students are mature enough … to understand that a school does not endorse,' let alone coerce them to participate in, 'speech that it merely permits on a nondiscriminatory basis'" (*Kennedy v. Bremerton School District*, 2022, majority opinion, p. 26). Thus, the long-standing precedent that school-sponsored religious actions—which would include school employees praying with or proselytizing to students—remains unconstitutional.

2. School employees can still be disciplined for engaging in religious activities at school.
School leaders should not misinterpret the *Kennedy* decision to assume that 'everything goes' when it comes to employees expressing their religious beliefs. Administrators should continue to educate teachers and non-teaching staff including athletic directors and coaches about the limits of their religious expression.

A Seventh Circuit case upholding the dismissal of a school counselor who had prayed and promoted religion to students provides an example of what school employees are not allowed to do (*Grossman v. South Shore Public School District*, 2007).

In another relevant case, the Third Circuit approved a district policy forbidding faculty participation in student-initiated prayer after a football coach had kneeled and bowed his head while players engaged in prayer in locker room (*Borden v. School District of Township of East Brunswick*, 2008).

3. It remains legal for educators to engage in private religious expression, and they must permit student-initiated, non-disruptive religious expression.
Again, the decades of church/state decisions are not overruled in *Kennedy.* The Court explained that educators may continue to engage in private religious expression such as "wearing a yarmulke to school" or "praying quietly over lunch" (*Kennedy v. Bremerton School District*, 2022, majority opinion, p. 28). Similarly, multiple past decisions protect student-initiated, non-disruptive prayer and other religious activities.

It also remains legal for parents or teachers to opt out of public schools to choose more intensive religious instruction offered at private schools. At an increasing rate, the Supreme Court has supported public funding being available for religious, private schooling.

4. Proof of coercion seems to be the key requirement for an Establishment Clause violation, and courts consider historical

practice and meaning of the government-related act.
Many legal scholars are curious what the new legal standard is after *Kennedy*. For decades, the Supreme Court was known to apply three tests to determine if the Establishment Clause had been violated. However, after *Kennedy,* the application of these tests appears to have shifted, as the Court discredited the *Lemon* and Endorsement tests.

In *Kennedy*, the majority stated that Establishment Clause should be analyzed "by 'reference to historical practices and understandings'" and that religion clauses have "complementary purposes, not warring ones" (pp. 20-23). Therefore, the Court emphasized the U.S. history and tradition of religious pluralism, which permits actions such as reciting "under God" during the Pledge of Allegiance or praying before school board meetings.

At the same time, the Court discussed that the players were not coerced to join the coach in his post-game prayer, and thus, focusing on the coercive effect of religious activity appears to remain to be a significant aspect in determining whether the Establishment Clause has been violated.

The Court has long emphasized that educators must recognize that their students are a captive audience who are legally required to attend school. Additionally, students are impressionable and susceptible to both explicit and implicit coercion. Educators are both role models and authority figures, and students can feel pressures that are not always obvious. Therefore, when school leaders are providing legal guidance to their staff, emphasis should be placed on avoiding any type of coercive religious expression.

5. School leaders must stay abreast of evolving church/state precedent.
Sotomayor's dissent stressed that the majority opinion provides no guidance for school leaders and educators. She criticized that "this decision does a disservice to schools and the young citizens they serve, as well as to our Nation's longstanding commitment to the separation of church and state" (*Kennedy v. Bremerton School District*, 2022, dissenting opinion, p. 2).

Thus, important questions remain about how *Kennedy* will influence future court rulings. How will courts respond when the religious activity in question is not *Christian* religious activity? For example, in response to the media attention about Coach Kennedy's prayer, the Satanic Temple of Seattle came to protest at the high school's football field (Nguyen, 2015). Will future courts see an increase of litigation involving educators who identify as Christian, Muslim, Hindu, Buddhist, Sikh, and other religions who have become more emboldened to express their religious beliefs while they are on school property with students present? What will the aftereffects of *Kennedy* be?

Until school leaders have additional guidance, it is vital that they proactively increase the legal literacy of their staff. They can do this at faculty meetings, professional development events, or even sharing this article. They also could discuss with staff why ethically, as opposed to legally, educators may decide it is important to take a separationist stance. For example, they could remind their colleagues that there are over 100 religious sects in the U.S. and many others who are atheists or agnostic. The leaders could facilitate exercises, case studies, or conversations to evoke empathy for students, colleagues, and

community members who may be in the religious minority. Leaders could discuss the school's mission or values ensuring that no students feel unwelcome.

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