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# ‘Hamlet Without the Prince’ – The U.S. Supreme Court on Religious Practice

## Changes in Case Law in the Light of the Kennedy v. Bremerton School District Case

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**Abstract:** The Supreme Court of the United States of America has recently issued a decision in several cases that are closely related to First Amendment rights. In doing so, the Court has changed its own set of criteria from its earlier practice. The reasons for these decisions have attracted increased interest among practitioners and academics, as it is a long time since the Court has so clearly distanced itself from its own precedent and called lower courts to account for failing to take certain criteria into account. By analysing the Court’s reasoning on the role of history and tradition and the compelling nature of religious belief, this paper seeks to answer the question whether the change in the Supreme Court’s practice can indeed be considered truly substantial. I argue that the change is significant, but as a process is not without precedent, and is not necessarily unacceptable in terms of its consequences.

**Keywords:** religious freedom, religious neutrality of the state, First Amendment, U.S. Supreme Court, endorsement test, reasonable observer, prayer in school

### 1. Content of the First Amendment

The First Amendment (1791) to the Constitution of the United States (1787) protects five cherished values: freedom of religion, speech, press, assembly and petitioning the state. Each of these fundamental rights is linked to freedom of conscience, protecting the possibility of people to think and speak according to their beliefs. The document reads:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The First Amendment therefore contains two clauses related to religion: one prohibiting the establishment of a state church and the other protecting free religious practice. The Establishment Clause is clear in that the establishment of a religion by the Congress, its 'officialisation' or a direct coercion to religious belief is a prohibited area of interference. However, the First Amendment's clauses on the free exercise of religion and freedom of speech protect individuals who engage in personal religious observance from state retaliation, and the Constitution does not authorise the government to suppress such religious expression. Perhaps it is thanks to this that most of the decisions related to the establishment clause have not been adopted in cases that can clearly be judged by a semantic interpretation of the First Amendment, but are in the 'grey area' of the rule, where courts have had to decide whether some governmental manifestation related to religion is at all covered by the constitutional prohibition.

The Establishment Clause was the result of a current affairs policy consensus, a significant element of which was the exclusion of the institutionalisation of religion from the powers of Congress – as a lesson from what had happened to the Church of England. Nevertheless, the colonists and their descendants considered themselves God-fearing people, much of American society is still religious today, and the United States has observed the national day of prayer and thanksgiving every year since its proclamation on 25 September 1789.<sup>1</sup> Unlike other Protestant nations, religion has remained central to American identity today (Huntington, 2005, p. 106). There is no doubt that President George Washington did not only use his thoughts on the providential grace of Almighty God as a rhetorical tool when designating Thanksgiving Day, and that the President who sought to establish a peaceful constitutional government demonstrated his religious tolerance, occasionally ahead of his time.

In contemporary America, of course, there were serious anti-religious forces in the footsteps of David Hume, Voltaire and Jean-Jacques Rousseau, and the personal presence of many (e.g. Thomas Paine), but this was not expressed explicitly in setting the content of the First Amendment. When Thomas Jefferson presented his commentary on the First Amendment to a Presbyterian minister, the minister asked him why he had not issued a Thanksgiving Day proclamation (unlike Washington and John Adams). Jefferson replied that religion was clearly a matter for the states. He explained that the U.S. Government should not interfere with the work, doctrines, dogmas and practices of religious institutions. No such power has been delegated to it by the member states, and therefore, if any human power has a say in such matters, the right to act is a matter for the *individual states*.

The view, attributed to Jefferson, though not derived from him,<sup>2</sup> that there should be an imaginary wall separating church and state, originally did not exist between the government and the people, but between the federal government and the individual states (Johnson, 1997, pp. 145–146, pp. 214–215). The separation of church and state did not originally mean that there was an impenetrable wall between the two, but that the

<sup>1</sup> On 25 September 1789, President Washington declared November 26 a national holiday of Thanksgiving.

<sup>2</sup> For example, the sixteenth century Anglican theologian Richard Hooker used the term 'wall of separation' in his writings, and Baptist Roger Williams, the founder of Rhode Island, wrote in 1644 that the Bible teaches that there should be 'the hedge, or wall of separation, between the garden of the Church and the wilderness of the world' (Williams, [1644] 1848, p. 435).

founding fathers were convinced that the union of church and state power would inevitably lead to tyranny. However, the doctrine of the 'wall of separation',<sup>3</sup> developed as a theory in the second half of the twentieth century, envisaged a very rigid wall of separation, which grew thicker and thicker, and eventually expressed the desire for government to be entirely secular, free from religious influence, and that religion should be in the homes of people and in the church.

Although the constitutional text itself only refers to the federal government (Congress), by 1833 all states had abolished 'official' religion, and the Court ruled in the 1940s that the provision applied to individual states.<sup>4</sup> This process has also taken place for other constitutional provisions: the same has happened with the constitutional prohibition of restrictions on freedom of speech, which covers all constitutional bodies and, since 1925, the member states and their bodies (Koltay, 2009, p. 98).

## 2. Subjects of the First Amendment' interpretation

Russell L. Weaver lists five areas that have from time to time raised points of law that need to be answered. The reason for their recurrence may be that, in the absence of generally valid criteria for their assessment, courts have been bound by the facts and circumstances of the particular case before them and have consequently been wary of making valid findings outside the scope of the case. The Supreme Court has done the same, keeping parallel several of the tests it has developed over time, and their modifications, in the system of judiciary. However, an overly fact-specific approach can obviously have a narrow scope, and personality law cases are not characterised by the routine repetition of situations.

The five issues mentioned include unconstitutional *financial aid* for religion, various *schooling benefits*, state support for *prayer*, the *inclusion of prayer in the curriculum* and *support for religious manifestations*.<sup>5</sup> In a different approach, the vast majority of cases involving establishment clauses have arisen in four main areas: *financial aid* for religious education<sup>6</sup> or other social welfare activities carried out by religious institutions, government *sponsorship of prayer*,<sup>7</sup> the *removal of religious dissidents* from generally applicable laws,<sup>8</sup> and in cases related to government owned or sponsored *religious symbols*.<sup>9</sup> These

<sup>3</sup> For more information on the Wall of Separation Doctrine see Baker, 2009.

<sup>4</sup> In *Everson v. Board of Education of the Township of Ewing* 330 US 1 (1947), all nine Justices agreed that the Establishment Clause applies to both the state and local governments.

<sup>5</sup> For the definition and detailed processing of the case groups see Weaver, 2017, pp. 274–321.

<sup>6</sup> *Everson v. Board of Education of the Township of Ewing* 330 US 1 (1947); *Board of Education v. Allen* 392 US 236 (1968); *Aguilar v. Felton* 473 US 402 (1985); *Zelman v. Simmons-Harris* 536 US 639 (2002); *Rosenberger v. Rector and Visitors of the University of Virginia* 515 US 819 (1995).

<sup>7</sup> *Engel v. Vitale* 370 US 421 (1962); *Abington School District v. Schempp* 374 US 203 (1963); *Lee v. Weisman* 505 US 577 (1992); *Santa Fe Independent School District v. Doe* 530 US 290 (2000); *Marsh v. Chambers* 463 US 783 (1983); *Town of Greece v. Galloway* 572 US 565 (2014).

<sup>8</sup> *Texas Monthly, Inc. v. Bullock* 489 US 1 (1989); *Cutter v. Wilkinson* 544 US 709 (2005); *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* 565 US 171 (2012); *Burwell v. Hobby Lobby Stores, Inc.* 573 US 682 (2014).

<sup>9</sup> *Lynch v. Donnelly* 465 US 668 (1984); *County of Allegheny v. ACLU* 492 US 573 (1989); *McCreary County v. American Civil Liberties Union of Kentucky* 545 US 844 (2005); *Van Orden v. Perry* 545 US 677 (2005).

groups of cases, through their considerable diversity, have encouraged the Court to develop new tests for the effectiveness of the constitutional test.

### 3. State-sponsored prayer

Of the foregoing subjects, the assessment of cases of state-sponsored prayer is a particularly complex area, as reflected in the Court's less than consistent practice. The first two of the Court's best-known decisions ruled unconstitutional the practice of public school pupils starting the school day with prayer or Bible reading, even if this is ostensibly voluntary.<sup>10</sup> Although the reception of these decisions has been rather controversial,<sup>11</sup> the Court has gradually extended the ban to prayers at graduation ceremonies<sup>12</sup> and even to school sports events.<sup>13</sup> The school district practice under scrutiny in *Engel* and *Schempp* clearly consisted of regulating an act with a religious content, with prayer being regularly included in the institution's agenda, with a controlled content. In these cases, the Court, referring back to the principle of *religious neutrality*, declared that the mere support of religion in general resulted in an unconstitutional practice, in the assessment of which circumstance the voluntary participation in prayer or the sectarian neutrality of prayer was of no material importance (Koltay, 2016, p. 168). While the majority opinion in *Engel* did not refute the religious character of American society, it did emphasise that when the power, authority and support of government is placed behind the cause of a single religion, the interests of dissenters are harmed. In this case, religious minorities are under indirect coercion and must adapt to the religious preferences of the majority. It is therefore inadmissible to make any religion officially accepted. The ruling went on to say that the Constitution accepts other points of view, and that the right of atheists or agnostics to follow their own path cannot be denied. Overall, the Court declared that believers (and everyone) would benefit from a religion-neutral government.

The Court has already supported its finding of the need for neutrality in *Schempp* with a further argument, the religious diversity of American society, as demonstrated by demographic changes. The Court dismissed the arguments based on the historical practice of constitutional amendment (i.e. its narrower range of interpretation) by arguing that the practices of Jefferson and James Madison's time could be highly offensive to many today (including believers and non-believers).<sup>14</sup> The *Engel* and *Schempp* decisions thus relied heavily on the *religious minority and non-believer* criteria in finding a violation of the Establishment Clause. Consequently, the Court extended the interpretation of the clause as early as the 1960s, not only to the effect that the state may not establish a national

<sup>10</sup> For a detailed treatment of the relevant cases see Koltay, 2016, pp. 165–178; see also Weaver, 2017, pp. 297–304. The two cited cases are the *Engel v. Vitale* 370 US 421 (1962) and *Abington School District v. Schempp* 374 US 203 (1963).

<sup>11</sup> Thomas C. Berg, who wrote the detailed history of the *Engel* and *Schempp* cases, analyses at length how some members of Congress, outraged by the *Engel* case, made efforts to invalidate the decision by the amendment of the Constitution. These efforts continued after the *Schempp* judgment: by May 1964, 147 amending proposals had been made, but all ultimately failed in Senate hearings and House debates (see Berg, 2011, p. 221).

<sup>12</sup> *Lee v. Weisman* 505 US 577 (1992), p. 632.

<sup>13</sup> *Santa Fe Independent School District v. Doe* 530 US 290 (2000).

<sup>14</sup> *Abington School District v. Schempp* 374 US 203 (1963), p. 235.

church, but also to the effect that state support for certain religious practices is impermissible because it marginalises non-believers or those of other religions (Levine, 2012).

In *Lee v. Weisman*, the Court, in assessing the circumstances, emphasised that the decision to invite a rabbi to pray and give blessings at a school celebration was made by the principal,<sup>15</sup> acting on behalf of the state, and hence, in essence the content of the prayers was directed and controlled by the principal. The presence of the rabbi had a coercive effect on the pupils present, in that the school obliged all of them to attend the religious event. This procedure was described by the Court as pressure, 'subtle coercion'.

It cannot be overlooked that in *Lee*, which came to trial two decades after the *Schempp* judgment, the *Lemon* test of absolute religious neutrality and the Endorsement test had been part of the case law for ten years as the fundamental tests of the First Amendment. In *Lemon v. Kurtzman*, the Court held that direct government aid to denominational schools was unconstitutional.<sup>16</sup> To determine whether a law or other government action is constitutional, it developed a three-step test. The first test is whether the challenged state action has a secular purpose, the second is whether it has the primary effect of promoting or inhibiting religion, and the third is whether it does not involve excessive entanglement of state and religion.

The second test for endorsement was proposed by Justice O'Connor in *Lynch v. Donnelly*.<sup>17</sup> The Court did not find unconstitutional the display of a nativity scene surrounded by other festive decorations in the heart of a shopping district, stating that it 'engenders a friendly community spirit of goodwill in keeping with the season.'<sup>18</sup> Under the endorsement test, the court is to examine whether the state intended to convey a message of 'endorsement' or 'disapproval', and whether the act had such a communicative effect. Accordingly, a violation of the Establishment Clause occurs when, to a reasonable, informed observer, the government's action appears to be an endorsement of religion. The endorsement test, which modified the first two criteria of the *Lemon* test, did not attack the speech of the religiously inclusive community and was more respectful of the identities of citizens of different religions, because it focused expressly on the government's message. The informed and reasoned observer benchmark was most often applied in cases involving religious symbols, although the Court also used it to judge a one-minute silence (meditation or silent prayer during school hours) a year after the *Lynch* decision.<sup>19</sup>

The third test, called the coercion test, was developed by Justice Kennedy in 1992 in *Lee*.<sup>20</sup> The criteria of the test are designed to determine whether the government's actions pressure or coerce someone to participate in a religious event or to remain passive in a situation of discomfort. The coercion test, despite its increased importance, has remained a doctrinal tool and has not replaced the other tests of the Court (Rode, 2016, p. 7).

Eight years after the *Lee* ruling, the subject of the investigation was prayer on school grounds, no longer in classrooms but on the sports field instead. In *Santa Fe v. Doe*, the

<sup>15</sup> *Lee v. Weisman* 505 US 577 (1992).

<sup>16</sup> *Lemon v. Kurtzman* 403 US 602 (1971).

<sup>17</sup> *Lynch v. Donnelly* 465 US 668 (1984).

<sup>18</sup> *Lynch v. Donnelly* 465 US 668 (1984), p. 685.

<sup>19</sup> *Wallace v. Jaffree* 472 US 38 (1985); McGrath, 2022.

<sup>20</sup> *Lee v. Weisman* 505 US 577 (1992).

Court ruled that a school policy allowing student-initiated and led prayer at a high school football game violated the Establishment Clause.<sup>21</sup> The policy required a vote first on whether to have a prayer and then on who should lead it. According to the decision, students and others present were forced to participate in a religious act. The Court focused on the active role of the school in the mechanism for selecting the student to lead the prayer. It attached importance to the fact that participation in the matches *was not voluntary* for the students and to the fact that the significant social pressure for such prayer was in a *special environment*. The Court assumed that students obviously perceived the situation as one in which participation was unavoidable, and that the pre-game prayer was endorsed and supported by the school. The Court concluded that the school policy clearly involved not only a perceived but also an actual endorsement of religion. As such, the presumed influence and action dynamics of the age group and the influence of the school's authority played a major role in the constitutional assessment of these practices at school events involving children or adolescents.

By comparison, at events in less coercive circumstances, essentially involving adults, the Court has generally not considered public prayer in a public institution to be unconstitutional. In *Marsh v. Chambers*, the Court held that prayer in public at the opening of a legislative day was such a practice.<sup>22</sup> In *Town of Greece v. Galloway*, the Court ruled the same way in relation to a prayer at the beginning of a town council meeting, where the town accepted any prayer without discrimination of religion.<sup>23</sup> In both decisions, the assessment was based on the practice built into historical tradition and its acceptability. The combination of these two factors, namely the low degree of coercion to participate in the prayer and the action as a tradition, prevented the practice from being found unconstitutional.

Some find it curious that while in *Schempp* the Court was keenly concerned with the sensitivity of people of other religions and non-believers, these aspects were not at all relevant in the majority decision in its assessment of the practice of legislative prayer, which favoured the dominant religious views (Levine, 2012, p. 785). In *Town of Greece v. Galloway*, however, the Court explained that the outcome of the inquiry is emphatically fact-dependent, and must take into account the context in which the prayer was said and the audience.<sup>24</sup> The Court also suggested that it would have considered the legal issue differently if the town council had persuaded the audience to participate in the prayer, and singled out dissenters, or indicated that agreeing to prayer would influence its decision making. However, these circumstances did not arise in the case<sup>25</sup> (Levine, 2012, p. 785).

In each of these cases, the 'democratic tradition' based on the separation of church and state has been a solid starting point for the Court. However, it is not easy to separate these two crucial forces of human existence. From the 1950s until roughly the early 2000s, the Court decided the cases before it by gradually widening the interpretative boundaries of the establishment clause, with only a few exceptions based on historical tradition. The

<sup>21</sup> *Santa Fe Independent School District v. Doe* 530 US 290 (2000).

<sup>22</sup> *Marsh v. Chambers* 463 US 783 (1983).

<sup>23</sup> *Town of Greece v. Galloway* 572 US 565 (2014).

<sup>24</sup> *Town of Greece v. Galloway* 572 US 565 (2014), p. 587.

<sup>25</sup> *Town of Greece v. Galloway* 572 US 565 (2014), p. 588.

Court applied its own constitutionally-constructed test to the facts found by the lower courts and, if their identification reached a 'critical mass'; in other words, if they fitted the elements of the test, decided on the constitutional issue. Where the facts did not fully fit the criteria known from previous cases, this resulted in either the constitutionality of the practice or the need for creating further tests. The prayer in the legislature escaped because it was uttered before persons of age, distinguished patrons and had a two hundred year tradition. The school morning prayer, on the other hand, was ruled unconstitutional because the Court presumed a high degree of influence on children or those on the verge of young adulthood. In these cases, however, the state *school* could always be identified as the initiator of the practice under scrutiny. The school prayer was therefore the decision of the institution, not of one of its employees.

In the cases just discussed, there was a competition between the First Amendment's coverage of the establishment clause and the free exercise of religion. The latter, however, concerned the prayer of the pupils of the school rather than the religious practice of the school's employees. The state school could therefore always be identified as the initiator of the practice under scrutiny. Of course, life produces other variations – for example, the case of the deeply religious school coach.

#### **4. Kennedy v. Bremerton School District<sup>26</sup>**

In *Kennedy v. Bremerton School District*, the point of law was whether the public school violated the First Amendment by firing a high school football coach for praying after school football games. In other words, the courts had to decide whether a public school employee's prayer during school sports activities was constitutionally protected or could be prohibited by the employer to avoid violating the Establishment Clause.

Joseph Kennedy, an employee of the Bremerton School District in Washington State, was a football coach at a public high school. As a Christian man of faith, he continued for many years (from 2008 to 2015) the practice of kneeling on the 50-yard line after school games for a short (about half a minute) prayer on the field, giving thanks for the players and the game. The prayer was done without public address and any member of either team was free to join in. According to his employer, the school, the coach violated the constitutional separation of church and state by this practice and was ordered to stop praying. Apart from a brief break, Kennedy refused to give up the practice, which had become a habit. He was then suspended and then dismissed by the school district. He sued his employer, claiming that the school district violated his rights under the Civil Rights Act of 1964 and restricted his right to freedom of religious practice and freedom of speech.

The lower courts ruled in favour of the school district. The trial court ruled that the school did not violate Kennedy's constitutional rights to freedom of speech and freedom of religious practice. The court set Kennedy's rights against the school's constitutional rule derived from the separation of church and state. According to the court's reasoning, the public school coach's duties did not end at the conclusion of the game, and that those on

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<sup>26</sup> *Kennedy v. Bremerton School District* 597 US (2022).

the scene could not be convinced that the coach was off duty when he prayed on the field. His ‘speech’ was therefore not of a private nature, but a public service employee’s speech. It was relevant that the coach, by virtue of his position, had an influence on the players, who obviously wanted to please their role model. Therefore, by his action, he exerted a ‘subtle coercive influence’ on the pupils, who were in a heightened emotional state at the sporting event, to participate in prayer. In the circumstances, it might have appeared to an outside observer at the event that the coach was conducting the prayer with the support of his employer and, ultimately, with the endorsement of the State. The court of appeal made the same assessment of the circumstances of the case and agreed with the first instance decision.

However, the Supreme Court reversed the decision (with 6 to 3 votes). It ruled that the Bremerton school district had violated Kennedy’s right to freedom of religion and freedom of speech. Judge Gorsuch, who wrote the majority opinion, reasoned that the coach’s prayer constituted private speech that was not generally within the scope of his coaching duties. The Court also rejected, for lack of evidence, the defence that Kennedy’s actions compelled the students to pray. The majority also announced the rejection of the *Lemon* test, which had been the standard test that far.

According to the Court, irrespective of whether the Free Exercise Clause or the Free Speech Clause is the legal basis for the inquiry, a different test must be applied.<sup>27</sup> The school district was required to prove that the restriction on the plaintiff’s constitutionally protected rights passed the strict scrutiny test, served a compelling interest and was focused solely on that purpose. Kennedy’s silent prayer on the field did not have the effect of compelling student athletes to join. Although some may have witnessed the religious act and heard the prayer, learning to tolerate speech or prayer of any kind is ‘part of learning how to live in a pluralistic society.’<sup>28</sup> The Court stated that:

Respect for religious expressions is indispensable to life in a free and diverse Republic – whether those expressions take place in a sanctuary or on a field, and whether they manifest through the spoken word or a bowed head. 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.<sup>29</sup>

The Court also held that Kennedy’s speech and religious exercise were protected even at a lower, intermediate standard. It declared the application of the long-criticised *Lemon* test in the *Kennedy* case ‘long outdated’, and abandoned it.

Justice Sotomayor and the two Justices<sup>30</sup> who joined him in the dissenting opinion disagreed with the Court’s preference for the constitutional clause on the free exercise of

<sup>27</sup> *Kennedy*, 142 S. Ct. 2407, p. 2427; for an analysis of the tests applied by the courts see Ruello, 2023.

<sup>28</sup> 597 U. S. \_\_\_\_ (2022), p. 26.

<sup>29</sup> 597 U. S. \_\_\_\_ (2022), p. 5.

<sup>30</sup> Sotomayor J. filed a dissenting opinion, Breyer J. and Kagan J. joined.



religion over the Establishment Clause. They argued that Kennedy's prayers were said during his service as a coach. The prayers, visible to the students, compelled them to join him as a role model for the students. Therefore, allowing a school district employee to 'publicly and communicatively display his personal religious beliefs at a school event' violates the Establishment Clause.

It can thus be seen that the Justices of the Court, in their majority and minority opinions, interpreted the *same facts in different ways*, attributing different relevance to the circumstances of the case. While the justices in the minority did not consider the applicability of the previous tests to be excluded, the majority announced a change of direction in the way cases with similar facts were judged. This case can therefore be seen as a 'battle of tests'. Its real significance lies in the Court's explicit rejection of the previously accepted Establishment Clause doctrine, the *Lemon* test, which held the government's permitting the expression of pro-religious messages unconstitutional (S. D. Smith, 2022, pp. 26–28), and which lower courts had previously been obliged to consider and apply. Its other equally significant element is that what was previously considered a subtle influence, an indirect coercion, no longer creates the possibility of restricting religious speech, according to the Court, but only in the event of direct coercion.

## 5. Weighing opposing arguments

The *Kennedy* case attracted particular attention because the coach suffered disadvantage because of his *religious activity during working hours*, which led to the simultaneous application of several fundamental rights tests: freedom of expression, freedom of religious practice (Kennedy claimed a violation of both rights) and the Establishment Clause, which do not at all consist of identical criteria. The courts apply the *Pickering* test in analysing<sup>31</sup> whether the interests of the employee or the state are to prevail when the state seeks to restrict the employee's speech. The test itself consists of two parts. First, the employee must prove whether the speech can be considered a public utterance. If it is not within the scope of public discourse then the employer's interests shall prevail and the employee cannot claim constitutional protection for the speech. If the speech concerns a matter of public concern, then, as a second step, the interest of the state (as employer) in the efficiency of the public service must be balanced against the interest of the public employee in participating in matters of public concern. It is for the employer to prove the applicability of the measure.

In *Garcetti v. Ceballos*, the Court expanded this framework and imposed a two-step test for determining whether a public employee's speech is entitled to protection.<sup>32</sup> Here again, the first step is to determine whether the employee has spoken as an ordinary citizen on a public matter. If not, their speech is not constitutionally protected through the First Amendment. If so, it must be examined whether the public body concerned had proper grounds for discriminating against the employee. In fact, the test in *Garcetti* focused on

<sup>31</sup> *Pickering v. Board of Education* 391 US 563 (1968).

<sup>32</sup> *Garcetti v. Ceballos* 547 US 410 (2006).

whether the employee made a proper statement in a manner that did not violate his official duties. Freedom of expression does not apply when it is exercised in the course of the performance of official, job duties. Eight years later, in *Lane v. Franks*, the Court limited this test to the question of whether the speech in question fell within the scope of the employee's duties in general.<sup>33</sup> Accordingly, if the speech falls outside the employee's normal employment duties, the speech is protected.

In the *Kennedy* case, both parties requested the court to apply certain parts of the *Pickering* test. It was obvious that not all aspects were necessary to assess the circumstances of the case, since, for example, the very first step (whether the speech was on a matter of public interest) led to a clear affirmative answer. The parties considered this in the same way, so no discussion was necessary.<sup>34</sup> However, the relevant circumstances to be examined were whether the person concerned spoke as an individual or as a public employee; whether the school had an appropriate reason to discriminate against the employee and whether the school would have taken the adverse employer action even without the protected speech.

According to Kennedy, when he said the short, silent prayer at the 50-yard line, he was speaking as a private citizen. His statement cannot be classified as being within the scope of his normal public employee duties. He further argued that a reasonable observer would not consider the prayer to be school-sponsored. Given the coach's past practice, a reasonable observer would know that the school's players had joined in religious expression in the past, but would also be aware that they had never been required, coerced or actively encouraged to participate in religious activity. A reasonable observer would only see the coach kneel down and conclude that he is experiencing personal silence.

According to the defendant, the school considered this utterance to be a public employee's speech, which it sought to prove by the circumstances. The coach performed the prayer during working hours when he supervised and controlled the players. As these duties continued after the match, his 'speech' was delivered during his usual work duties. According to the school, the coach's conduct was an infringement under all tests, including the endorsement test, the coercion test and the *Lemon* test. First, the students who witnessed Kennedy's demonstrative religious practice concluded that he enjoyed the school's endorsement. Second, because the coach decides who plays in games and for how long, arguing with the coach's ideas is a deterrent, and thus subtle coercion was present in this case. Third, the school believed that the coach's prayer practice had no secular purpose and the supposed school endorsement had no such effect.

## 6. Error in the choice of tests to be used

As opposed to the above, the Court clearly distinguished government speech in support of religion, prohibited by the First Amendment, from protected private speech in support of religion. It stated that the district court did not choose the 'appropriate test' for

<sup>33</sup> *Lane v. Franks* 573 US 228 (2014).

<sup>34</sup> *Kennedy*, 142 S. Ct. 2407, p. 2424.

considering the circumstances of the case, as it applied the 'while at work' formulation in analysing the coach's practice, rather than the 'within the scope' formulation in the *Lane* case. The Court then focused on the coach's role, without properly examining the prayer in the light of the criteria set out in the *Lee* and *Santa Fe* cases, and, as a result of the inconclusive protocol, the court arrived at the wrong legal conclusion.

The district court held that Kennedy spoke as a public employee when he prayed at the 50-yard line because he was still at work at the time. This reasoning may be consistent with the reasoning given in *Garcetti* (statements made by an employee in the performance of his official duties are not considered private speech), but it is clearly contrary to the standard applied in *Lane*, which held that the key question is whether the speech in question is within the scope of the employee's duties in general. In assessing this, the time, place and attire of the employee and the immediate context of the action (its perceptibility) must be considered jointly in relation to the utterance. None of these can be separated from the assessment, because they are not decisive in determining whether the employee acted within the scope of his duties in making the utterance. In contrast to the former, the content of the utterance must be given decisive weight: on this basis, the prayer was not part of the coach's duties.

Had the *Lane* rule been applied, it would have been clearer that Kennedy was speaking as a private individual. The Court held that, as to whether Kennedy was on duty at the time of the prayer, rather than whether his prayer was part of his normal job duties, the district court considered a relevant element only that if he was acting *while at work* then it was in any event a public employee's manifestation. This is not a persuasive reasoning, and it violates the interpretive criterion announced in *Lane* by overly expanding the scope of *public employee speech*, thereby rendering virtually any prayer that is said while at work unconstitutional (Rode, 2016, p. 17). Under this approach, the Court ruled, a school could dismiss a Muslim teacher for wearing a headscarf in the classroom or prohibit a Christian employee from praying silently in the cafeteria while eating their lunch.

Unlike the prayer in the *Santa Fe* case, the coach's silent, and brief prayer was not broadcast over a public address system to the 'captive audience',<sup>35</sup> and those who did not attend could not hear it. Furthermore, it is a rather unrealistic assumption that the school teachers are acting solely in the course of their official duties while at work. At Bremerton, after sports matches, as is school custom, all employees were allowed a few minutes for personal activities (such as mobile phone calls, informal chats with spectators or team members), the legitimacy of which was never questioned by the school. Kennedy prayed during this time, for half a minute, on the pitch. It is unlikely that any reasonable outside observer would have regarded this activity as speech explicitly endorsed by the school. The post-match situation is more akin to a short break after a meeting, or a few minutes during working hours when everyone is minding their own business.

In this trial, the shortcomings of the endorsement test were also demonstrated. The constitutional criteria were essentially defined for cases concerning the permissibility of religious symbols, where the question of whether the display of a work of art or other

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<sup>35</sup> The use of the term 'captive audience' is analysed by Garry, 2009.

object in public enjoys the endorsement of the state must be examined from the point of view of an impartial, objective observer. In school prayer cases, it is no longer easy to identify an observer with similar characteristics. It is unlikely that an objective observer, as envisaged by Judge O'Connor in the *Kennedy* case, would have happened to be on the field, as typically people with an interest in the match are present. Even if this were the case, it is not unusual for the game to be disconnected from the circumstances, as the atmosphere on all sides is heightened, everyone is usually more or less ecstatic, and at the end of the game neither the fans nor the students are concerned with what one coach is doing on the field. The context of a school team game is simply different from, say, a war memorial cross or the aspect of people gazing around a nativity scene in a shopping centre. In such circumstances, it is difficult to imagine an objective and rational outside observer wondering whether the coach is acting with the endorsement of the state in the half-minute in question. It is even more difficult to identify with the idea that we should judge what happened on the pitch, namely the behaviour of the participants and the impact of the prayer on them, from his point of view.

It is to be noted that coaches and players also kneel down on many less solemn occasions. In the event of a serious injury sustained during a game, it is common for coaches and players to kneel and fans to bow their heads, all praying for the same purpose in the silence (Rode, 2016, p. 21). It is unlikely, however, that any school would see this as a real threat to violate the Establishment Clause. In addition, there have been examples of teams kneeling before matches on the basis of other preferences, not as a personal time, but for explicit demonstrative purposes. Despite the religious origin of the gesture, no discrimination against this act has ever occurred.

Otherwise, in Kennedy's case, the facts suggested that there was a complete lack of school participation in the prayer. Bremerton did not supervise or control the subject matter or content of the prayer; the prayer was not the result of the school's policy of encouraging religious expression, and the school was unaware of the practice during the first eight years of the coach's career. Hence, because Kennedy's prayer was not influenced by the school, it could not be construed as having been endorsed by the school, so there were strong arguments for the private nature of his speech.

The Court also judged the effect of the coach's action differently from the lower courts. The Court found a fundamental difference from the *Lee* case in that the school did not participate in Kennedy's prayer, and the prayer itself was not officially known until eight years later, through a complaint from a parent. No one disputed that the coach did not encourage the students to join in, and that the students who voluntarily prayed with him were not a homogeneous group, either in terms of their identity or numbers. This calls into question whether they chose to participate in prayer under coercion. In contrast to the prayer at a graduation ceremony (*Lee*) or a student-led prayer before a football match (*Santa Fe*), Kennedy prayed after the players had left the field and the fans had left or were about to leave. Therefore, there was not even a question of direct coercion on the students.

On the question of the assessment of coercion, some differences emerged on the basis of an analysis of the analogy of the facts. In *Santa Fe*, the prayer broadcast over the public address system immediately preceded the match, so it would have been rather difficult to argue that the players had a way of distancing themselves, so the Court obviously did not

use the term 'captive' audience by chance. Such a situation did not occur in the *Kennedy* case. However, the school's concern about the role of the coach is more understandable. The coach is undoubtedly a leading figure for the team members; he has control over their place in the game, their playing time and influence over their careers as athletes based on his professional opinion. His role is not solely educational through sporting objectives: he bears more responsibility for the team's performance than, for example, a physics teacher for the class average. He gets to know the team members and their environment better, following not only their physical but also their mental development. The coach is a kind of role model, who can be perceived positively or negatively, and whose adaptation is driven by recognition or fear, but whose respect based on authority is undoubtedly present in the sporting world.

It is likely that *Kennedy's* players were involved in prayer because of this complex, unique relationship, and it seems plausible that this could be seen as a subtle coercive effect of his person. But what about those who joined the prayer from the opposing team or the spectators? In their case, it is not very logical to assume such a coercive effect, if only because of the aforementioned lack of personal connection. Moreover, the members of *Bremerton's* team did not always join him, and they varied in composition from one occasion to another, so the supposed coercive element must have been quite remote. The Court simply did not consider the subtle coercive effect sufficient to justify a restriction on the coach's exercise of religion. In this respect, quoting from the *Lee* decision, it valued, as a constitutional tradition, the tolerance of a wide range of human behaviour as part of living in a plural society.

## **7. Implications of the *Kennedy* case for the assessment of coercive effect**

Gorsuch J. noted in advance that members of the Court sometimes disagreed on what exactly qualifies as impermissible coercion in light of the original meaning of the Establishment Clause,<sup>36</sup> yet it seems that the Court in this case has clearly rejected the decisive importance of the 'subtle coercive effect' that remains below the threshold of direct compulsion. Consequently, in future cases before the courts, as long as the employer cannot prove direct coercion, prayer as an expression of free exercise of religion in the workplace cannot be restricted under the Establishment Clause. That is, as long as it is not said in school, 'You must come and pray', but only 'Who wants to come?', some degree of constitutional protection cannot be denied from a religious exercise. The presumption of 'psychological coercion' used in the early cases of school prayer (*Engel*, *Schempp*) became questionable with the *Kennedy* decision. Research into psychological coercion was essentially concerned with whether the institution exerts undue pressure on pupils with the view to participate in religious activities. Criteria to

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<sup>36</sup> Members of this Court have sometimes disagreed on what exactly qualifies as impermissible coercion in light of the original meaning of the Establishment Clause; compare *Lee v. Weisman* 505 US 577 (1992), pp. 593, 640–641 (Scalia J. dissenting).

help determine this included: whether participation is compulsory, the extent of school involvement, who says the prayers, or the degree of involvement of the lead person (McGrath, 2022, p. 2464).

However, it is apparent *prima facie* that it is an impossible undertaking to establish a presumption as to the degree of coercion exercised on a target audience with a different composition in every case.<sup>37</sup> Justice Scalia, dissenting in *Lee*, strongly criticised such an expansion of the concept of coercion, stating that the majority opinion's notion of coercion is evidence of a confused understanding of the true meaning of 'coercion,' a psychology practiced by amateurs that is boundless and subject to limitless manipulation. Only a combination of facts with concrete consequences for the person subjected to the coercion can be considered coercive, provided the correct approach is followed. In the *Kennedy* case, the defendant did not prove such a coercive effect.

Nor has state aid or government endorsement proved to be an easily applicable standard. The very fact that this test can be applied in school prayer-type disputes has made the practice uncertain, since coercion must be examined from the state's perspective and cannot be extended to the protected freedom of expression of the person saying a voluntary prayer. This uncertainty was intensified by the facts of the *Kennedy* case. The case is therefore seen by some as a symbolic parting of the waters, as it has made clear a constitutional change of direction that has been observable in the Court's decisions for a decade or even more (S. D. Smith, 2022, p. 27). In the American constitutional order, the 'wall of separation' theory of the relationship between church and state, developed in the second half of the twentieth century, dominated legal thinking for decades after the *Everson* case in 1947.<sup>38</sup> This doctrine, which was maintained for nearly seventy years, required the two spheres to be kept separate. According to this view, the experience of religion is essentially a private matter, to be protected only in the private sphere, but public and governmental functions (including public schools) must be neutral and therefore secular.

Prior to the *Kennedy* verdict, public schools had strong powers to control the religious communications of teachers and students under their responsibility (Lupu & Tuttle, 2023, p. 47). Those who have challenged the endorsement test over time have often argued that it relies on figurative abstractions that do not have their origin in constitutional tradition. A typical example of it is the three-step test created in the *Lemon* case, which cannot be derived from the text of the Establishment Clause. The Court's jurisprudence has subsequently required that governmental action must not even symbolically endorse religion, but there was no clear guidance on how to recognise symbolic endorsement.

In contrast, according to those who oppose an overly expansive interpretation of the Establishment Clause, the drafters of the Constitution were aware of the different meanings of 'establishment' and 'endorsement' when drafting the Establishment Clause and chose the former to express their intentions. They therefore challenged the constitutional jurisprudence by arguing that the original meaning of the Establishment Clause (the prohibition of the institutionalisation of religion) had been changed by the *Lemon* test

<sup>37</sup> *Lee v. Weisman* 505 US 577 (1992), p. 632.

<sup>38</sup> *Everson v. Board of Education of the Township of Ewing* 330 US 1 (1947); for an analysis of the case, see Ward, 2009.

and its 'successors'. They allow the judge to make a subjective assessment of whether the state actor had a secular purpose, so that the judge can engage in relatively informal speculation about the state of mind of another government official and draw a subjective conclusion about whether the government actor's purpose is secular. If the court finds that there was no secular motive, it must find that the state action violated the Establishment Clause.<sup>39</sup>

The requirement of a secular purpose as created by judges, and the prohibition on endorsing religion, is, according to opponents of the doctrine, a stretch of the judicial power under Article III of the Constitution. However, by overruling the *Lemon* test, the Court has called into question the justification of the criteria (religious purpose, effect on religion, interconnection between the two spheres) on which the practice of the Establishment Clause was based. The Court has not been able to establish, despite serious efforts, a coherent rule for assessing the infringement of the Establishment Clause.

## 8. The role of tradition in judging cases

According to the change of direction announced by the Court, courts in future will have to decide whether a law or practice violates the Establishment Clause by taking into account history and historical tradition and going back to the original meaning of the text as drafted by the Founding Fathers. This brings back on the agenda the not so recent debate between liberal and conservative interpreters of the Constitution as to whether subsequent practice of the Constitution can override its original understanding. The question of the nature of the mutual criticism between the two sides cannot be answered correctly by contrasting the extremes of their differences. To understand the differing views, we must accept that both approaches are ultimately based on a choice between value preferences, influenced by debates about the interpretation method of the Constitution. The history of dissenting opinions of the justices of the Court is also the history of how, and under what conditions, the liberal view of the Constitution (as an evolving organism) and the conservative approach of defending the original meaning of the Constitution can prevail over each other.

In the *Kennedy* case, the Court instructed the lower courts to interpret the Establishment Clause by reference to historical practices and interpretations, rather than applying the *Lemon* test and the endorsement test. This finding had already been made in the 2014 *Town of Greece* and 2019 *American Legion* cases,<sup>40</sup> and the Court also referenced it. According to the legal reasoning of the former judgment, 'the line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers.'<sup>41</sup> In doing so, the Court wished to emphasise that an analysis focusing on the original meaning and history is not a feature of the *Kennedy* case but a long-standing rule, that is, it is not an exception to the

<sup>39</sup> A summary of the criticisms of the *Lemon* and endorsement tests can also be found in the *amicus* filed in the *Kennedy* case (February 2022).

<sup>40</sup> *Town of Greece v. Galloway* 572 US 565 (2014); *American Legion v. American Humanist Association* 588 US \_\_\_\_ (2019).

<sup>41</sup> *Town of Greece v. Galloway* 572 US 565 (2014).

Court's jurisprudence on the Establishment Clause. This should have been recognised by the courts of first and second instance. In *Marsh*, the Court emphasised the idea that the legislature's chaplaincy goes back to the First Congress, which is why it is such an old tradition that it has become part of the fabric of society.<sup>42</sup> Although the Court considered the decision an exception due to the limited context in which the prayer was said.<sup>43</sup> And, in *American Legion*, the Court considered the *Lemon* test inappropriate for adjudicating the point of law,<sup>44</sup> instead deeming the tradition-based reasoning appropriate to overcome the courts' overly broad interpretation of the Establishment Clause.

Some of the analysts of that thesis missed the set of application criteria of history and tradition as standard. They stressed that the Court had not revealed the techniques that would allow a more thorough understanding of the historical context of the original meaning and determining the historical tradition (analysed by Cooley, 2023, p. 61). It defined the scope of the Establishment Clause by reference to historical practices and perceptions, but did not carry out the analysis itself (mapping the historical practice and relating it to the facts of the case), referring only to its previous precedents (M. L. Smith, 2022, pp. 38–39). In doing so, the judges exposed the constitutional case law to the risk of inconsistency, thus ultimately creating the potential for undermining legal certainty.

The originalists also argued with legal certainty. Since such an approach to constitutional interpretation requires the identification of the communicative content of the constitutional text, it is essential to collect and evaluate all the evidence on the historical and traditional meaning. These then act as constitutional limits on judicial decisions and the formulation of doctrines. Where the text of the Constitution is vague, history and tradition can be the basis for the choice of the right doctrine, whereas the idea of a living constitution undermines the predictability of the law, empowering judges to interpret the content of the Constitution according to their own convictions. The rule of law (as an important political value), the separation of powers (including the desire for judges to rule according to existing rules) and popular sovereignty (as a political value of democratic legitimacy) are common premises of the different versions of originalism. However, the validity of the three elements is doubtful if the idea of a living constitution derives its primary definition of meaning not from social practices but from artificial, abstract principles and values (Barnett & Solum, 2023, pp. 2, 14).

## 9. Moving towards the free religious practice

What does all this mean for the *Kennedy* case? If the focus of legal judgment is on the fact that Kennedy is identified as a coach during his prayers, the Court's reasoning effectively makes any religious expression by public employees categorically prohibited. In this approach, the content of the utterance is irrelevant and, since the religious element is ignored, the case will be decided on the constitutional aspects of the employee's

<sup>42</sup> *Marsh v. Chambers* 463 US 783 (1983).

<sup>43</sup> *Town of Greece v. Galloway* 572 US 565 (2014).

<sup>44</sup> According to the ruling, the Bladensburg cross on the World War I memorial did not violate the Establishment Clause, and the historical approach should be taken as the guiding principle in the assessment of religious symbols.



freedom of speech. The conflict between the two competing interests precludes the free religious practice under the First Amendment, even though the employer also discriminated against the employee for fear of violating the Establishment Clause. The employee, on the other hand, cannot effectively invoke his right, at all, to freedom of religious exercise, which is in fact in conflict with the Establishment Clause.

In my view, this is the one-sided situation, which the Court has recognised and which has led it to take a different starting point in its adjudication of the case. Namely, the First Amendment protects not only two but all three values (the prohibition of the institutionalisation of the church, freedom of expression and freedom of worship) simultaneously, and does not establish any inherent hierarchy between them. The legal assessment of these matters will require a more comprehensive optic in the future, rather than the proverbial thinking that 'There are three kinds of people: Those who can count, and those who cannot'. It is true that the Founding Fathers said nothing about how they intended the Constitution to be interpreted, but these values were not placed side by side in the First Amendment by chance. The Court recalled a precedent that in Anglo-American history, government repression of speech has often been directed at religious speech, even though private religious speech is by no means an orphan child of the First Amendment, but is – from the point of view of freedom of speech – fully protected to the same extent as secular speech. Therefore, 'free speech clause without religion would be *Hamlet* without the prince'.<sup>45</sup>

The fact that the First Amendment doubly protects religious speech (both through free speech and independently) is not accidental, but a natural consequence of the Framers' distrust of government attempts to regulate religion and suppress dissent. The Court thus expressed the view that early opponents of the religious establishment were not concerned with the separation of church and state, but rather with state-sponsored religious discrimination. However, this had a well-defined, small number of issues, which the Court gradually broadened, increasing the wall of separation. This approach ignores the fact that there has never really been a consensus on the separation of church and state, nor that, in history, governance has always been conducted with some degree of cooperation between the two spheres.

The complete rejection of state endorsement for the church has never been achieved, as the church takes over certain public functions from the state, typically in the areas of education, running the social system and the pursuit of cultural goals. The institutional interactions that develop in the process are realities of the recent case law, of which the Court takes note.<sup>46</sup> In other cases of the Establishment Clause, such as the performance of prayer in a state institution or the display of religious symbols in public spaces, a narrow, exceptional range existed from the outset, precisely due to this historical tradition. In the *Lynch* case, the nativity scene in Bethlehem did not violate the Establishment Clause because of its Christmas context, its historical tradition and its friendly, community

<sup>45</sup> *The Capitol Square Review and Advisory Board. v. Pinette* 515 US 753, 760 (1995).

<sup>46</sup> In *Carson v. Makin* 596 US \_\_\_\_ (2022), there was a change of aspect. The Court's prior case law had held that the state *could permit* the allocation of public funds to religious purposes in certain cases, but in *Carson*, it concluded that if a public funding program funds secular purposes similar to those of a church-maintained institution, then the allocation of public funds should be permitted.

aspects. However, in *County of Allegheny v. American Civil Liberties Union*,<sup>47</sup> a majority of judges held that the mere display of a nativity scene on the main staircase of the courthouse violated the Establishment Clause because its display was ‘indisputably religious – indeed sectarian’.

In *Kennedy*, the Court in effect simply reaffirmed the doctrine that some degree of governmental recognition and accommodation of religious utterances is a good practice that is part of the national heritage. In its interpretation, a religious person need not choose between adherence to his religious identity or participation in activities protected by the First Amendment. This ruling also suggests that freedom of expression and freedom of religion are not overtaking but complementing each other. The flaw in the doctrine of the State that is indifferent to religion is that it misconstrues religion and religious sentiment. Some people undoubtedly regard their faith as absolutely personal, but religion has never been (by its very nature) purely private for countless people, and the Court’s precedents have not changed this (S. D. Smith, 2022, p. 27). The *Kennedy* ruling of 2022 ultimately moved the jurisprudence towards a freer religious practice and away from the separation of church and state. What are the prospects?

If the *Kennedy* decision is correct, and the arguments it makes are subsequently confirmed by the Court and incorporated into jurisprudence, this consequence may be seen as a correction of the Court’s interpretation of the Establishment Clause. If religious activity in the personal time of a public school employee is protected in the same way as any profane speech then the prohibition of discrimination can function as a guarantee of the free religious practice. In this approach, the Establishment Clause and freedom of religious practice are not necessarily in conflict. Tolerance of the expression of religion does not make it a condition of respect that religious persons substitute a conscientiously determined purpose based on secular beliefs or traditions for a purpose based on religion (expecting them to act with a secular purpose, and not to support religion even in symbolic ways).

If the *Kennedy* ruling is wrong, then the Court has unnecessarily contradicted its own seventy years of practice, leaving the Establishment Clause vulnerable to vague, easily manipulated and emphatically non-legal notions of historical practice and tradition. The lack of clear legal criteria makes this jurisprudence uncertain and inconsistent, and favours a result-oriented, distorted search for precedents, in which the judges’ own legal conceptions are strongly present.<sup>48</sup> History and tradition include, among other things, the recent precedent history, in which the wall metaphor has been explicitly applied over a long period of time, and cannot be disregarded without any consideration. The Court, by narrowing the doctrine of coercion to direct coercion, has allowed religious expression in public schools to an unprecedented extent, opening the door wide to the expression of any religious belief in a public institution.

We will see what happens.

<sup>47</sup> *County of Allegheny v. ACLU* 492 US 573 (1989).

<sup>48</sup> On the technique of selecting precedents according to a predefined outcome, see Cross and Harris, 1991, pp. 63–71, cited by Janý, 2021, p. 147.

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