



## Football, Faith, and the First Amendment – Part 2

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**[00:00:00] Jeffrey Rosen:** Hello friends. I'm Jeffrey Rosen, President and CEO of the National Constitution Center, and welcome to We the People, a weekly show of constitutional debate. The National Constitution Center is a nonpartisan, nonprofit chartered by Congress to increase awareness and understanding of the constitution among the American people.

**[00:00:23]** On April 25th, the Supreme Court will hear oral arguments in Kennedy versus Bremerton School District. The case is about Joseph Kennedy, a high school football coach in Washington state who prayed in the locker room before games and at the 50 yard line. He lost his job after refusing to comply with school district orders to stop. The case raises important questions about free speech and the free exercise of religion. And, to dig into them we're honored to have two of America's leading First Amendment experts who have participated in briefs on both sides of the case.

**[00:01:02]** Nicole Garnett is the John P. Murphy Foundation Professor of Law at Notre Dame Law School. An author of *Lost Classroom, Lost Community: Catholic Schools' Importance in Urban America*. She and the Notre Dame Religious Liberty Initiative wrote a brief in support of the coach. Nicole, thank you so much for joining.

**[00:01:20] Nicole Garnett:** Thank you for having me. Great to be here.

**[00:01:23] Jeffrey Rosen:** And Rachel Laser is the President and CEO at Americans United for Separation of Church and State, which is representing the school district. Americans United filed a brief on behalf of the school district and its legal director will be arguing at the court on Monday. Rachel, thank you so much for joining.

**[00:01:39] Rachel Laser:** It's great to be here.

**[00:01:41] Jeffrey Rosen:** Rachel, let's begin with you. There's a dispute about exactly what happened in this case. What are the facts?

**[00:01:47] Rachel Laser:** This is a case about a coach who violated the religious freedom of students by pressuring them to pray with him at the 50 yard line immediately following games at the time when team huddles usually occur. The school district repeatedly offered Coach Kennedy alternative options, such that he could pray in a way that wouldn't pressure students to join and he refused them all and sued the school district. And the facts are really important to get right

here because the lower courts warned the Supreme Court that Kennedy and his lawyers were spinning a "deceitful narrative" that is utterly belied by the facts in this case.

**[00:02:31]** So in fact, this is a case about a coach who pressured students to join him in prayer when he was on official duty as a public school coach.

**[00:02:40] Jeffrey Rosen:** Thank you so much for that. Nicole, what are your views about out the facts in the case?

**[00:02:46] Nicole Garnett:** I would start by saying that this case is... Um, the, the factual disputes in this case are quite unusual. The level of factual disputes are quite unusual in a Supreme Court case. Um, the parties, uh, the petitioner and the respondent can't agree on what questions are presented by the case. Um, they can't agree on what the f- what happened. Um, you know, I don't think there's any particular evidence that there was any pressure other than perhaps sort of social, the idea that the, the kids seeing the coach praying, they felt pressured to pray with him. But look, this, this, the facts of this case unwind over eight years. It's clear that at different times he did different things, starting with a quiet prayer by himself, moving to a prayer with some of his students, being told not to do prayers in the locker room. He says he stopped doing that. Other people joined him.

**[00:03:39]** Um, so I actually anticipate that the facts will play a big role in the argument next week, and I also anticipate that the justices are going to be annoyed by it. Because, as you know, the Supreme Court is not typically set to decide what the facts of the case are and here, um, it's almost impossible to know exactly what was happening in that last couple of incidents that led to him being dismissed. But, um, it's not something... I, I do think the parties will dispute the facts in the Supreme Court next week, and it's not something that typically happens at this level. And I, I, I find, I think that there will be expressions of frustration over the facts. Well, not over the facts, but over the fact that the facts are an issue in the case.

**[00:04:19] Jeffrey Rosen:** Thank you so much for that. Well, let's talk now about the constitutional grounds that the lower court invoked for saying that the coach could be disciplined. Uh, there was a majority opinion and a dissent on the Ninth Circuit. Rachel, what did the lower court hold?

**[00:04:34] Rachel Laser:** The lower court held that the Bremerton School District had every right to regulate speech because the coach was acting as an agent of the state and therefore the state gets to regulate its own speech. And alternatively, they found that there was an Establishment Clause violation, which is in the 1st Amendment of our constitution, which joins with the free exercise clause to protect religious freedom for all of us. They found that the religious freedom that was at risk in this case was the religious freedom of the students on the team and not the religious freedom of the coach.

**[00:05:09] Jeffrey Rosen:** Thanks so much for that. Nicole, do you, uh, agree with that characterization of the majority opinion on the lower court and what did the dissenters on the lower court hold?

**[00:05:18] Nicole Garnett:** I do agree that the lower court held th- this, the coach, um, when he was engaging in this prayer activity, whatever, however, whatever exactly was happening was, um, engaging in government speech. And then alternatively held that the district had to fire him, or because he refused to stop doing it, um, because it, it to have failed to, to fire him or to violate the Establishment Clause. That's what the lower court held.

**[00:05:43]** The lower courts as... the, the second part of the, um, the opinion was the majority part of the opinion, which was the focus on the Establishment Clause. The, the Establishment Clause in this case, the lower court found that, um, the reason that it violated the Establishment Clause, um, to not fire him, essentially they had to do it, um, was because an- a reasonable observer, there's a test that we talk about in our brief, it's called the endorsement test, that a reasonable observer watching coach Kennedy would think that the Bremerton School District was endorsing this religious conduct. And by f- and that endorsement would be a violation of the Establishment Clause.

**[00:06:26]** I do not read the opinion as being about the r- the religious liberty rights of the students so much as the fact that the, the, um, lower court held that Supreme Court precedent requires public book schools to be secular, and by failing to fire him, they would've been not secular, that they would've been appearing to the public, to the reasonable observer, whoever that is, um, to be endorsing, um, religion.

**[00:06:48]** That test is really important because, if the speech is not government speech, and if the lower court was wrong about the endorsement test, then they can't, then to fire him violated his free exercise and, and free speech rights. This is what the lower court, um, dissent said. And it wasn't just one dissent. There was an opinion and then there was a dissent from the- no- well, there was, it went up, uh, to the, essentially the full court of appeals of the Ninth Circuit, um, and there was, uh, that, to try to ask the court to reconsider the case and the, the Ninth Circuit, the declined to do so, but this produced 11 separate opinions about the, um, what was going on and what the legal issues were at stake.

**[00:07:31]** So there is this government speak- was he speaking as a government employee, is definitely part of the case. I think the bulk of the case and the bulk of the Ninth Circuit law report opinion is this question about whether this line between, um, whether they had to fire him with, or rather than, or they would otherwise violate the Establishment Clause or whether they couldn't fire him because they would violate his free speech and free exercise rights. And that turns on this endorsement question.

**[00:07:57] Jeffrey Rosen:** Thank you very much for that. And thank you both for helping us explain that there are two important questions at the least. First, was it government speech or not and, could his speech be regulated as a government employee? And second, uh, was it private religious speech that was either protected by the free exercise clause or prohibited by the Establishment Clause?

**[00:08:19]** Uh, uh, Rachel, why don't we take up the first question of government speech. You argue in your brief that it was government speech and therefore it could be regulated as the

school district chose. Uh, tell us more about that argument and how you think the Supreme Court should decide that free speech question.

**[00:08:36] Rachel Laser:** So, for one, I don't think it's disputed that when coaches head to the 50 yard line immediately following a game right after the handshake and start speaking in a motivational way to their team after a game, that they're on duty, right. And everyone certainly would perceive them to be on duty, but in this case, there's even a job description that includes motivational strategy, um, in the job description. So this is all part of what the coach was hired to do. He doesn't deny that part of his job was to motivate and inspire and be a role model for his team. Um, and there's nothing that's disputed about whether he did in fact, make students feel like they should follow him right when he was sort of doing this as an official. Because in the legal record are numerous instances of parents coming forward to say that their kids did feel pressured to pray to play, to pray to feel part of the team, that it was is awkward for them.

**[00:09:36]** Also in the record is the fact that when the coach didn't pray, neither did the students, right. And the students had every right to pray on their own if they wanted to. But in this case, this is a guy who only had access to the students and access to the 50 yard line at that time, because he was an agent of the state. And therefore, when he was holding prayers, you can look at any picture by the way, back to the facts, um, and you can see that numerous times he was surrounded by a crowd of students who were down on their knees. He was holding a helmet up in the air, holding these prayers. He doesn't deny that they were prayers, and this was clearly a time and a place where he was acting as an agent of the state and therefore the state gets to regulate his speech.

**[00:10:26] Jeffrey Rosen:** Nicole, what are your views about the school district's argument, which Rachel just made that the coach was acting as an agent of the state and therefore his speech could be regulated as a government employee under cases like Garcetti and Pickering.

**[00:10:42] Nicole Garnett:** So I guess I would start with a bigger picture question about the scope of those decisions. So the, the government can regulate its employee's speech and, and certainly, um, the government can regulate teachers speech in the classroom. So if the math teacher, for example, the- the- decides that the math teacher wants to give a, you know, a lecture on cooking, the school can say, "You- you gotta teach calculus, not cooking." Um, so that's, that's gotta be the case.

**[00:11:10]** I think that it is, and the courts, the Supreme Court has warned that we need to be very careful about how we define the role of, of teachers and coaches. Um, otherwise that- we will dramatically constrain the ability of public school teachers to speak. And I think that is a risky proposition. So that we don't want it to be, as Rachel said, that anybody who has a motivational role, everything they say can be controlled by their employer. Um, I think that is, is, that is a very, um, difficult and dangerous line.

**[00:11:43]** And I also think it's particularly, I will acknowledge, um, that it is particularly difficult to maintain that line, um, respecting the free speech, free exercise, rights of public employees and teachers in particular and students, because many of these cases involve students and within the public school setting. And, and the court struggles with this. Just last year, for

example, as you know, they had, I think it was just last year, the, the famous cheerleader case where the cheerleader, I don't remember if it was tweeted or Instagram some obscenities about the cheerleading coach and got dismissed. And the question is whether the, the, you know, to what extent can the government, the, the school regulate her speech.

**[00:12:22]** These are hard questions. I teach education law, and we struggle with these questions in class. Actually, they're super fun questions to struggle with in class. Um, so just to keeping in mind, you know, there are free speech rights at issue that, that extend beyond the, the question of this particular case or even religious speech. And I don't think, I do think we wanna try to, try to protect the religious, I mean, the, the free exercise and free speech rights of our public school teachers.

**[00:12:46]** Um, so that's, that's the first thing I would say. The second thing I think is there's this factual problem, right? So, um, was he at dismissed for giving motivational prayers? Was he dismissed for, for kneeling on the ground surrounded by kids who voluntarily did so? Many of the pictures in the record are actually of opposing team. Um, so, this is why I think the argument will of- focus so much on, on the facts. So I think, um, both of those things.

**[00:13:15]** The court granted on the question about whether he could be dismissed for a, a private, silent prayer. Now, the, Rachel and her, uh, team says that's not... It actually affe- like litigation wise, it's fascinating that the, the, the respondent's brief says the real questions presented something other than what the questions presented are. So I think that that's a really difficult thing.

**[00:13:39]** So I think tha- that's how I would approach the question of the Pickering employee speech thing. We gotta be careful that we don't say that everybody who is, uh, has a teacher or coaching role, everything they do and say becomes government speech, because that's, uh, a dangerous business. And, and I don't, you know, it, some to some extent, it turns on facts.

**[00:14:00] Jeffrey Rosen:** Rachel, the second big set of questions, uh, raised by the case is whether or not the speech constituted, uh, district endorsement of religion. The district told coach Kennedy that he was free to engage in private conduct including prayer, even when on duty, as long as it didn't interfere with the performance of his job or constitute district endorsement of religion. That endorsement test comes from a case called Allegheny County in 1989. Uh, tell us about that test and whether or not you think it's the correct test for deciding whether or not the speech violates the constitution?

**[00:14:41] Rachel Laser:** So the endorsement test is whether a reasonable observer would perceive the government as endorsing or disapproving religion. Um, and it was actually, I have it dated to being laid up by justice O'Connor in Lynch v. Donnelly in 1984. So that was interesting too, because it dates to a case where the court said five, four that a nativity scene could stay up because it was part of a larger holiday display. And the endorsement test grew out of the concern, and I loved the words of Justice O'Connor, um, when she wrote about it in that opinion, that the en- that the endorsement of the government sends a message to non-adherents 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. And that's

precisely, literally, actually what happened in this case that the coach effectively divided his team along religious lines into insiders and outsiders, and, of course the students felt pressured to join so that they could be insiders.

**[00:15:46]** So the endorsement test is one of many tests, um, that the courts have used to apply the requirements of the Establishment Clause. And let me just first say that for this case, it doesn't matter what test you're applying, because, um, you would fail that test. Because, the line is so clear. I think it is important, like Nicole is saying for us to be able to draw a line for teachers and coaches. Um, you know, I have a faith myself. I come from the Jewish tradition. I respect... I married a guy who went to Yeshiva. I respect, um, people's ability to not leave their faith behind no matter what their job is, and that's important. And, at this same time, when you are acting in your public role and you are acting in a way that pressures students to join, you've crossed the line and here, we've crossed the line.

**[00:16:46] Jeffrey Rosen:** Nicole, in your brief, you argue that the endorsement test is unworkable in a way that's resulted in disarray and confusion, that it perversely singles out religion for disfavored treatment and it should be replaced by a clear rule that history and tradition are the proper guidepost. Tell us about what the endorsement test is, where it comes from, thanks to Rachel for the correction about Lynch and, uh, why you think it's unworkable and perversely singles out religion for disfavored treatment.

**[00:17:13] Nicole Garnett:** Right. So Rachel's correct that the endorsement test, um, which is interestingly ha- it's kind of a half test. Sometimes the court applies it and sometimes the court doesn't. Um, was Justice O'Connor's way of sorting through holiday displays so how many, you know, frosty the snowmen does it take to make the manure constitutional in front of City Hall? So would the- a reasonable observer walking past the City Hall religious Christmas display or holiday display? I think that, you know, the crèche was an endorsement of Christianity and Manor [inaudible 00:17:43] of Judaism.

**[00:17:45]** um, our, our, our brief ex- focuses exclusively on the endorsement test. Um, and we, we do argue that it's unworkable and it has, um, dis- generated disarray in the lower courts and in, and also it has generated confusion, um, and disarray in the public school classrooms and hallways. Um, and the reason we say that it is, uh, unworkable is the problem of the reasonable observer.

**[00:18:11]** So the reasonable observer is not a person. It's a hypothetical person who a judge or a teacher or a principal fills with their own views about whether or not the reasonable observer would think that Coach Kennedy praying with some people on him on, around him, on the 50 yard line that Bremerton School District was endorsing that or not. I mean, I actually think the reasonable observer test here clearly can't be that they were because they kept telling him to stop and he was defying their order. So it's un- it's hard for me to even understand in this case, how the endorsement test gets you to the place where you say the reasonable observer would think that Bremerton School District was endorsing this be.

**[00:18:49]** But, but it's an unanswerable question because the reasonable observer is not a real person. Um, and it has led to disarray. We, we, we bring up a lot of examples in our, our brief,

both in the lower courts. So for example, it's un- it's okay to sing religious hymns at a public high school choir in some circuits, but unconstitutional to sing religious hymns in the public high school choir in other circuits. Insp- it's okay to mention God or, um, or whatever, a religious make religious references in public high school graduations in some circuits, but you can be punished for doing it in other circuits.

**[00:19:28]** Um, my favorite cases in involve candy canes with religious messages on them. So in some circuits, uh, children can pass out candy canes with like little stickers that say, Jesus loves you around Christmas time and in other circuits they, they can be punished for doing so, or, and these are all justified based on the, the endorsement test. Like would the little kids think that, that if the little boys passing out candy cane with Jesus loves you on it, the school is endorsing religion or not?

**[00:19:54]** I- I think this is... And then our brief also goes into a lot of fun, just gives examples of, of things that go on public schools. I think that the, the endorsement test is problematic because it's led to this sort of, kind of extreme risk aversion on behalf of, uh, public school administrators who are well-meaning and they have this idea, like public schools must be secular and they start suppressing teacher speech.

**[00:20:18]** There was one example, teacher was pu- punished for saying, "bless you," to a colleague who sneezed. Um, they think that everything needs to be sort of scrubbed clean of religion in, in the public schools. I'm sure even Rachel doesn't agree with that, and I think, but the confusion leads to suppression of purely private conduct. Um, and, um, uh, so you gave the example Rachel of whether or not... You said, of course the students could pray. I'm not sure that's true. I mean, what if the students like the c- the captain organized a, a team prayer every day after the game, the coach, wasn't a part of it? What if, um, the- Coach Kennedy stopped praying, but the kids have to play or started praying in, um, because they're protesting the, the district telling them to stop praying?

**[00:21:07]** Why would, what would the reasonable observer think about that? Um, and if you read the lower court opinion about the reasonable observer, Judge Mullen, um, Smith says, "well, you know, the reasonable observer would know that this all started eight years ago." And that's just- it can't be true. So I think that, our argument is that this, the reasonable observer test is unworkable, and it, it's not something that courts can do, and it's not something that teachers and principals can do. And it's led to disarray in the lower courts. Um, and it's also led to the over suppression of religious speech and conduct pur- purely private religious speech and conduct in the classrooms and hallways of public schools. Um, and that's a problem.

**[00:21:50] Jeffrey Rosen:** Rachel, what is your response to Nicole's argument that the endorsement test should be jettisoned? She gives many examples in her brief, and as, as you rightly remind me, it, it was in *Lynch v. Donnelly* that the court held that the display of the city owned nativity scene didn't violate the Establishment Clause. The court held context was important, of leading some to call it the origin of the three plastic animals rule, that if you had reindeer along with a crèche, it might be okay, but not a crèche by itself. Do you think that the

endorsement test as articulated in Lynch should be maintained? Um, and do you think that the court will uphold it or not?

**[00:22:30] Rachel Laser:** We feel fine about the endorsement test, but here the court doesn't even need to reach the Establishment Clause issue, and I think that's really important to highlight. As our brief makes clear, Kennedy spoke as a coach. He spoke as an agent of the state and the state gets to regulate its own speech. So I think that's point number one that I wanted to emphasize.

**[00:22:51]** Back to the endorsement test, and I will speak now as a religious minority. And, um, I can get almost offended in this space because I think that the reasonable observer test is one that's meant to get us outside of our own bubble and our own perspective. I think if there's anything that we've sort of come to understand in these, in this day and age, it's that we can sometimes have blinders on, um, when it comes to who we are and not realize the effect, the impact of our actions. And so the reasonable observer says, step outside of yourself. I know you don't think Coach Kennedy, or you say, you say you don't think that you were pressuring students to join you, but let's just get outside of your head and go to what students would think. Or in this case, let's, let's think about whether the average person would look down at you conducting this prayer, if they realized it was prayer, which it became public that it was, and think that the school district was endorsing this.

**[00:23:49]** And in fact, the way that the school found out that this was prayer, 'cause it was actually going on for some years and the school district didn't even know 'cause it was happening in that, in that huddle context. But the way the school found out was that an opposing coach came to the school and said, "Wow, so I don't, I didn't realize that you all have your, let your, and let and have your coaches hold prayer. Um, I didn't realize that, you know," and so that's how it came to the coach's attention even.

**[00:24:18]** But, back to the initial point, um, we don't have a problem with the endorsement test. It grew out of another test, which we may be getting to, um, called the Lemon Test. And, uh, Americans United was actually part of bringing that case, um, with the NAACP and the ACLU. We just honored, um, Alton Lemon in our magazine Church & State this month. He was an incredible guy. He was worried about diverting public funds and, from public schools over to fund private religious schools. He acknowledged that and knew that so many black and brown kids and so many of our kids, nin- over 90% of our kids used the public schools.

**[00:24:59]** And he actually was successful when he brought that lawsuit challenging that law that siphoned off public funds and the court came up, the new test that is a good test. That test actually [laughs], is as good as any test. This is complex space and that test was really straightforward and it had three prongs to it. And he said, and... the- the test said, is there a secular purpose, you know. And number two, is the effect of it favoring is favoring religion, and number three, is there excessive entanglement of religion and government? And that test has been, um, unfortunately weakened as the court has become more political, but we even like that test.



**[00:25:43] Jeffrey Rosen:** Thank you so much for that, for articulating the Lemon Test so clearly and for defending it. Nicole, the Lemon Test of course has been much criticized by the more conservative justices on the Supreme Court, the late Justice Antonin Scalia famously called it ghoul in a late night horror movie that stalks our Establishment Clause jurisprudence. And- and- and- and, do you think that the court has-

**[00:26:06] Nicole Garnett:** I think he said it stalked children.

**[00:26:09] Jeffrey Rosen:** It stalks children as well. [laughs]. Well, uh, even more frightening than stalking our Establishment Clause of [laughs] jurisprudence. Well, um, does the court have to reconsider Lemon? Is Lemon still good law or is it enough in your view to reconsider the endorsement test? And then tell us about the alternative that you propose, which is of focus on history and tradition. In practice, how would that history and tradition test work as an alternative?

**[00:26:34] Nicole Garnett:** Right. So, um, it's a great question. I mean, we... in our brief, we chose to focus on the endorsement test because we think in this particular context, it is the root of the problem and it's not a clear test. It's very difficult. It's not just getting out. So it's not just coach Kennedy saying maybe this is a bad idea. It's actually a, a, a judge who's there looking at facts that are disputed deciding or teacher or, you know... I, I think that it's, it's very hard for the, for anyone to know what a reasonable observer thinks because they're not a real person.

**[00:27:04]** Um, so we focus exclusively on the, on the endorsement test, which we think that if the court got rid of the endorsement test, to the extent it would, it would, it would le- lend a lot of clarity, um, to, you know, well-meaning public school teachers and administrators who don't know whether it's okay to let little kids pray before their lunch or read the Bible at recess or write that God is their idol in a paper asking them to talk about their idol. In that particular case, it was not a case. It was just a story in the newspaper, the little girl was told she couldn't use God as her idol. She had to pick a substitute and that she was allowed to pick Michael Jackson.

**[00:27:39]** Um, and obviously that's just a mistaken. And so that the endorsement test creates this confusion. Um, lemon, I do not think is a clear test. It's made, made, it was never really clear what the factors, uh, ever really meant. Um, and then as Rachel points out, it has been significantly eroded, but the court has, has been resistant in this context in others to just saying Lemon is dead, um, and that we should find a different, uh, a different test.

**[00:28:07]** So for example, um, Rachel is correct that the original Lemon versus Kurtzman was about public assistance to private schools including religious schools. Um, the Supreme Court has made clear that a school choice programs can benefit kids going to religious schools. There's no constitutional, uh, question about that. This year, um, the Supreme Court is hearing a different religion case, which seems likely to hold that if you have a private school choice program, you can't exclude religious schools from it on free exercise ground.

**[00:28:37]** So Lemon is, it, it was always murky, but now it's, it's not clear what's left of it. And I do think some clarity over these issues would be important. I don't think they have to jettison either of the [laugh]... They don't have to get rid of Lemon and they don't have to get rid of the

endorsement test in order to resolve this case. Um, but, uh, the Beckett Fund in a different case that was heard, another religious, uh, speech case that was heard earlier this term case *Shurtleff versus Boston*. Um, their brief described that, they said that there was a shag carpet understanding of the Establishment Clause, where the court is sort of like done some vacuuming, but maybe hasn't gotten rid of the shag carpet and the shag carpet is kind of confusing teachers and lower court judges. And so maybe there are votes to overturn it. Justice Kavanaugh in the previous case seemed quite frustrated with the endorsement test and the Lemon Test.

**[00:29:30]** I don't think they have to get rid of it, but it would be nice, um, because it would lend clarity to lower courts who have to litigate these cases. Um, or decide these cases.

**[00:29:41]** Uh, so what is our test? Our test that we propose, um, is simply that what the court has done in the cases that involve for example, ceremonial prayer in legislatures and in some of the public, uh, display cases where they say that the, the proper guideposts for, um, what the Establishment Clause means and what, what governments are required to do, um, in order to, to stay within the bound- the guardrails of the Establishment Clause is, um, should be determined by history and tradition. Um, and the s- Lemon Test and endorsement tests have nothing to do with the history of tradition of the Establishment Clause.

**[00:30:18]** Um, we don't, in our brief, the Note Dame Religious Liberty Initiative does not fully articulate the alternative. That was not the goal of our brief. The goal of our brief was to talk about the difficulties of the endorsement test. Um, there are briefs that, um, in, in the case. Again, I think Beckett's brief is good on this, where they, um, they do sort of try to articulate what a history and traditional rule would look like. It does turn on the question of coercion that Rachel is, has, um, highlighted. Um, but the definition of coercion would be different than subtle. Maybe some psychological pressure.

**[00:30:51]** My husband's a big Duke fan. Like, you know, he's like, he's a public school teacher and he wears a Duke Jersey and so the other kids decide they better wear a Duke Jersey, even if they're like Carolina fans in order to... That's not the kind of coercion that we're talking about. But actually being punished or, or losing a benefit for failing to engage in this, whatever it is, um, that, uh, I would give the example in the 19th century, Catholics kids, sometimes Jewish kids in public schools being forced to read from the King James Bible and expelled if they failed to do so, sometimes beaten.

**[00:31:28]** That's coercion. So that, that is not in my brief. It's not the brief that we wrote, but I think that that is, um, something, if the court does jettison endorsement or Lemon or both, I think that, um, they will have to come to terms with what the alternative it is.

**[00:31:46]** Uh, I think, um, there are currently a majority of justices who have questioned both the endorsement test and Lemon, um, including Justice Gorsuch, who was quite brutal about the endorsement test as a Tenth Circuit judge. But they haven't necessarily articulated an alternative either. And I, I might be surprised if they do so in this case, but I don't know. It does seem that, um, there is some appetite among the current members of the court to try to clean up the doctrine.

**[00:32:17] Jeffrey Rosen:** Rachel, we now come to this really important question, how big a deal would it be if the court does abandon the endorsement test and embrace something more like a test of coercion, defined not simply as a subtle psychological pressure, but being punished or losing a benefit. Might that mean that prayer in the classroom itself is permissible under some circumstances? And, why do you think that it would be a bad idea for the court to embrace a coercion test?

**[00:32:50] Rachel Laser:** So the court has already said that if there is coercion, that's an Establishment Clause problem, but it doesn't require, uh, coercion, um, as a bar to find a violation of the Establishment Clause. And here, by the way, I think that that test would be met [laugh] in this case. But, um, the court has long found, conservative and liberal justices alike, have long found that school children are particularly impressionable. They are captive audiences in their school. We require them to report there and they've given extra care to protecting the religious freedom of students. So the bar is really high when it comes to pressure.

**[00:33:32]** You know, something that Nicole said was that the Lemon Test doesn't have anything to do with history, but it actually was a test that was crafted from decades of court opinions interpreting the Establishment Clause and put that all together and came out with a test that if you think about, if you think about it from scratch is pretty rational. Um, the history and tradition test that the Notre Dame brief is putting forward is such a dangerous one. It isn't even a test. It's retrogressive politics masquerading as a legal test.

**[00:34:09]** And I think what happened with the, with the Lemon Test that we talked about wasn't that the justices had a problem with the, the test itself, it's they didn't like the way the cases [laughs] were coming out applying the test. And we saw a real shift in the courts shortly after the Lemon Test, when Nixon appointed two new justices, including Justice Rehnquist. And then, uh, Re- Reagan came in and elevated Justice Rehnquist to Chief Justice and Scalia came in and all of a sudden the courts were in, uh, not happy with the way the outcome of the Lemon Test was.

**[00:34:49]** Now the, back to the history and tradition. What I wanna say about the history and tradition test is that it's so dangerous because it would turn back the clock on the great progress that America's made towards, I think in the words of president Lincoln being our better angels. And that we've been on this constant journey in America. We're not perfect, but we have these incredible ideals that are promised in our constitution, and we are moving steadily towards achieving that great ideal of equality that de Tocqueville said, Americans cared about more than anything. But if we are stuck with a test that measures violations only based on what passed muster and history, we are stuck with segregation, we are stuck with bans on interracial marriage. We are going backwards in a very dangerous way.

**[00:35:41]** So that would be a test... It's not even a test, but that would be a rejection of what has been a test that's based in Establishment Clause, precedent, really firm precedent, as old as *Roe v. Wade*. Um, and it would be very scary to thwart that precedent and turn to something that is a way of reinforcing a status quo that is regressive in America.

**[00:36:08] Jeffrey Rosen:** Nicole, you just heard Rachel's, uh, strong case against a history and tradition test, which she called scary and regressive. Please tell us why you think it be a

constitutionally good idea, and give us also a sense of in practice, how broadly it would sweep? Would Abington and Schempp, the case that held that legally sanctioned or officially mandated prayer or Bible reading in the classroom be reconsidered and, and how much of our current jurisprudence would have to be rethought?

**[00:36:40] Nicole Garnett:** Well, so, I, I just wanna make clear that the Notre Dame Religious Liberty Initiative, neither, no one here involved in the Notre Dame Religious Liberty Initiative including myself, um, and my husband who also wrote the brief is a fa- is in favor of segregation, so I, I think that was a little over the top. Um, I would describe Lemon as progressive politics, uh, masquerading as a test, um, and in particular hostility to funding of religious institutions that, and, um, the history of the Lemon Test, as you say, Rachel dates back, um, many years, um, to a very ugly time in American history, where there was a, a lot of hostility toward Catholics in this country and particular Catholic schools.

**[00:37:19]** So, um, you know, we can have our fights about, you know, which about ugly history. Um, I also, I guess I would take, um, I, I would, I would, I take exception to the idea that the current justices on the court are just playing politics and they don't like the out comes. The current justices on the court are formalists. Um, their question that they ask is what does the constitution mean? And their, the que- and the underlying query to many of them, not all of them, at least probably five of them, um, maybe four and a half, um, is, uh, what does it, did it mean as it was in- originally what is the original understanding of the, uh, the constitution? Um, and, and in this case, what was the original understanding of the, um, Establishment Clause?

**[00:38:11]** I, I don't think, um, it would be a necessarily a disaster to say, we're not gonna have an endorsement test or a Lemon Test anymore. Um, I think that it is a disaster to punish kids for showing up at class with a hijab on and, or Ash Wednesday ashes and tell 'em they have to wash 'em off or to withhold their diploma because they mentioned God in their high school graduation speech. It's not just Coach Kennedy that's being affected negatively by these cases, by this doctrine. It's a mess and it's hurting the, as you say, the 90% of school children that attend public schools, including people who, small children who would prefer to ha- not be punished for engaging in innocent religious conduct.

**[00:38:53]** Um, so, uh, so I think, um, the question Jeff is one that the court will not reach in this case. What exactly, how exactly broadly would this history and tradition sweep? I have, um, in, I, again, I mentioned I teach educational law, one particular challenge to, in talking about the original understanding of the free exercise clause, the free speech clause and the establishing clause as it applies to public schools, is that there were no public schools as an original matter as it applies originally, there were no public schools at the time of the founding. They are 19th century innovation.

**[00:39:31]** So it's very, I think that, that would take, um... I could imagine Justice Thomas, um, writing something about this. Although again, Justice Thomas in some of these cases, as you know, said, you know, he actually thinks that the public schools have a lot of power to, to, uh, control kids. They can't, that basically kids don't have First Amendment rights. So I don't think it will be resolved in this case. I don't think the court is going to say in this Coach Kennedy case,

and nor do I think they ever will say that, you know, school prayer is okay because the history and tradition supported it. Um, because there aren't nine Justice Thomases on the court and there never will be.

**[00:40:06]** Um, but I think, um, it's clear that what they could say is that history and tradition does not prohibit Coach Kennedy from doing what he did and leave other bigger questions for a later day. Um, I think that these, this, this question will come up, it's twi- this is two cases of the endorsement test this term and I do think the court, some members of the court, whether it's four or five, are going to have something to say about the proper test in this situation, if it's not the endorsement test, not Lemon.

**[00:40:37] Jeffrey Rosen:** Rachel, give us a sense of what the landscape might look like if the court reconsiders the endorsement test. Nicole just suggested that Justice Thomas might be willing to allow prayer in the classroom, but she doesn't think that there are a majority of votes for that. But as you look at the possibilities, what kind practices that are currently viewed as violating the constitution might be allowed if the court does turn to a history and tradition test in, in, in the religious liberty context.

**[00:41:08] Rachel Laser:** So if the court buys into this false narrative, what this George W. Bush appointed Ninth Circuit judge called a deceitful narrative and calls what is really pressure-pressurefull, is that a word prayer [laughs], by a coach on duty at the 50 yard line, private and solitary, and I'm doing air quotes, then teachers and coaches all across the country could claim that their non-private and personal prayer, just like Coach Kennedy's non-private and personal prayer that they're doing on official duty is constitutional. Teachers and coaches could pressure students to pray in every public school classroom across the country.

**[00:41:50]** Think about it. The teacher who is reading the Lord's prayer as students are entering her classroom out loud and "to herself in a private and solitary manner," [laugh], um, would be pressuring students once again, going, turning the clock way backwards to joining her in saying the Lord's prayer. Um, minority and non-religious students, which are a growing population right now in our country would feel excluded and like they have to forsake their religious freedom and the separation of church and state is what guarantees all of us our religious freedom. And every time we erode that we are jeopardizing the religious freedom of our neighbors and maybe someday of ourselves. And we think that if the court gets it wrong in this case, it could be the biggest erosion and blow to religious freedom in decades.

**[00:42:48] Jeffrey Rosen:** Nicole, give us a sense of why Justice Thomas has concluded as a matter of original understanding that school prayer is consistent with the constitution. Is it 'cause he thinks the Establishment Clause doesn't apply against the states or some other reason? And, and I want to ask you also about, uh, Jefferson's Bill for establishing religious freedom in Virginia, which contains so any of the reasons that the court is protected free speech over history. Jefferson says, "that well aware that the opinions and beliefs of men depend not on their own will, but follow involuntarily the evidence proposed to their minds. God have created the mind free and manifested his supreme will that free it shall remain by making it altogether insusceptible of restraint." And Jefferson says, "For that reason, government can regulate overt

acts against peace and good order, but lacks all power to intrude into the field of opinion." I'm, I'm asking because I'm not sure of the answer, but would Jefferson have allowed prayer in the classroom or not?

**[00:43:52] Nicole Garnett:** I don't know what Thomas Jefferson would or wouldn't have done. He wasn't the relevant, he didn't ratify the constitution. Um, but um, I would say, uh, to the, the question about Justice Thomas, I mean Justice Thomas has said that Establishment Clause should not apply against the states, it was intended as a federalism provision. So he, he, as far as I know, he's, he's not opined about, um, school prayer. He just doesn't think the Establishment Clause applies against the state, the states as an original matter, because it was intended as a, a federalism require- t- federalism provision designed to protect state establishments. So states of Massachusetts, I think didn't disestablish the co- congregational church until the 1830s.

**[00:44:35]** Um, so, I, I... That that's Justice Thomas' view. I, I think that's a v- I don't know that any other justice has en- endorsed that view. Um, and so, um, to your question about Jefferson, I mean, as an I'm an originalist. So for me, the question is what do the words in the constitution mean as they were understood by the people who ratified them? Um, and there are ways that we, we could fight about, we could have... Originalism isn't math right, and it, um, so I, you know, Thomas Jefferson's, he was not, uh, at a, I don't think he was at a ratification commi- com- uh, any of the ratification com- commis- conventions and he was as you know, more secular than many of the founding fathers, um, and people at the time, for sure.

**[00:45:25]** Um, I mean, to Rachel's sort of parade of horrors, um, about the teacher reading from the King James, I mean, reading the Lord's prayer and people feeling uncomfortable. I mean, I, I would also, I would say we need to remember there's a counterweight here, which is the, the teacher who gets punished for saying, bless you. Or if reading the Bi- for, to her, uh, colleague or saying that I'll pray for you or reading the Bible quietly, or the student who gets punished for doing these things. Those are religious liberty issues too. And we can fight about whether Coach Kennedy was engaged in public or private conduct, but when a little kid is, when a teacher calls and says the little kid can't pray, or before lunch, or read the Bible during his recess, that is private, purely private conduct, and that is a religious liberty issue as well.

**[00:46:13]** Um, and, and, uh, you know, as far as minority religions go, what about the Muslim teacher who may want to join her students for, for prayer? Um, because the students are voluntarily doing it and she wants to, or he wants to join it as a, because they're, they're obligated to do the same thing? I don't think that would violate the Establishment Clause as originally understood and I don't think it's necessarily oppressive a one way [inaudible 00:46:40] that's only oppressive to, to minority, uh, religions.

**[00:46:43]** I- I'm a public school kid and a religious person, I went to public school. And I would prefer that my, the public schools not, you know, indoctrinate children. I think they're probably not very good at it. Um, I don't think that we're talking about that at all. We're really talking about in this case, whether or not this question is, is a government speech or not. And if it's not, um, it, what the endorsement test means. And I, I think that the, the sort of, you know, parade of horrors that gets trotted out in this case is, it's not what is at stake. There are real religious

liberty violations going on in public schools all over the country, because people who are well-meaning and want to obey the law don't understand that private religious conduct is permissible, because they're confused and worried about the appearance of endorsing religion, if they continue to permit it and that's a serious religious liberty concern.

**[00:47:39] Jeffrey Rosen:** Thank you so much for that. Well, it's time for closing arguments in this very rich, deep and important discussion. And Rachel, the first one is to you. Please tell we, the people, listeners, why the Kennedy v. Bremerton case is important and how you think the court should decide it.

**[00:47:57] Rachel Laser:** So, if this case were about private and personal conduct, we wouldn't be here or we'd be weighing in on the side of the coach and all these instances that Nicole's giving of school children and they're, they're right to pray, we're there for them, you know, and that's actually what we're concerned about. But we're concerned that's not the facts in this case. So the facts in this case are that this is about a coach who pressured students to join him in prayer at the 50 yard line, and that violated the religious freedom of school children. And he was acting anyway in his, a public official role as a coach, as an agent of the state. He wouldn't have had access to those students or access to that field, or been entitled to that motivational speech where he included his religion's prayers if he weren't working for the state and therefore the state gets to regulate his speech.

**[00:48:49]** Um, you raised, I just will conclude with this because I can't resist. Um, first of all, I, I, I really warn against law office history. I think we can even see from this conversation that lawyers and judges don't give dispassionate scholarly interpretations of history in the first place. But I will just say, since you raised them about Thomas Jefferson, who of course was so proud to be the author of the Virginia Statute of Religious Freedom, that it's on his grave epitaph and it's not even that he's president on his grave epitaph, that is one of the things that's listed and of- it's of course thought of as the underpinning of the religion clauses in the first amendment. And way back in 1821 in his autobiography, he wrote that that Virginia Statute for Religious Freedom was to protect the Jew and the Gentile, the Christian and Muhammadan, the Hindu and the infidel of every denomination.

**[00:49:43]** So that to me is a ringing endorsement, really a radical thought for such early times in America, that school children's diverse, religious backgrounds must be protected and it must be left in the realm of their parents and their Sunday Schools and their houses of worship. And we should not be, ever become a country where teachers or coaches can pressure students to pray.

**[00:50:10] Jeffrey Rosen:** Uh, Nicole, the last word in this excellent discussion is to you. Please, tell We the People listeners, why the Kennedy v. Bremerton case is important and how you think the court should decide it.

**[00:50:21] Nicole Garnett:** Um, so I think it's important to keep in mind what the questions presented in the case, uh, are. Um, and that is whether a public school employee who says a brief quiet prayer by himself while at school invisible to students is engaged in government speech that lacks any First Amendment protection.

[00:50:37] Now, um, Rachel disputes that that's what the question presented is, but is the petition's question presented the court granted. And I think that it would be very dangerous for the court. If we wanna, if we care about religious lib- liberty, it would be very dangerous for the court to say yes, to of that question, yes, that coach lacks any First Amendment protection.

[00:50:59] Um, there as religious liberty is protected by the Establishment Clause by keeping government out of our churches and keeping government out of our living rooms. Um, but it also is protected by the free speech clause and the free exercise clause by allowing us to express our views and to worship, um, in, in accordance with our own personal convictions of religious convictions or perhaps lack thereof. And I'm sure that, um, Rachel will agree that declaration, um, the Virginia declaration, um, included religious, uh, liberties, that it were both establishment focused and free exercise focused.

[00:51:35] Um, and the second argument is that just the one we make in our brief that, um, the current doctrine is a mess and the endorsement test in particular has led to the suppression of religious speech and conduct, particularly in public schools whereby percent of our kids go. And those are, those, um, are often completely unnecessary, driven by bad decisions made by well-meaning, but mis- misinformed and risk averse public school teachers and public school administrators. And the law, the doctrine, that particular doctor in the endorsement test, if the court, if the court does nothing else in this case, it would do well to make clear by jettisoning the endorsement test, that you do not have to suppress private religious speech and conduct in public schools.

[00:52:24] **Jeffrey Rosen:** Thank you so much Rachel Laser and Nicole Garnett for, uh, debate in the best tradition of We the People. You've taken us back to the first principles of the First Amendment and for that behalf of all the listeners, I'm so grateful. Rachel, Nicole, thank you so much for joining.

[00:52:42] **Nicole Garnett:** Thanks so much for having us.

[00:52:43] **Rachel Laser:** Thanks a lot. Yeah.

[00:52:48] **Jeffrey Rosen:** Today's show was produced by Melody Rowell and engineered by Greg Shackler. Research was provided by Kevin Klaus, Ruben Aguire, Sam Desai and Lano Ulrich.

[00:53:00] Friends, on May 2nd, the National Constitution Center's unveiling the first amendment tablet at the NCC. It is so inspiring. When I saw it in person for the first time I was so moved and I know you will be too. If you're able to come to Philadelphia to see the 50 ton 75 foot high First Amendment tablet.

[00:53:21] If you're able to join us on May 2nd, please do. Come to Philadelphia. Come as my guest, uh, as a We the People listener and you can watch these incredible panels that we're gonna have to celebrate the opening of the tablet, uh, which will feature Randall Kennedy, **[inaudible 00:53:40]** Strassen, Greg Lukianoff. There'll be speeches from Judge J. Michael Luttig and Jan North and I'll try to talk about the essence of the First Amendment as exemplified by two documents, Jefferson's Virginia Bill for Recognizing Religious Freedom, which we talked about



today and also Justice's concurrence in *Whitney v. California*. So come to Philly on May 2nd if you can. And if not, then register for the Zoom link, which you'll find on our webpage, [constitutioncenter.org](http://constitutioncenter.org) for upcoming programs.

**[00:54:14]** And, please rate, review and subscribe to *We the People* on Apple Podcast. When you rate, it boosts our profile and helps other people learn about the show. And of course your support and donations are always welcome. Our crowdfunding campaign is over. It was a big success. Thanks to all of you who donated. I'm so grateful to you, but we are always looking for support for our meaningful work, which was so well represented by today's great conversation. On behalf of the National Constitution Center, I'm Jeffrey Rosen.