A CORD OF THREE STRANDS: HOW *KENNEDY V. BREMERTON SCHOOL DISTRICT* CHANGED FREE EXERCISE, ESTABLISHMENT, AND FREE SPEECH CLAUSE DOCTRINE[*]

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In 2015, Bremerton High School football coach Joseph Kennedy lost his job for kneeling at the fifty-yard-line after football games to say a brief prayer of thanksgiving.[1] Coach Kennedy sued the school district.[2] On June 27, 2022, the United States Supreme Court held that Coach Kennedy's brief, quiet, personal postgame prayer was protected by the Free Exercise and Free Speech Clauses of the First Amendment to the United States Constitution.[3] The Court also held that the Establishment Clause posed no obstacle and concluded that the *Lemon* test is no longer good law.

Kennedy v. Bremerton School District profoundly alters Free Exercise, Establishment, and Free Speech Clause doctrine. A significant contribution of the *Kennedy* opinion lies in the principle that the three clauses work together to provide robust protection for religious speech. Writing for the 6-3 majority, Justice Neil Gorsuch explained that the clauses of the First Amendment "work in tandem. Where the Free Exercise Clause protects religious exercises, whether communicative or not, the Free Speech Clause provides overlapping protection for expressive religious activities."[4] The result, which the framers

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[*] Note from the Editor: The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. To join the debate, please email us at info@fedsoc.org.

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[1] *See* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2418-19 (2022).

[2] *Id.* at 2419.

[3] *Id.*

[4] *Id*. at 2421.

intended because of their "distrust of government attempts to regulate religion and suppress dissent," is that the First Amendment "doubly protects religious speech."[5] Here, the Court rebuked the tendency of courts and commentators to set the Establishment and Free Exercise Clauses against one another.[6] This article will explore the changes in the law, open questions, and the proper framework moving forward under each of the three clauses.

Common criticisms of the *Kennedy* opinion include 1) that it does not change existing law, 2) that it is confusing and fails to provide guidance, and 3) that it is limited in scope. This article demonstrates that the Court's opinion advanced First Amendment jurisprudence in several ways. Although there certainly still are open questions, lower courts are already citing the case for its clear guidance, especially on the Free Exercise Clause, the final demise of the *Lemon* test, and the contours of government speech.

One important measure of a Supreme Court opinion's impact is the frequency and depth with which subsequent courts and judges cite it. As one empirical analysis argued, "Citations are a facially clear measure of the importance of opinions, at least within the law itself. They are commonly used in research and offer an available measure for quantitative analysis."[7] Because "measures of case importance correspond to perceptions of case importance,"[8] albeit imperfectly, the way cases are cited during the first several months after they are decided is especially relevant in gauging the impact they will have on jurisprudence going forward. In its first nine months on the books, *Kennedy* has already been cited 69 times, and nearly all of these are substantive citations on the merits rather than minor procedural points.[9] Nor are its citations limited to similar factual scenarios or issue areas.

Two citations, both in the Ninth Circuit, demonstrate the significant impact of *Kennedy*'s theme: the clauses of the First Amendment work in harmony, and they do not conflict. In *Green v. Miss United States of America*, the Ninth Circuit upheld a national beauty pageant's practice of limiting its contestants to biological women.[10] While the opinion focused on expressive association rather than free exercise, it cited *Kennedy*'s explanation of the

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[5] *Id.*

[6] *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 587 (1992) (interpreting Establishment Clause to prohibit prayer at graduation ceremony, in opposition to Free Exercise Clause).

[7] *See, e.g.*, Frank B. Cross & James F. Spriggs II, *The Most Important (and Best) Supreme Court Opinions and Justices*, 60 EMORY L.J. 407, 411 (2010).

[8] *Id.*

[9] This count and all other citation counts are accurate as of March 6, 2023.

[10] No. 21-35228, 2022 WL 16628387 (9th Cir. Nov. 2, 2022).

"significant parity in the operations of the Free Speech and Free Exercise Clauses," and its argument that the "Clauses work in tandem" and "provide[] overlapping protection" for religious speech.[11] The court even acknowledged that the Supreme Court "rebuked our court for treating these Clauses as hermetically sealed, 'separate units.'"[12] The court also pointed out that *Kennedy* applied strict scrutiny regardless of "[w]hether one views the case through the lens of the Free Exercise or Free Speech Clause," as the result was the same under "the First Amendment's double protection."[13] While the beauty pageant at issue in *Green* was not a religious event, *Kennedy*'s reasoning mattered because it showed that "even a purportedly minor modification of the Pageant's message" could significantly change the overall message and violate the First Amendment's protection of free expression.[14]

In another case that relied heavily on *Kennedy*, *Waln v. Dysart School District*, a Native American student asked to wear an eagle feather on her graduation cap, and the school district refused, while making exceptions for many other students who wanted secular messages on their caps.[15] The court cited *Kennedy* throughout its opinion, emphasizing that "the First Amendment doubly protects religious speech" because the "Clauses work in tandem."[16] The district's policy was not neutral or generally applicable because it allowed secular exceptions while excluding the plaintiff's religious expression.[17] And the district's selective enforcement triggered strict scrutiny under the Free Speech Clause, shifting the burden to the district "[w]hether one views the case through the lens of the Free Exercise or Free Speech Clause."[18] Thus, regardless of the factual context or type of First Amendment claim asserted, *Kennedy* is significant for its cohesive reading of the Constitution, and early citations already show lower courts adopting this approach.

Most other citations to *Kennedy* focus on one of the three First Amendment clauses in particular. *Kennedy* is most commonly cited as a free exercise case that restates and strengthens the governing legal framework. In Establishment Clause cases, courts most commonly cite it for holding that the *Lemon* test is officially dead and has been replaced by analysis of historical

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[11] *Id.* at *11 n.14.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] Waln v. Dysart Sch. Dist., No. 21-15737, 2022 WL 17544355 (9th Cir. Dec. 9, 2022).
[16] *Id.* at *4.
[17] *Id.*
[18] *Id.* at *8.

practices and understandings. (Only two post-*Kennedy* cases have toyed with applying *Lemon.*) In free speech cases, courts cite *Kennedy* most commonly for the proposition that when evaluating the speech of government employees, courts must make a threshold inquiry of whether the particular speech at issue was public or private before determining how the First Amendment applies.

I. *KENNEDY*'S IMPACT ON THE FREE EXERCISE CLAUSE

As a free exercise case, *Kennedy* is most important because of how it synthesized the past two decades of Free Exercise Clause jurisprudence. Lower courts are commonly citing it as a helpful summary of the many ways that religious claimants can bring and prevail on free exercise claims. And perhaps most significantly, footnote 1 makes clear that under *Masterpiece Cakeshop*, government hostility toward religious beliefs is an automatic free exercise violation. Such claims are not subject to any balancing test—not even strict scrutiny.

A. Kennedy*'s Free Exercise Holding*

Kennedy held that the Free Exercise Clause provides robust protection not only for "the right to harbor religious beliefs inwardly and secretly," but also for "the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through 'the performance of (or abstention from) 'physical acts.'"[19] In clear, concise analysis, the Court spelled out Coach Kennedy's sincerely motivated religious exercise, which "no one questions," of "giving 'thanks through prayer' briefly and by himself 'on the playing field' at the conclusion of each game he coaches."[20] Coach Kennedy did not seek to lead any prayer involving students and had stopped leading locker-room prayers and postgame religious talks. The District disciplined him only for his brief, quiet, personal prayer, and that violated his right to free exercise of religion.[21]

The Court's free exercise reasoning is clear and simple in part because the District never questioned Coach Kennedy's sincerity or that its actions

[19] *Kennedy*, 142 S. Ct. at 2421.
[20] *Id.* at 2422.
[21] *Id.*

burdened his religious practice.[22] Nor did it try to squeeze its repeated targeting of his religious practice into the mold of "neutral or generally applicable rules" from *Employment Division v. Smith.* On the contrary, the District "conced[ed] that its policies were 'not neutral' toward religion" when it took the extreme stance that Coach Kennedy could not take "any overt actions" that appeared to endorse any voluntary prayer.[23] Nor did the District attempt to show its actions were generally applicable; it invented a "bespoke requirement specifically addressed to Mr. Kennedy's religious exercise," allowing other staff to take personal phone calls or visit with friends, yet opining that Coach Kennedy needed to spend every postgame moment supervising his players.[24] Thus, the District's actions triggered strict scrutiny.

While the Court's free exercise analysis is brief, it is significant for several reasons. First, it helpfully summarizes current free exercise jurisprudence, which has changed significantly in the last several years. It cites *Employment Division v. Smith* only in conjunction with *Church of Lukumi Babalu Aye v. Hialeah* and *Fulton v. City of Philadelphia.* The Court makes clear that there is more than one way to win a free exercise case: "a plaintiff may carry the burden of proving a free exercise violation *in various ways, including* by showing that a government entity has burdened his sincere religious practice pursuant to a policy that is not 'neutral' or 'generally applicable.'"[25] Next, the Court explained that even the *Smith* framework has expanded in four significant ways: government action may violate the Free Exercise Clause if it (1) expresses hostility toward religion (*Masterpiece Cakeshop*); (2) targets or discriminates against religion (*Lukumi*); (3) "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way" (*Fulton*); or (4) if it provides "a mechanism for individualized exemptions" (*Fulton*).[26] Each of these circumstances triggers at least strict scrutiny; the first triggers an automatic free exercise violation.

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[22] Indeed, the District would have been hard pressed to find any reason for questioning Coach Kennedy's beliefs or practices. *See, e.g.*, Thomas v. Review Bd. of Ind. Emp. Div., 450 U.S. 707, 714 (1981).

[23] *Id.* at 2422-23.

[24] *Kennedy*, 142 S. Ct. at 2423. Even if the school district had had a neutral policy regarding postgame staff activities, which it did not, its unequal enforcement against Coach Kennedy would still have triggered strict scrutiny under the Free Exercise Clause.

[25] *Id.* at 2422 (citing Employment Division v. Smith, 494 U.S 872, 879-81 (1990)) (emphasis added).

[26] *Id.* (citing Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1877 (2021)).

In footnote 1, the Court clarified that some free exercise violations are so blatant that they do not require strict scrutiny analysis or the *Smith* framework: "[a] plaintiff may also prove a free exercise violation by showing that 'official expressions of hostility' to religion accompany laws or policies burdening religious exercise."[27] While strict scrutiny is the most difficult test for the government to meet, it still involves balancing, and religious claimants do not always prevail. Yet when government actors have showed clear hostility and animus toward religion in formulating or implementing their policies, such behavior violates the Free Exercise Clause on its face, and courts can comfortably "'set aside' such policies without further inquiry."[28] This rule will serve as a warning to governments and a balm to religious claimants who have borne the brunt of government hostility.

Given the shift away from unitary application of *Smith* in free exercise jurisprudence, lower courts have found helpful *Kennedy*'s succinct summary of the current framework.[29] Notably, the Court still cited *Smith*, despite the facts that it has been heavily criticized and that five Justices signaled dissatisfaction with it in *Fulton.*[30] This is not surprising, however, because whether to overrule *Smith* was not squarely presented in this case. Furthermore, the Court overruled *Lemon*, and the Court would be unlikely to overrule two landmark Religion Clause precedents (however heavily criticized) in the same case. But the fact that *Smith* is only cited along with *Lukumi* and *Fulton*—which qualify it—shows that free exercise claimants are not limited to the unfavorable *Smith* framework when they seek redress for violations of their constitutional rights. The Court's acknowledgement of the multiple ways to analyze free exercise claims demonstrates its gradual shift away from *Smith* as "one test to rule them all."[31] Indeed, such an approach may make *Smith* increasingly irrelevant, because many factual scenarios fall outside its ambit or fit more effectively in the *Lukumi* framework for religious targeting, the

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[27] *Kennedy*, 142 S. Ct. at 2422 n.1 (quoting Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n, 138 S. Ct. 1719, 1732 (2018)).

[28] *Id.*

[29] *See infra* at I.B.

[30] John O. McGinnis, *The* Fulton *Opinion and the Originalist Future of Religious Freedom*, LAW & LIBERTY (June 24, 2021), https://lawliberty.org/the-emfulton-em-opinion-and-the-originalist-future-of-religious-freedom/ ("While the majority's opinion did not overrule *Smith*, two concurrences joined by five justices suggest that *Smith* is on life support.").

[31] *See generally Fulton*, 141 S. Ct. at 1915-22 (Alito, J., concurring); *see also* Br. of Becket Fund for Religious Liberty as Amicus Curiae, Carson v. Makin, 142 S. Ct. 1987 (2022).

Fulton framework for individualized exemptions, or the *Hosanna-Tabor* framework for religious autonomy, to name a few.[32]

B. Lower Court Citations to Kennedy *on Free Exercise*

At least three circuit courts of appeal have already cited *Kennedy* for its free exercise framework. In *M.A. v. Rockland County Department of Health*, the Second Circuit cited *Kennedy* first—instead of directly relying on *Smith* and *Lukumi*—for the principle that "this Court will find a First Amendment violation unless the government can satisfy 'strict scrutiny' by demonstrating its course was justified by a compelling state interest and was narrowly tailored in pursuit of that interest."[33] The court found that New York's Emergency Declaration during a measles outbreak was not neutral because it required children who were unvaccinated for religious reasons to quarantine, but not children who were unvaccinated for medical reasons. Drawing a comparison to *Kennedy*, the concurrence explained that the Declaration's "object" was to burden the religious plaintiffs "at least in part because of their religious character."[34]

In *Green v. Miss United States of America*, the Ninth Circuit applied the principle from *Kennedy* that the clauses of the First Amendment "work in tandem" to its analysis of the beauty pageant's expressive association claim.[35] And in *Maisonet v. Commissioner, Alabama Department of Corrections,* the Eleventh Circuit cited *Kennedy* for the basic proposition that plaintiffs must show that they "seek[] to engage in a sincerely motivated religious exercise" and that "a government entity has burdened [their] sincere religious practice pursuant to a policy that is not neutral or generally applicable."[36] There, an imam challenged Alabama's practice of excluding clergy from the execution chamber on the basis of his own free exercise rights, and the court dismissed his claim because all other non-state employees were also excluded regardless of their religion. Thus, whether religious claimants prevail or lose, *Kennedy* is a helpful guide to free exercise jurisprudence.

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[32] *See, e.g.*, Hosanna-Tabor Evangelical Lutheran Ch. & Sch. v. EEOC, 565 U.S. 171, 190 (2012) (declining to apply *Smith* in ministerial exception case because it "involved government regulation of only outward physical acts").

[33] M.A. v. Rockland Cnty. Dep't of Health, No. 21-551, 2022 WL 16826545, at *4 (2d Cir. Nov. 9, 2022) (quoting *Kennedy*, 142 S. Ct. at 2422).

[34] *Id.* at *8 (Park, J., concurring) (citing *Kennedy*, 142 S. Ct. at 2422).

[35] *Green*, 2022 WL 16628387, at *11 n.14.

[36] Maisonet v. Comm'r, Alabama Dep't of Corr., No. 22-10023, 2022 WL 4283560, at *3-*4 (11th Cir. Sept. 16, 2022) (citing *Kennedy*, 142 S. Ct. at 2422).

Lower courts are citing *Kennedy* in a wide range of factual scenarios relating to free exercise. For example, in *James v. Kootenai County*, the District of Idaho found that a coroner violated a Native American family's free exercise rights by performing an autopsy of their daughter instead of allowing for timely burial rituals.[37] The court called *Kennedy* a "Free Exercise case[]" and cited it for the holding that "[a] plaintiff may demonstrate the infringement of his rights under the Free Exercise clause in numerous ways, 'including by showing that a government entity has burdened his sincere religious practice pursuant to a policy that is not 'neutral' or 'generally applicable.'"[38] The court also drew a comparison between the *Kennedy* Court's close scrutiny of the school district's disciplinary actions and its own scrutiny of the coroner's autopsy practices. Rather than permitting government actors to rely on general laws that empower them with discretion, the opinion explained that courts must evaluate their policies as applied to particular religious plaintiffs—and in both *James* and *Kennedy*, that tailored scrutiny revealed policies "specifically designed to be intolerant of religious beliefs."[39]

Three other cases illustrate the broad applicability of *Kennedy*'s free exercise framework in diverse factual contexts. In *Tatel v. Mt. Lebanon School District*, the Western District of Pennsylvania synthesized *Kennedy*'s framework into this rule:

> A government policy will not qualify as "neutral" if it: (1) is specifically directed at religious practice; (2) discriminates on its face; or (3) has as its object a religious exercise. *Id.* (citations omitted). A government policy will not be "generally applicable" if it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way, or if it provides a mechanism for individualized exemptions."[40]

The court applied this rule in a free exercise case brought by religious parents against a public school. The parents asserted that they had "sincerely held religious beliefs about sexual or gender identity and the desire to inculcate those beliefs in their children," and that their children's first-grade teacher

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[37] James v. Kootenai Cnty., No. 2:19-CV-00460-BLW, 2022 WL 4585858, at *4 (D. Idaho Sept. 29, 2022).

[38] *Id.*

[39] *Id.* at *5.

[40] Tatel v. Mt. Lebanon Sch. Dist., No. CV 22-837, 2022 WL 15523185, at *26 (W.D. Pa. Oct. 27, 2022) (citing *Kennedy*, 142 S. Ct. at 2421-22).

was advocating her own agenda which conflicted with their beliefs.[41] While the "District provide[d] notice and opt out rights for numerous other, non-religious topics," it would not allow the parents to opt their children out of lessons on the religiously significant topic of gender identity, and that triggered strict scrutiny under the Free Exercise Clause.[42]

The North Carolina Court of Appeals applied the same rule to find that the state could not exclude religious schools from its voucher program, because then the program would cease to be neutral under the Free Exercise Clause.[43] The court cited Justice Gorsuch's observation in *Kennedy* that "[t]he Constitution and the best of our traditions counsel mutual respect and tolerance, not censorship and suppression, for religious and nonreligious views alike."[44] The Southern District of New York cited *Kennedy* to demonstrate that the Free Exercise Clause protects both those "who harbor religious beliefs inwardly and secretly" and those who "live out their faiths in daily life," allowing members of an Orthodox Jewish family to amend their complaint where they challenged the maximum occupancy limit on affordable housing.[45]

The free exercise context where *Kennedy* may have the most immediate impact is in cases involving religious objections to COVID-19 vaccine mandates, which continue to percolate in multiple jurisdictions. Several cases upholding free exercise challenges to vaccine mandates have cited *Kennedy*'s articulation of the free exercise framework.[46] In the military context, the District of Nebraska quoted *Kennedy*'s observation that the Free Exercise Clause "does perhaps its most important work by protecting the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life."[47]

Even courts that ultimately reject free exercise claims cite *Kennedy* as the latest touchstone of free exercise jurisprudence, recognizing that the case

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[41] *Id.*

[42] *Id.*

[43] Kelly v. State, 2022-NCCOA-675, 2022 WL 10218654, at *7 n.3 (App. N.C. 2022).

[44] *Id.* (citing *Kennedy*, 142 S. Ct. at 2416).

[45] Katz v. New York City Hous. Pres. & Dev., No. 21 CIV. 2933 (JPC), 2022 WL 3156178, at *4 (S.D.N.Y. Aug. 8, 2022).

[46] *See, e.g.*, UnifySCC v. Cody, No. 22-CV-01019-BLF, 2022 WL 2357068, at *7-*8 (N.D. Cal. June 30, 2022) (finding that portion of vaccine mandate which prioritized high-risk employees with secular exemptions over religious objectors likely violated the Free Exercise Clause); Roth v. Austin, No. 8:22CV3038, 2022 WL 3593373, at *2 (D. Neb. Aug. 5, 2022) (upholding facial challenges but not as-applied challenges to military COVID-19 vaccine mandate).

[47] *Roth,* 2022 WL 3593373, at *8 (citing *Kennedy*, 142 S. Ct. at 2421-22).

states the proper framework for the free exercise analysis. For example, several cases rejecting free exercise challenges to vaccine mandates also cite *Kennedy* for its explanation of the neutral and generally applicable framework as modified by cases since *Smith*.[48] In *Tingley v. Ferguson*, the Ninth Circuit rejected a Christian therapist's challenge to a state ban on conversion therapy, finding that it was neutral and generally applicable and not designed to target religious healthcare providers.[49] This was "unlike the situation in *Kennedy*, in which the school district admitted that it 'sought to restrict [the coach's] actions at least in part because of their religious character.'"[50] And in the *Matter of A.C.*, an Indiana state court rejected parents' free exercise claim when their transgender child was removed from their home, finding that the removal decision was based on mental health concerns rather than targeting the parents' beliefs as such. Yet again, the court cited *Kennedy* for its strict scrutiny framework and its recognition that the First Amendment protects "the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through the performance of (or abstention from) physical acts."[51] Thus, courts are citing *Kennedy* as the Supreme Court's latest word on how the Free Exercise Clause functions in myriad factual scenarios.

C. Kennedy*'s Protection of Government Employees' Free Exercise*

Kennedy's free exercise analysis reinforced the important principle that coaches, teachers, and other school employees—like students—do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[52] This rule applies when school employees are not acting in their official capacities to speak on behalf of the government. In *Kennedy*, the Court held that Coach Kennedy was not acting in his official capacity when

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[48] *See, e.g.*, Does 1-2 v. Hochul, No. 21CV5067AMDTAM, 2022 WL 4637843, at *8 (E.D.N.Y. Sept. 30, 2022) (rejecting free exercise challenge to New York healthcare workers' vaccine mandate because it was neutral and generally applicable); Brock v. City of New York, No. 21CIV11094ATSDA, 2022 WL 3445732, at *2 (S.D.N.Y. Aug. 17, 2022) (rejecting free exercise challenge to NYC's vaccine requirement for workers); George v. Grossmont Cuyamaca Cmty. Coll. Dist. Bd. of Governors, No. 22-CV-0424-BAS-DDL, 2022 WL 16722357, at *14 (S.D. Cal. Nov. 4, 2022) (finding vaccine mandates neutral and generally applicable because they allowed employees to apply for religious exemptions).

[49] Tingley v. Ferguson, 47 F.4th 1055, 1084–85 (9th Cir. 2022) (citing *Kennedy*, 142 S. Ct. at 2422).

[50] *Id.* (citing *Kennedy*, 142 S. Ct. at 2422).

[51] Matter of A.C., No. 22A-JC-49, 2022 WL 12166236, at *8 (Ind. Ct. App. Oct. 21, 2022) (citing *Kennedy*, 142 S. Ct. at 2421).

[52] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969).

he said a brief, quiet, personal prayer "during a period when school employees were free to speak with a friend, call for a reservation at a restaurant, check email, or attend to other personal matters."[53]

The Court also expressed strong disagreement with the lower court's decision that "treat[s] everything [school employees] say in the workplace as government speech subject to government control."[54] The Court reasoned that such an interpretation would allow "a school [to] fire a Muslim teacher for wearing a headscarf in the classroom or prohibit a Christian aide from praying quietly over her lunch in the cafeteria."[55] Under the Free Exercise Clause, school employees may engage in non-disruptive religious expression unrelated to the scope of their official duties and professional capacity and generally not coercive to students, such as wearing religious attire or jewelry.[56]

When teachers or coaches are acting in their official capacity, such as during instructional time, they must remain "neutral" toward religion. The Supreme Court distinguished Coach Kennedy's postgame prayers in his personal capacity, which are constitutionally protected by the Free Exercise Clause, from prayers that could be "attributable to the State," which may violate the Establishment Clause.[57] State neutrality toward religion does not require the absence of religion from public spaces. Indeed, to expel faith from the school environment, as if there was something harmful about students encountering the sincere religious beliefs of their role models and peers, when they are exposed to every other type of opinion and viewpoint, sends a message of hostility—not neutrality—to religious employees and students alike. Government guidance has recognized many ways that school employees are free to practice their own faith. For example, they "may take part in religious activities where the overall context makes clear that they are not participating in their official capacities."[58] Teachers may "take part in religious activities such as prayer even during their workday at a time when it is permissible to engage in . . . private conduct," "meet with other teachers for prayer or bible study" at a time that would be equally appropriate to engage in other nonreligious conversation such as "before school or during lunch," or "participate

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[53] *Kennedy,* 142 S. Ct. at 2425.

[54] *Id.*

[55] *Id*.

[56] *Id*.

[57] *Id*. at 2422; Lee v. Weisman, 505 U.S. 577, 587-88 (1992).

[58] U.S. Dep't of Educ., *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools*, *available at* https://www2.ed.gov/policy/gen/guid/religion-andschools/prayer_guidance.html (last updated Jan. 16, 2020).

in their personal capacities in privately sponsored baccalaureate ceremonies or similar events."[59] And religion is not a taboo topic in the classroom: "school district employees can discuss the historical and cultural role of religion as part of a secular program of education."[60] These principles are far from extreme or new; they merely acknowledge the longstanding reality that many school employees are people of faith who do not forfeit their religious exercise when they sign an employment contract, and that students will be exposed to different religious beliefs during the course of their lives in a pluralistic society. Because pluralism begins in the school context and extends into the workplace and beyond, for a public school to prevent students from any contact with religious beliefs besides their own is to do them a disservice in preparation for successful relationships in adult society.

Most importantly for the school context, the Court makes clear that public schools and other government actors can no longer hide behind hypothetical Establishment Clause concerns to justify real free exercise violations.[61] On the contrary, "there is no conflict between the constitutional commands [of the Establishment Clause and the Free Exercise Clause.] . . . And in no world may a government entity's concerns about phantom constitutional violations justify actual violations of an individual's First Amendment rights."[62] This decisive holding points out the error of public school officials who for decades have ousted religion entirely from the school environment for fear of violating the Establishment Clause.

Overall, *Kennedy*'s impact in the free exercise context is two-fold: it synthesizes existing free exercise jurisprudence in a way that is clear and helpful for lower courts to follow, and it clarifies that under *Masterpiece Cakeshop*, official expressions of religious hostility constitute a per se free exercise violation even apart from strict scrutiny analysis.

II. *KENNEDY*'S IMPACT ON THE ESTABLISHMENT CLAUSE

A. Replacing Lemon *With Historical Analysis*

Kennedy's most significant contribution to Establishment Clause jurisprudence, and to First Amendment law overall, is its clear recognition that the long-criticized *Lemon* test from *Lemon v. Kurtzman* is overruled. While the

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[59] *Id.*
[60] *Id.*
[61] *Kennedy*, 142 S. Ct. at 2432.
[62] *Id.*

exact time of death remains uncertain, the test that "stalk[ed] our Establishment Clause jurisprudence" "[l]ike some ghoul in a late-night horror movie" is finally dead and buried.[63] Writing for the 6-3 majority, Justice Gorsuch explained that "this Court long ago abandoned *Lemon* and its endorsement test offshoot."[64] Here, the Court unequivocally rejected the *Lemon* test and its "reasonable observer" standard for two main reasons. First, the "reasonable observer" standard created a "modified heckler's veto, in which . . . religious activity can be proscribed" based on "'perceptions'" or "'discomfort.'"[65] Second, the *Lemon* test "invited chaos" in lower courts and created a "minefield" for legislators because of its subjective, unpredictable, and often contradictory outcomes.[66]

While this holding marks a significant milestone in Establishment Clause jurisprudence, it follows directly from the Court's 2019 holding in *American Legion v. American Humanist Association.* There, in a 7-2 ruling, the Court upheld a memorial in the shape of a cross that had commemorated World War I veterans for nearly 100 years. Five Justices said that *Lemon* should be overruled, but they did so in splintered opinions. These Justices gave four detailed reasons why the test failed to provide consistent or constitutional results, and the Court did not use the *Lemon* test at all but focused on "historical practices and understandings" instead. The Court had also analyzed historical practices instead of applying *Lemon* in *Town of Greece* five years earlier.[67] *Kennedy* built on this foundation. The majority cited both *American Legion* and *Town of Greece* in finding that the Court had "long ago abandoned *Lemon*."[68] Thus, while the official time of death was likely 2019's *American Legion*, *Kennedy* clarifies that lower courts may no longer resurrect *Lemon* to support their decisions.[69]

Justice Sonia Sotomayor's dissent argues that the Court in *Kennedy* "goes much further" than it did in *American Legion* by "overruling *Lemon* entirely

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[63] Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring).

[64] *Kennedy,* 142 S. Ct. at 2427 (citing American Legion v. American Humanist Association, 139 S. Ct. 2067, 2079-81 (2019); Town of Greece v. Galloway, 572 U.S. 565, 575-77 (2014)).

[65] *Kennedy,* 142 S. Ct. at 2427 (citing Good News Club v. Milford Central School*,* 533 U.S. 98, 119 (2001)).

[66] *Id.* at 2427 (citing Cap. Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 768-69 (1995)).

[67] *American Legion*, 139 S. Ct. at 2101-02 (Gorsuch, J., concurring) (citing *Town of Greece*, 572 U.S. at 576).

[68] *Kennedy,* 142 S. Ct. at 2427.

[69] *Id.* (faulting the school district and the Ninth Circuit for "overlook[ing]" the fact that "this Court long ago abandoned *Lemon* and its endorsement test offshoot").

and in all contexts."[70] The dissent's reading of *American Legion* is that it declined to apply *Lemon* in the monument context and rejected its "grand unified theory of the Establishment Clause," but it says *Lemon* was not actually overruled until *Kennedy*.[71] Even if this interpretation is correct, both the majority and the dissent make clear that *Lemon* is now overruled.

Now that *Lemon* is no longer good law, what framework should replace it? *Kennedy* answered that question too, drawing from *Town of Greece* and *American Legion*: "the Establishment Clause must be interpreted by 'reference to historical practices and understandings.'"[72] Courts should focus on "original meaning and history" in the first instance.[73] This approach is faithful to the Founders' understanding, and it also respects the complementarity of the clauses of the First Amendment. Here, the Bremerton School District viewed the Establishment Clause as a trump card which defeated Coach Kennedy's free exercise and free speech rights. But the Court recognized that the Religion and Free Speech Clauses of the First Amendment work together with "'complementary' purposes, not warring ones where one Clause is always sure to prevail over the others."[74] Focusing on historical practices and understandings will ensure that the clauses are interpreted together, rather than in opposition in a way that allows a hostile government to choose "its preferred way out of its self-imposed trap."[75]

B. Lower Court Citations to Kennedy *on the Establishment Clause*

In the months immediately following *Kennedy*, the Second, Fifth, Ninth, and Eleventh Circuits all cited it for the proposition that the *Lemon* test is dead and replaced by analysis of historical practices and understandings. For instance, in *Jusino v. Federation of Catholic Teachers, Inc.*, the Second Circuit held that the *Lemon* test was no longer good law, regardless of whether *Lemon* was abandoned "long ago," as the majority said in *Kennedy*, or in *Kennedy* itself, as the dissent concluded.[76] In *Rojas v. City of Ocala, Florida*, the Eleventh Circuit remanded with instructions to apply *Kennedy*'s historical test to an Establishment Clause challenge to a mayor's prayer vigil, recognizing that

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[70] *Id.* at 2429 (Sotomayor, J., dissenting).
[71] *Id.*
[72] *Id.* at 2428 (internal citations omitted).
[73] *Id.*
[74] *Id.* at 2426.
[75] *Id.* at 2427.
[76] Jusino v. Fed'n of Catholic Teachers, Inc., No. 21-2081, 2022 WL 17170533, at *5 (2d Cir. Nov. 23, 2022).

"the Supreme Court drove a stake through the heart of the ghoul and told us that the *Lemon* test is gone, buried for good, never again to sit up in its grave."[77] When analyzing a Justice of the Peace's practice of opening court sessions with prayer, the Fifth Circuit looked to "historical evidence" rather than the *Lemon* test, recognizing that "[i]ts long Night of the Living Dead . . . is now over," and that it was "too easily manipulated to shed light on history's relevance."[78] And the Ninth Circuit recognized that "the Supreme Court's recent decision in *Kennedy* . . . has called into doubt much of our Establishment Clause case law" and "marks a shift in the Court's Establishment Clause jurisprudence."[79] Post-*Kennedy*, "[i]nstead of relying on the *Lemon* test, lower courts must now interpret the Establishment Clause by 'reference to historical practices and understandings.'"[80]

District courts have followed suit in the months since the *Kennedy* decision. In *Napper v. Hankison*, the Western District of Kansas found that "the Supreme Court recently rejected *Lemon*'s inquiry into whether a particular display offends the observer or amounts to an 'endorsement' of religion."[81] In *Kane v. De Blasio*, the Southern District of New York cited *Kennedy* for the rule "that the Establishment Clause must be interpreted by reference to historical practices and understandings."[82] In *JLF v. Tennessee State Board of Education*, the Middle District of Tennessee had already applied historical analysis instead of the *Lemon* test to a challenge to the national motto "In God We Trust," and it cited *Kennedy* as further reason to abandon the *Lemon* test in Establishment Clause cases.[83]

Only two district courts, as of the date of this writing, have toyed with applying *Lemon* now that *Kennedy* has overruled it. In *Ervins v. Sun Prairie*

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[77] Rojas v. City of Ocala, Fla., 40 F.4th 1347, 1351–52 (11th Cir. 2022).

[78] Freedom From Religion Found., Inc. v. Mack, 49 F.4th 941, 951, 954 n.20 (5th Cir. 2022) (citing *Kennedy*, 142 S. Ct. at 2427).

[79] Sabra v. Maricopa Cnty. Cmty. Coll. Dist., 44 F.4th 867, 887-88 (9th Cir. 2022) (citing *Kennedy*, 142 S. Ct. at 2427-28) (finding that Muslim plaintiff's Establishment Clause claim against module on "Islamic terrorism" was barred by qualified immunity).

[80] *Id.*

[81] No. 3:20-CV-764-BJB, 2022 WL 3008809, at *15 n.2 (W.D. Ky. July 28, 2022) (rejecting Establishment Clause challenge to Bible verse in firearms training for police officer).

[82] No. 21 CIV. 7863 (NRB), 2022 WL 3701183, at *10 (S.D.N.Y. Aug. 26, 2022) (rejecting Establishment Clause challenge to vaccine mandate).

[83] No. 3:21-CV-00621, 2022 WL 16541177, at *2 (M.D. Tenn. Oct. 27, 2022) (rejecting atheist plaintiff's attempt to relitigate her case against the national motto "In God We Trust" by arguing that *Kennedy* changed intervening law, because the previous court did not rely on *Lemon* test to address her claim).

Area School District, the Western District of Wisconsin rejected parent plaintiffs' Establishment Clause claim based on a history lesson about the Code of Hammurabi.[84] The court acknowledged that after *Kennedy*, "the continuing validity of the *Lemon* endorsement test is doubtful," but "even if *Lemon* applied," the Establishment Clause claim would fail because the challenged practice was not religious in nature.[85] Thus, the claim "cannot be squared with *Lemon* or any other Establishment Clause standard."[86] In *Abiding Place Ministries v. Newsom*, the Southern District of California opined that *Kennedy* "criticiz[ed] the Ninth Circuit's use of the *Lemon* test," yet it seemed to consider the prongs of *Lemon* anyway when analyzing a COVID-19 lockdown order.[87] These outlier cases are best interpreted as applying a belt and suspenders approach to the Establishment Clause. Even so, this equivocal approach is odd because of how decisively *Kennedy* spoke of *Lemon*'s overruling.

C. Open Questions About the New Establishment Clause Test

Thanks to the Court's decisive holding in *Kennedy*, lower courts no longer need to quibble over whether or how to apply the *Lemon* test. Yet questions remain about the proper framework for Establishment Clause analysis. The exact contours of the "historical practices and understandings" approach are still being explored, especially because these inquiries are often context-specific. Two other open questions are whether coercion still has a role in Establishment Clause analysis, and whether offended observer standing is still valid after *Kennedy*.

1. History and Tradition Analysis

The Court in *Kennedy* did not define the exact contours of the history and tradition analysis that should replace *Lemon*. Justice Sotomayor's dissent characterizes this as a major weakness of the opinion with dire consequences in the public school context, arguing that "the Court's history-and-tradition test offers essentially no guidance for school administrators. If even judges and Justices, with full adversarial briefing and argument tailored to precise legal issues, regularly disagree (and err) in their amateur efforts at history, how are school administrators, faculty, and staff supposed to adapt?"[88] Although

[84] Ervins v. Sun Prairie Area Sch. Dist., No. 21-CV-366-JDP, 2022 WL 2390180, at *9 (W.D. Wis. July 1, 2022).

[85] *Id.*

[86] *Id.*

[87] No.: 3:21-cv-00518-RBM-DDL, 2023 WL 2001125, at *8 (S.D. Cal. Feb. 14, 2023)..

[88] *Kennedy*, 142 S. Ct. at 2450 (Sotomayor, J., dissenting).

it may not always be simple to apply a historical analysis, Justice Sotomayor's concern may be overstated in light of existing case law.

Several Supreme Court cases offer guidance in applying a historical approach to Establishment Clause questions: *Marsh v. Chambers*, *Town of Greece*, *American Legion*, and *Kennedy*. These cases, as well as Justice Gorsuch's concurrence in *Shurtleff v. City of Boston*, rely heavily on scholarship by Professor Michael McConnell, whose detailed investigation of founding-era religious establishments provides helpful context for evaluating more recent Establishment Clause claims.[89] The *Kennedy* decision incorporates this scholarship by reference, citing both the *Shurtleff* concurrence and McConnell's scholarship in footnote 5.[90] As Justice Gorsuch recognized in *Shurtleff*, citing McConnell, six features of an establishment that the framers of the First Amendment sought to forbid included:

1. Government control over doctrine and personnel of established churches;
2. Government-mandated attendance of the established church;
3. Punishment of dissenting churches and individuals;
4. Restrictions on dissenters' political participation;
5. Government financial support for established churches; and
6. Government use of established churches to carry out civil functions.[91]

Based on these six criteria, courts—and school administrators—may be able to tell whether an Establishment Clause issue they face is analogous to founding-era establishments. In many cases, "[t]hese historical hallmarks . . . [will] provide helpful guidance for those faced with future disputes."[92] In short, courts and government actors are now directed to look to the original meaning of the Constitution, and judges can breathe a sigh of relief that they no longer need to count snowmen and reindeer to determine whether a holiday display is somehow too religious. In the founding era, such displays were not typically a concern since they merely acknowledged the cultural influence of

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[89] *See* Michael McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2110–2112, 2131 (2003); *see also* Daniel Chen, Kennedy v. Bremerton School District*: The Final Demise of* Lemon *and the Future of the Establishment Clause*, 21 Harv. J.L. & Pub. Pol'y Per Curiam (Aug. 8, 2022) (drawing connection between Justice Gorsuch's *Shurtleff* concurrence, Michael McConnell's scholarship, and *Kennedy*'s historical approach framework).

[90] *Kennedy*, 142 S. Ct. at 2429 n.5.

[91] Shurtleff v. City of Boston, Massachusetts, 142 S. Ct. 1583, 1609–10 (2022) (Gorsuch, J., concurring) (citing McConnell, *supra* note 89, at 2131).

[92] *Shurtleff*, 142 S. Ct. at 1610 (Gorsuch, J., concurring).

religion.[93] However, judges will need to take a closer look at government efforts to control who is preaching or what they are preaching, since those situations raise concerns under both the Establishment Clause and the Free Exercise Clause.

Thus, while analyzing historical practices and understandings is not a one-size-fits-all approach, or a "grand unified theory" of the Establishment Clause as the *Lemon* test purported to be,[94] it does provide a clearer framework for courts to follow than *Lemon*. It may take some time for courts and litigants to adapt to a new approach, and to determine how it applies in different contexts. But it is far better for the law to grapple with historical realities than the amorphous, subjective standards that plagued application of the *Lemon* and endorsement tests. On the whole, a historical approach should lead to results more aligned with the original meaning of the First Amendment and less dictated by the policy preferences of judges.

2. Coercion Analysis

In *Kennedy*, the Court focused on coercion as a major touchstone of its analysis, but its use of the term "coercion" is notably different from how it was used in cases such as *Lee v. Weisman* and *Santa Fe Independent School District v. Doe*. Because the *Kennedy* Court overturned *Lemon* and its "reasonable observer" endorsement test offshoot, the Court now views coercion through the lens of the original meaning of the Establishment Clause rather than through the perspective of a hypothetical reasonable observer. The six elements of a founding-era establishment that McConnell and Gorsuch highlight all "reflect forms of 'coerc[ion]' regarding 'religion or its exercise.'"[95] The *Kennedy* opinion made this clear: "coercion along these lines was among the foremost hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment."[96] While Coach Kennedy's brief, private prayer "did not come close to crossing any line," the line the Court seems concerned about here is actual religious coercion by the state, such as where a school district employee intends to influence students' behavior and students actually change their behavior as a result. This is a far cry from the "phantom constitutional violations" that *Lemon*'s reasonable

[93] *Id.* ("'No one at the time of the founding is recorded as arguing that the use of religious symbols in public contexts was a form of religious establishment.' . . . it appears that, until *Lemon*, this Court had never held the display of a religious symbol to constitute an establishment of religion.").

[94] *Kennedy*, 142 S. Ct. at 2427 (citing *American Legion*, 139 S. Ct. at 2021).

[95] *Shurtleff*, 142 S. Ct. at 1609 (Gorsuch, J., concurring) (citing *Lee*, 505 U.S. at 587).

[96] *Kennedy*, 142 S. Ct. at 2429.

observer seemed to create.[97] The Sixth Circuit has already cited *Kennedy* for the principle that "[g]overnment 'justification[s]' for interfering with First Amendment rights 'must be genuine, not hypothesized or invented post hoc in response to litigation.'"[98] Thus, coercion will continue to be a touchstone as courts analyze Establishment Clause claims going forward, but in order to prevail, claimants will need concrete, non-speculative evidence that coercion was intended and that it occurred.

3. Offended Observer Standing

As at least one lower court has recognized, the *Kennedy* opinion did not conclusively decide whether "offended-observer standing" is obsolete for Establishment Clause cases.[99] But it may be the next to fall now that the *Lemon* test is overruled. As Justice Gorsuch's concurrence in *American Legion* pointed out, "[l]ower courts invented offended observer standing for Establishment Clause cases in the 1970s in response to . . . *Lemon.*"[100] The offended observer standing doctrine was not at issue in *Kennedy* because it was Coach Kennedy who sued the school district over its actions against him, not parents or students who sued because they were offended by the alleged religious establishment.

Future cases will likely either set aside this standing doctrine or severely limit its scope. As Justice Gorsuch said in a 2019 concurrence, "With *Lemon* now shelved, little excuse will remain for the anomaly of offended observer standing, and the gaping hole it tore in standing doctrine in the courts of appeals should now begin to close."[101] Perhaps the Court will not feel the need to explicitly denounce offended observer standing, but instead claimants will realize that they need evidence of actual coercion in order to prevail on Establishment Clause claims, and that will deter suits based merely on offense.

III. *KENNEDY*'S IMPACT ON THE FREE SPEECH CLAUSE

The *Kennedy* Court's Free Speech Clause holding offers useful guidance for analyzing the free speech claims of government employees. The opinion

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[97] *Id.* at 2432.

[98] Doster v. Kendall, Nos. 22-3497/3702, 2022 WL 17261374, *28 (citing *Kennedy*, 142 S. Ct. at 2432 n.8).

[99] *Napper*, 2022 WL 3008809, at *15 n.12.

[100] *Am. Legion*, 139 S. Ct. at 2101 (Gorsuch, J., concurring in the judgment).

[101] *Id.* at 2102.

will be particularly useful for evaluating when government employee speech should be considered private speech, rather than official speech. When a government employee's private speech is also religious, six Justices agreed that the Free Speech Clause and Free Exercise Clause work in tandem to provide an extra layer of protection. However, the different opinions of the Justices reflected disagreement about the proper analysis for free speech claims of government employees, particularly when those speech claims involve religious speech, leaving open questions for future cases.

A. Kennedy*'s Free Speech Holding*

1. The Free Speech and Free Exercise Clauses Doubly Protect Religious Speech

The Court's free speech analysis in *Kennedy* began by affirming that the First Amendment's Free Speech and Free Exercise Clauses "work in tandem" and "provide[] overlapping protection for expressive religious activities."[102] This statement that "the First Amendment doubly protects religious speech" did not break new ground.[103] Many Supreme Court cases address protected religious expression. The *Kennedy* Court noted that "government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince."[104] Even the dissent agreed that the majority opinion of "[t]he Court is correct that certain expressive religious activities may fall within the ambit of both the Free Speech Clause and the Free Exercise Clause."[105]

2. Public Employee Speech: Private Speech or Government Speech?

The Court continued its Free Speech analysis by repeating *Tinker*'s promise that the "First Amendment's protections extend to 'teachers and students,' neither of whom 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'"[106] It would be improper for schools to treat "everything teachers and coaches say in the workplace as government speech subject to government control."[107] Still, teachers are government employees who may be called upon to speak the government's message.

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[102] *Kennedy*, 142 S. Ct. at 2421 (citing Widmar v. Vincent, 454 U.S. 263, 269, n.6 (1981); Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 841 (1995)).

[103] *Id.*

[104] *Id.* at 2421 (quoting *Pinette*, 515 U.S. at 760).

[105] *Id*. at 2446 (Sotomayor, J., dissenting).

[106] *Id*. at 2423 (citing *Tinker*, 393 U.S. at 506).

[107] *Id.* at 2425.

The Court then explained that its past cases used the *Pickering* test to address the free speech claims of government employees. The court first announced the test in *Pickering v. Board of Education* in 1968,[108] and later applied it with qualifiers in *Garcetti v. Ceballos* in 2006.[109] Under this test, courts first ask whether the speech at issue is government speech (such as speech spoken by the employee as an agent of the government) or private speech (such as speech spoken by the employee as a citizen on a matter of public concern). If it is government speech, the government may control it. On the other hand, if it is private speech, it may be constitutionally protected.

When private speech is involved, courts are to "balance" the interests of a government employee "as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[110] This is sometimes referred to as *Pickering* balancing. *Garcetti* explained that, if a government employee is disciplined for speaking on a matter of public concern, courts analyze "whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public."[111]

The *Kennedy* Court was careful to explain that it applied *Pickering* because both sides asked the Court to use that test. The opinion left room for future argument that *Pickering* may not be the correct approach for all government employee speech cases. The opinion specifically flagged two possible exceptions. First, academic freedom questions, most commonly encountered at the university level, may proceed under a different analysis.[112] Second, "[b]ecause our analysis and the parties' concessions lead to the conclusion that Mr. Kennedy's prayer constituted private speech on a matter of public concern, we do not decide whether the Free Exercise Clause may sometimes demand a

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[108] Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, Will Cnty., Illinois, 391 U.S. 563 (1968).

[109] Garcetti v. Ceballos, 547 U.S. 410 (2006).

[110] *Pickering*, 391 U.S. at 568.

[111] *Garcetti*, 547 U.S. at 418.

[112] In *Garcetti*, the Court specifically carved out academic freedom questions from the normal public employee speech test. Two circuits have thus concluded that professors engaged in scholarship or teaching deserve full First Amendment protection: Demers v. Austin, 746 F.3d 402 (9th Cir. 2014); Adams v. Trustees of the University of N.C.-Wilmington, 640 F.3d 550 (4th Cir. 2011). For a discussion of the academic freedom exception, see Nick Cordova, *An Academic Freedom Exception to Government Control of Employee Speech*, 22 FEDERALIST SOC'Y REV. 284 (2019), *available at* https://fedsoc.org/commentary/publications/an-academic-freedom-exception-to-government-control-of-employee-speech.

different analysis at the first step of the *Pickering–Garcetti* framework."[113] Religious speech may be entitled to heightened protections whether or not it is on a matter of public concern.

Applying the *Pickering* test to the facts in *Kennedy*, the Court held that Kennedy's speech was private speech rather than government speech:

> When Mr. Kennedy uttered the three prayers that resulted in his suspension, he was not engaged in speech "ordinarily within the scope" of his duties as a coach. He did not speak pursuant to government policy. He was not seeking to convey a government-created message. He was not instructing players, discussing strategy, encouraging better on-field performance, or engaged in any other speech the District paid him to produce as a coach. . . . Simply put: Mr. Kennedy's prayers did not "ow[e their] existence" to Mr. Kennedy's responsibilities as a public employee. [114]

The Court recited a few additional facts about the timing and circumstances of Kennedy's prayers that bolster the argument that his speech was private speech. For instance, he prayed separately from his team during the post-game period, when "coaches were free to attend briefly to personal matters—everything from checking sports scores on their phones to greeting friends and family in the stands."[115] That others could engage in comparable private speech during that time made it less likely that the job's requirements included use of that time for official purposes.[116] Overall, the Court concluded that the totality of the circumstances reflected that Kennedy was not acting within the scope of his government duties as a coach.

The dissent did not take a firm position on whether Kennedy's speech should be considered government speech or private speech. The dissent stated that "the District has a strong argument that Kennedy's speech, formally integrated into the center of a District event, was speech in his official capacity as an employee that is not entitled to First Amendment protections at all."[117] But it focused its argument on its analysis of the school district's burden in light of the Establishment Clause and, thus, considered resolution of this threshold free speech issue to be unnecessary.[118]

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[113] *Kennedy*, 142 S. Ct. at 2425 n.2.
[114] *Id.* at 2424 (citations omitted).
[115] *Id.* at 2425.
[116] *Id.* at 2424–25.
[117] *Id*. at 2445 (Sotomayor, J., dissenting) (quoting *Garcetti*, 547 U.S. at 418).
[118] *Id.* at 2426 n.3.

B. Lower Court Citations to Kennedy *on the Free Speech Issue*

In the months since the opinion's release, it has often been cited by courts evaluating whether a government employee's speech should be considered private speech. For example, one district court case, *Beathard v. Lyons*, gave this summary of *Kennedy*'s holding:

> Kennedy makes it clear that when a high school football coach engages in prayer after a high school football game, he is not engaged in speech that falls within his ordinary job duties. . . . Just because a student or other staff members can see one exercising their freedom of speech does not transform private speech into government speech. . . . During the football game, the coach's "prayers did not 'ow[e their] existence' to Mr. Kennedy's responsibilities as a public employee." . . . The Court explained that while not everything a coach says in the workplace is considered government speech, one must evaluate the substance of the speech as well as the circumstances around the speech to determine whether or not the speech was within one's job duties.[119]

This court applied the same standard when evaluating a state university football coach's replacement of a Black Lives Matter poster with a sign stating that "All Lives Matter to our Lord & Savior Jesus Christ." The court concluded that the coach's actions were not taken in furtherance of his official job duties:

> In putting up the replacement poster, Plaintiff was expressing his personal views, which in no way "owed their existence" to his responsibilities as a public employee. . . . Plaintiff was not paid by the University to decorate his door or to use it [sic] to promote a particular viewpoint, he was employed to coach football.[120]

In another case, *DeMarco v. Borough of Saint Clair*, the magistrate judge quoted *Kennedy* at length on the legal standard for deciding whether government employee speech is private or official.[121] The court applied the standard to hold that because there was no evidence that a part-time police chief was required "to partner with local business owners and engage in fundraising" or

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[119] Beathard v. Lyons, No. 121CV01352JESJEH, 2022 WL 3327753, at *3 (C.D. Ill. Aug. 11, 2022).

[120] *Id.*

[121] DiMarco v. Borough of Saint Clair, No. 3:20-CV-1335, 2022 WL 6685296, at *10 (M.D. Pa. July 19, 2022), *report and recommendation adopted*, No. 3:20-CV-01335, 2022 WL 6685263 (M.D. Pa. Sept. 27, 2022).

that fundraising was a part of his duties, the part-time police chief's fundraising activities should be considered private—not government—speech.[122]

In *Kingman v. Frederickson*, the Seventh Circuit recited *Kennedy*'s standard to grapple with the question of whether a government employee was fired in retaliation for protected speech at city council meeting. Ultimately, the court resolved the case on different grounds without resolving the question of whether the speech at issue should be considered private—and thus fully protected—speech.[123]

Another Seventh Circuit decision, *Cage v. Harper*, found that a university's chief legal officer was acting in furtherance of his job responsibilities "when he raised concerns about the potential conflict of interest flowing from [a board member] simultaneously serving on the University's Board and seeking to become the institution's next president."[124] Because he was speaking pursuant to his official duties, his speech lacked protection under the Free Speech Clause.

C. Open Questions

The different opinions in *Kennedy* left open some questions about the proper framework for evaluating government employees' free speech claims related to religious speech. In particular, questions remain about the government's burden and which level of scrutiny applies.

The majority opinion, by stating that it was applying *Pickering* only because both parties asked it to, left room for future argument that *Pickering* may not be the correct approach for all government employee speech cases. Justice Alito's concurrence explained that he was joining the majority opinion on the understanding that the Court is leaving open the question of which standard applies. This suggests he may be in favor of a heightened standard of review, at least where there is a break in official activity.[125]

Justice Thomas's concurrence suggested that when government employees' private speech is also religious speech, the government might have a higher burden. He wrote, "the Court has never before applied *Pickering* balancing to a claim brought under the Free Exercise Clause. A government

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[122] *Id.*

[123] Kingman v. Frederickson, 40 F.4th 597, 602 (7th Cir. 2022).

[124] Cage v. Harper, 42 F.4th 734, 742 (7th Cir. 2022).

[125] *Kennedy*, 142 S. Ct. at 2433–34 (Alito, J., concurring).

employer's burden therefore might differ depending on which First Amendment guarantee a public employee invokes."[126]

Justice Kavanaugh's position is the least clear. He did not join the first portion of the free speech analysis, Part III-B. But because Justice Kavanaugh did not write a separate concurrence, we do not know why he did not join the majority's opinion in full. It is therefore unclear whether he disagreed with the majority's approach (applying *Pickering* to a claim involving religious speech), disagreed with the outcome of the *Pickering* test as applied here (finding Kennedy's speech was private speech), or deemed it unnecessary to decide in light of the Court's free exercise holding. Kavanaugh did join Part IV, which held that the government failed to meet its burden under any of the possible standards (*Pickering*, intermediate scrutiny, or strict scrutiny). Thus, it is unlikely that Kavanaugh would hold that Kennedy's speech should be considered government speech. It therefore seems most likely that he does not want to address the threshold free speech issue unless a case requires it.

On the other hand, one scholar notes that Justice Kavanaugh, while he was serving on the D.C. Circuit, joined a panel opinion that took a broad view of government speech in the government employee context.[127] The opinion in *LeFande v. District of Columbia* held that a police officer's emails criticizing his superiors "enjoy no First Amendment protection because his interest in sending them is outweighed by the police department's interest in promoting office harmony and efficiency."[128]

Overall, the different *Kennedy* opinions tee up the issue for future litigants to argue that burdens on the religious speech of government employees should be subject to a higher level of scrutiny than the default *Pickering* test—a judicial test created in the context of whistleblower speech—would require. Religious private speech implicates different concerns as well as a combination of rights under the First Amendment.

IV. CONCLUSION

Kennedy is likely to have a lasting impact on the jurisprudence of the first three clauses of the First Amendment. In the Free Exercise Clause context, it synthesized decades of post-*Smith* cases. In the Establishment Clause context,

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[126] *Id.* at 2433 (Thomas, J., concurring).

[127] Timothy Zick, *Judge Kavanaugh and freedom of expression*, SCOTUSblog (Aug. 7, 2018, 3:49 PM), https://www.scotusblog.com/2018/08/judge-kavanaugh-and-freedom-of-expression/.

[128] LeFande v. D.C., 841 F.3d 485, 488 (D.C. Cir. 2016).

it replaced the unsuccessful *Lemon* test with a test grounded in history and tradition. In the Free Speech Clause context, it paved the way for increased protection for government employees' private speech, particularly at the intersection of free speech and religious expression.

Other Views:

- Ira C. Lupu & Robert W. Tuttle, Kennedy v. Bremerton School District – *A Sledgehammer to the Bedrock of Nonestablishment*, GEO. WASH. L. REV. ON THE DOCKET (2022), https://www.gwlr.org/kennedy-v-bremerton-school-district-a-sledgehammer-to-the-bedrock-of-nonestablishment/.
- Ian Millhiser, *The Supreme Court hands the religious right a big victory by lying about the facts of a case*, VOX (June 27, 2022), https://www.vox.com/2022/6/27/23184848/supreme-court-kennedy-bremerton-school-football-coach-prayer-neil-gorsuch.
- Brief for Respondent, Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022), *available at* https://www.au.org/wp-content/uploads/2022/03/Kennedy-v.-Bremerton-School-District-SCOTUS-Respondents-Brief-3.25.22.pdf.